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TINKER AND VIEWPOINT DISCRIMINATION

John E. Taylor*

I. INTRODUCTION

Suppose that a school restricts student expression critical of homosexual conduct yet allows or actively supports student expression that promotes acceptance and tolerance of gays and lesbians. Can such a policy be justified if the “anti-gay” speech disrupts the educational environment of the school while the “pro-gay” speech does not? Or does the differential treatment of “anti-gay” and “pro-gay” speech constitute unconstitutional viewpoint discrimination because it distorts the “marketplace of ideas” within the school? Can viewpoint discrimination ever be justified on the ground that anti-gay speech invades the “rights of others” under *Tinker v. Des Moines Independent Community School District*?¹ These were among the questions debated by Judges Reinhardt and Kozinski in the Ninth Circuit’s now-vacated panel opinion in *Harper v. Poway Unified School District*,² but their significance to the law of student speech is quite general. Courts are increasingly becoming concerned with the question of whether *Tinker* allows viewpoint-based restrictions of student speech, but so far jurists have not reached agreement on this question or even on the simpler question of what counts as viewpoint discrimination. This article attempts to clarify the emerging debate about the permissibility of viewpoint discrimination under *Tinker* and proposes modifications to the *Tinker* framework that would enable courts to deal more fruitfully with charges that school officials have imposed viewpoint-based restrictions on student speech. Specifically, I argue that *Tinker* should be read to require that school speech restrictions be narrowly tailored to the ends of preventing substantial disruption to the work of the school and preventing interference with the rights of others. Adding a narrow tailoring requirement to *Tinker* will adequately prevent schools from engaging in purposeful viewpoint discrimination, but a broader reading of *Tinker* as prohibiting speech restrictions with viewpoint-discriminatory effects is both unnecessary and unwise. To illustrate some of the difficulties courts have faced in this area, I begin with two stories.

A. Of Gay Rights and Confederate Flags: A Tale of Two Schools

School A defines its educational mission to include the promotion of tolerance, respect, and mutual understanding among students of different sexual orientations. The school cooperates with student observance of a national “Day of Silence” in which students cover their mouths with tape in order to dramatize the ways in which gay and lesbian students are silenced by majority

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¹ 393 U.S. 503 (1969).

² 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

discrimination.³ Many students wear “Day of Silence” T-shirts as well. It seems fair to say that the school actively seeks to promote a particular set of viewpoints on gay rights and supports students who espouse these favored viewpoints. Over the years, these efforts have been reasonably successful in that the school has experienced relatively little student unrest related to issues of sexual orientation. Perhaps the community is one where gays and lesbians generally enjoy a significant degree of social acceptance, and so for a good many students the school is preaching to the choir. Nonetheless, some parents in the community and some students in school believe that homosexual conduct is morally wrong. Indeed, for all or nearly all of these people it understates the matter to say that homosexual conduct is “morally wrong.” They would claim that it is deeply *sinful*, an offense against God and nature. Predictably, the pro-gay speech of school and students calls forth counter-speech.⁴ One student comes to school wearing a hand-lettered T-shirt that reads “Be Ashamed. Our school has embraced what God has condemned” on the front and “Homosexuality is Shameful. Romans 1:27” on the back. The message is not directed at specific students and the T-shirt wearer makes no active effort to disrupt the operations of the school. He engages in “pure speech”⁵ that counters but does not intercept the school’s message.⁶ The shirt prompts a few lively discussions among students, but no fights or even shouting matches break out. A school official sees the shirt and asks the student to change or to turn the shirt inside out because it violates a school policy restricting speech that denigrates other students on the basis of sexual orientation.

School B defines its educational mission to include the promotion of tolerance, respect, and mutual understanding among students of different races. The school’s curriculum and various school events promote this mission in a wide variety of ways: for example, curricular emphasis on the importance of the civil rights movement, observance of Black History Month, etc. Students sometimes wear shirts or clothing celebrating racial and cultural diversity (for example, dashikis, headwraps) or celebrating the achievements of the civil rights

³ “Day of Silence” is a national event designed to raise awareness of bullying and harassment of gays, lesbians, bisexuals, and transsexuals (LGBT) in the public schools. See <http://www.dayofsilence.org>. Alliance Defense Fund, a religiously conservative legal advocacy group, has started a competing event dubbed the “Day of Truth.” See <http://www.dayoftruth.org>.

⁴ Howard Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 368 (2004) (“[A]ll speech . . . leads inevitably and necessarily to counter-speech, speech responding to and dissenting from the approved and sanctioned original message.”).

⁵ The armbands at issue in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), were said to be “pure speech” as opposed to speech mixed with conduct. *Id.* at 505-06.

⁶ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 279 (1988) (Brennan, J., dissenting) (distinguishing between speech that interferes with the school’s efforts to convey its own message and speech that merely conflicts with the school’s message, and arguing that only the former category may be restricted); William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 517 (1989) (elaborating on Justice Brennan’s distinction as one between speech that intercepts the school’s message so that it does not reach its intended audience and speech that contradicts the school’s message).

movement (for example, shirts bearing photos of Dr. Martin Luther King, Jr.). It seems fair to say that the school actively seeks to promote a particular set of viewpoints on race relations and that the school at least tolerates and perhaps promotes student expression consistent with the favored viewpoints. Some students, however, are resistant to the school's message. In extreme cases, this resistance may be rooted in relatively overt belief in white racial supremacy. In other cases, students may be rebelling against the school's message because they feel it amounts to "special treatment" for minority students rather than the "equal treatment" that minorities deserve.⁷ The dissenting students may feel that they should celebrate their "white heritage" just as other students celebrate their own origins.⁸ Whatever the underlying attitudes, some students express their resistance by wearing clothing (T-shirts, hats, belt buckles) bearing the Confederate battle flag. Though the messages are not directed at specific students, the wearing of the Confederate flag symbols has increased the degree of racial tension at the school and has been associated with several physical altercations between white and black students. School officials adopt an informal policy that students will no longer be allowed to wear Confederate flag symbols. Students who come to school wearing a T-shirt bearing the Confederate flag are told to go home and change or to turn the shirts inside out.

In each of these scenarios, it seems plausible to say that the schools have acted to restrict student expression voicing one set of viewpoints while leaving other student viewpoints unrestricted. Further, the schools have added their own voices in support of the unrestricted viewpoints. Have the schools acted properly? Have they engaged in viewpoint discrimination? If so, can viewpoint discrimination be justified by a school's need to maintain order and discipline?

An answer to the first question may seem straightforward: School A's actions are unconstitutional, School B's are not. A school's authority to regulate speech that "merely happens to occur on school premises"⁹ is governed by the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*, which requires schools to justify speech restrictions by proving or reasonably forecasting the existence of "material and substantial interference" with the work of the school or an invasion of the "rights of other students to be secure and to be let alone."¹⁰ The *Tinker* standard would suggest that School B

⁷ Perhaps this reaction manifests the set of attitudes that Jed Rubenfeld describes as undergirding an "anti-anti-discrimination agenda." *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 175-83 (2005). I do not deny that this sort of reaction may reasonably be seen as a manifestation of racism; my only point is that motivations for donning the symbols can vary.

⁸ Plaintiffs often assert – and courts sometimes take seriously – the claim that wearing symbols of the Confederacy is a way of expressing pride in "Southern heritage" and need not express any racially divisive message on the part of the wearer. *See, e.g., Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1248-49 (11th Cir. 2003). It remains the case, of course, that many who see Confederate flag shirts and the like will perceive a racially divisive message whether or not one was intended.

⁹ *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1213 (11th Cir. 2004).

¹⁰ *Tinker*, 393 U.S. at 508, 511.

acted properly because the evidence of previous racial altercations relating to the wearing of Confederate symbols is precisely the sort of evidence of substantial disruption that *Tinker* requires. Numerous cases support this result.¹¹ Yet if School B *has* acted properly, what do we make of the second and third questions about viewpoint discrimination? There is a deep and wide consensus that viewpoint discrimination is a very bad thing.¹² And while the government in its role as manager of the public schools may legitimately claim greater authority over speech than it enjoys in its role as sovereign, does this enhanced authority really give the schools the authority to restrict one side of a debate while tolerating or even promoting the other? If School B can ban Confederate flag symbols, does this mean that *Tinker* allows viewpoint discrimination? Or can it be said instead that the school has permissibly classified speech on the basis of its potential to cause harm and has not engaged in viewpoint discrimination at all?

The conclusion that School A violated the First Amendment may also seem straightforward. As I have described the facts, the evidence of disruption seems far short of substantial and thus one would expect that *Tinker* would condemn the school's actions. Yet my first scenario largely tracks the facts presented to the Ninth Circuit in *Harper v. Poway Unified School District*.¹³ There, a panel opinion by Judge Reinhardt affirmed the district court's denial of student Tyler Harper's request for a preliminary injunction on the ground that Harper's "Homosexuality is Shameful" T-shirt interfered with the "rights of others" under *Tinker* and could, therefore, be suppressed by the school.¹⁴ Harper argued, among other things, that the school's actions were a clear instance of viewpoint discrimination and, therefore, unconstitutional, but Judge Reinhardt responded that *Tinker* allows schools to engage in viewpoint discrimination when this is necessary to protect the rights of other students.¹⁵ In a lengthy dissent, Judge Kozinski argued that the school had engaged in unconstitutional viewpoint discrimination and that Judge Reinhardt's use of the "rights of others" prong of *Tinker* to justify the school's actions was both unprecedented and indefensible.¹⁶ The United States Supreme Court subsequently vacated *Harper* and remanded the case to the Ninth Circuit with instructions that the case be dismissed as

¹¹ See *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554, 568 (6th Cir. 2008); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 496 (D.S.C. 1997).

¹² See *infra* notes 49-68 and accompanying text (explaining the reasons why viewpoint discrimination undermines First Amendment speech values).

¹³ 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). I embellished the facts by removing the evidence of some prior confrontations in the school relating to gay rights issues. The Ninth Circuit did not rely on *Tinker*'s substantial disruption prong. See *Harper*, 445 F.3d at 1184. The larger questions raised by the case are posed more sharply if we assume that there was minimal evidence of prior disruptions.

¹⁴ *Id.* at 1192.

¹⁵ *Id.* at 1184-85.

¹⁶ *Id.* at 1197-1200.

moot.¹⁷ Consequently, the case is no longer good law, even in the Ninth Circuit.¹⁸ Nevertheless, it raises significant questions about whether *Tinker* allows viewpoint discrimination and about the independent viability – if any – of *Tinker*'s rights-of-others prong. If the case is wrongly decided – and I believe that it is¹⁹ – is that because there was inadequate proof of disruption or because the case involved viewpoint discrimination? If the school had presented more evidence of past disruptions relating to anti-gay speech, would that have justified the school in banning Tyler Harper's T-shirt while condoning and even supporting student participation in the Day of Silence event? Would the school's actions still have constituted viewpoint discrimination?

These sorts of questions have received relatively little attention in the case law and the scholarship,²⁰ but (partially in response to *Harper*) that is changing. When the decision was issued, internet commentary immediately denounced Judge Reinhardt's decision as a wrong-headed endorsement of viewpoint discrimination,²¹ a charge echoed by several Ninth Circuit judges who dissented from their court's decision not to rehear *Harper* en banc.²² The Sixth Circuit has recently held that *Tinker* includes a flat ban on viewpoint-discriminatory speech restrictions.²³ On the other hand, Professor Kristi Bowman has recently

¹⁷ 127 S. Ct. 1484, 1484 (2007).

¹⁸ This may change, however. A second iteration of the case is currently making its way through the courts with Tyler Harper's sister, Kelsie, seeking injunctive and declaratory relief against the Poway Unified School District. *Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072 (S.D. Cal. 2007). Kelsie, like Tyler, wishes to express her opposition to homosexuality at school. *Id.* at 1075. The district court granted partial summary judgment for the school district on Kelsie's free speech claim, using essentially the same reasoning employed by Judge Reinhardt. *Id.* at 1094-95.

¹⁹ See *infra* notes 284-302 and accompanying text.

²⁰ In contrast, the question of whether school viewpoint discrimination is permissible under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), has been extensively discussed. See, e.g., Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175 (2007). Both Waldman and Wright argue that *Hazelwood* allows for some viewpoint-based regulation of school-sponsored speech. In a forthcoming paper, Alan Brownstein provocatively argues that school-sponsored speech currently governed by *Hazelwood* should not be subject to judicial review under the Free Speech Clause at all. *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School Sponsored Activities* (UC Davis Legal Studies Research Paper Series, Research Paper No. 11, July 2008), available at <http://ssrn.com/abstract=1154126>.

²¹ See, e.g., Posting of Eugene Volokh to The Volokh Conspiracy, *Sorry, Your Viewpoint is Excluded from First Amendment Protection*, <http://volokh.com/posts/1145577196.shtml> (April 20, 2006).

²² *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052, 1054 (9th Cir. 2006) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (stating that "the panel majority's decision amounts to approval of blatant viewpoint discrimination").

²³ *Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008). Earlier Sixth Circuit opinions had pointed in the same direction. See *Lowery v. Euverard*, 497 F.3d 584, 605 (6th Cir. 2007) (Gilman, J., concurring in the judgment); *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th

suggested that a survey of the Supreme Court's case law regarding student speech supports Judge Reinhardt's conclusion that schools are sometimes allowed to engage in viewpoint discrimination.²⁴ Further, courts regularly approve facially viewpoint-based restrictions on student speech involving the Confederate flag under *Tinker* with barely a word about the First Amendment's general distrust of viewpoint discrimination.²⁵ Perhaps the differential treatment just reflects a sense that the morality of homosexual conduct and even the mere "tolerance" of gays are socially contested issues, whereas a school's promotion of racial equality has become such a social given that we no longer think of this as a "viewpoint" at all.²⁶ While this may be plausible as a statement of judicial psychology, it stands in considerable tension with a foundational principle in First Amendment doctrine. If "[u]nder the First Amendment there is no such thing as a false idea,"²⁷ it will hardly do to say that viewpoints can be suppressed when their opposites have become sufficiently well entrenched.²⁸

Cir. 2001). *Barr* largely removed some of the ambiguities about the force of these earlier decisions. I discuss *Castorina* and *Barr* more fully *infra* notes 135-62 and accompanying text.

²⁴ Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 192 (2007).

²⁵ *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 496 (D.S.C. 1997).

²⁶ Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 70 [hereinafter Kagan, *Changing Faces*] (stating that "[t]he very notion of viewpoint discrimination rests on a background understanding of a disputed issue" and that "[i]f one sees no dispute, . . . one will see no viewpoint discrimination in any action the government takes"). In another article, Kagan notes that the Supreme Court has sometimes simply refused to recognize the viewpoint-discriminatory character of some speech regulations. Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 876 & n.13 (1993) (discussing *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which upheld a law banning advertising of casino gambling while failing to restrict anti-gambling speech).

²⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

²⁸ In a very interesting recent article, Douglas Laycock raises doubts about the extent to which this foundational principle applies to the public schools. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111 (2008). Schools are obviously not neutral players in the world of ideas, nor should they be, and Laycock suggests that there is really a series of questions that must be answered about how far schools can go in promoting favored ideas as part of their educational missions:

To what extent can a public school adopt inculcation of a viewpoint as part of its educational mission? To what extent can it indoctrinate students in that viewpoint by one-sided teaching or repeated emphasis? To what extent can it universalize instruction in that viewpoint by insisting that all students read or listen to the viewpoint, or be examined on it, without exempting those who conscientiously object? And finally, to what extent can it enforce its indoctrination in that viewpoint by suppressing all dissent?

Id. at 117. Laycock later suggests that *Morse v. Frederick*, 127 S. Ct. 2618 (2007), shows that advocacy of illegal drug use is an idea that schools may actively suppress, but he cautions that there cannot be many such ideas if students are to retain meaningful speech rights in school. Laycock, *supra*, at 120.

B. A Preview of the Argument

The primary question pursued in this article is whether *Tinker's* substantial disruption test permits schools to enact and enforce viewpoint-discriminatory restrictions on student speech.²⁹ This question cannot be meaningfully answered without some specification of what makes a school speech restriction an instance of viewpoint discrimination. Is it enough to say that the restriction identifies a viewpoint on its face or has viewpoint discriminatory effects? Or is the label "viewpoint discrimination" best reserved for instances of purposeful viewpoint discrimination?

The answers given to these questions lead to different doctrinal approaches. If a school speech rule restricting the expression of certain viewpoints by name counts as viewpoint discrimination *regardless of the reasons behind the restriction*, and *Tinker* flatly forbids viewpoint discrimination, school speech doctrine must include a requirement that all content-based speech rules qualify as subject-matter restrictions rather than viewpoint restrictions. Further, all school speech restrictions must be enforced in a viewpoint-neutral manner. On this approach, courts can determine that some speech restrictions governed by *Tinker* are unconstitutional without even looking at what the evidence might show about the reasonableness of the school's predictions of actual disruption. For example, a rule banning clothing that denigrates other students on the basis of their sexual orientation would be unconstitutional simply because it is facially viewpoint-based. This approach owes much to public forum cases like *Rosenberger v. Rector of University of Virginia*, which emphasized that even in a limited public forum, speech restrictions must be viewpoint-neutral.³⁰ Although it is too soon to tell, the approach may be gaining momentum in the courts and has apparently triumphed in the Sixth Circuit.³¹ Judicial attraction to this approach is understandable, for the idea that anything labeled "viewpoint discrimination" must be bad seems relatively firm ground in the sometimes confusing world of constitutional speech doctrine. Further, the religious litigants involved in so many student speech cases³² urge courts to view speech restrictions through the prism of viewpoint discrimination because that strategy has worked so well for them in the past.³³

²⁹ While my main focus is the substantial disruption test, I also say a few words at the end of the article about the distinctive issues raised by *Harper's* use of the rights-of-others prong. See *infra* notes 284-302302.

³⁰ 515 U.S. 819, 830-31 (1995). The Supreme Court has suggested that viewpoint-based restrictions might be justified by strict scrutiny where the viewpoint discrimination was necessary to avoid violating the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001). In practice, adding a *Rosenberger*-style rule to *Tinker* would result in an absolute ban on viewpoint discrimination.

³¹ See *supra* note 23 and accompanying text.

³² See generally Bowman, *supra* note 24 (discussing the extensive case law regarding student religious speech).

³³ See John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 241-43 (2007) (explaining why religious litigants tend to focus on *Rosenberger*-style free speech

This article argues for a different approach, which emerges if we think of viewpoint discrimination as purposeful restriction of expression on the basis of governmental disagreement with the message. When viewpoint discrimination is understood in this way, to say that a school has engaged in viewpoint discrimination in a case governed by *Tinker* is to say that it has acted unconstitutionally.³⁴ *Tinker* does not allow schools to restrict student speech for “ideological purposes.”³⁵ The school can, however, restrict speech in order to

arguments); Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 470-72 (2008) (stating that in the wake of *Rosenberger* and its progeny, student plaintiffs rely heavily on the rhetoric of viewpoint discrimination).

³⁴ I am tempted to write that a school (or even the state generally) may *never* restrict ideas on the basis of disagreement with their message, and both the Supreme Court and highly-respected scholars have yielded to that temptation. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 229 (1983) (“The government can never justify a restriction on otherwise protected expression merely because it disagrees with the speaker’s views.”). The plausibility of such absolute formulations depends largely on whether one can give a tight meaning to the ideas of what counts as “restricting” or “prohibiting” as opposed to merely regulating expression. All agree, for example, that the government need not be viewpoint-neutral in its own speech. Somewhat more controversially, it has been suggested that there are funding contexts where the government has no choice but to make distinctions that are content-based and even viewpoint-based. Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 204-07 (1994). In the educational context, it seems fairly clear that public schools must sometimes make viewpoint-based judgments in the service of their educational missions. See Brownstein, *supra* note 20, at 75 (“Virtually every aspect of a teacher’s responsibilities involves the direction and control of speech.”), 80 (stating that “[i]n any educational system, a significant number of instructional decisions are explicitly viewpoint discriminatory”); KENT GREENAWALT, DOES GOD BELONG IN THE PUBLIC SCHOOLS? 168 (2005) (stating that schools try to instill some viewpoints at the expense of others and that this aim may be reflected in “viewpoint discriminatory” class assignments such as essays requiring students to write about, for example, the value of honesty, respect, or religious liberty); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1825 (1987) (stating that viewpoint discrimination is a “regular and unavoidable aspect” of the government’s efforts to manage speech within the confines of government institutions including public schools). Consequently, I limit myself to the more modest claim that in cases governed by *Tinker*, the school is absolutely forbidden to restrict speech simply because of disagreement with the speaker’s message.

³⁵ The label “ideological purposes” is drawn from Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996). Here is her description of what counts as an ideological purpose:

First, the government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker; it may not act on the basis of a view of what is a true (or false) belief or a right (or wrong) opinion. Or, to say this in a slightly different way, the government cannot count as a harm, which it has a legitimate interest in preventing, that ideas it considers faulty or abhorrent enter the public dialogue and challenge the official understanding of acceptability or correctness. Second, though relatedly, the

prevent the substantial disruption of the school's work. It follows, on my view, that *Tinker* allows schools to enact facially viewpoint-based speech rules³⁶ or to enforce facially viewpoint-neutral rules with viewpoint-discriminatory effects³⁷ if those rules are justified by the need to prevent substantial disruption to the work of the school.

My proposed answer to the question of whether *Tinker* permits schools to employ viewpoint-discriminatory speech restrictions leads quickly to a second question: If *Tinker* indeed prohibits purposeful viewpoint-discrimination and the line is between illegitimate ideological regulation and legitimate harm-based regulation of speech,³⁸ how should courts draw this line? How does one take a constitutional principle that turns on the reasons for government action and turn it into a workable test that courts can apply?

Such a test is obviously needed, for school officials will never announce that they have restricted speech on the basis of disagreement with its message; instead, they will claim they have regulated speech to prevent harm. And this is something that schools (and the state more generally) may sometimes do – at least with sufficient justification. Fortunately, the problem of distinguishing legitimate from illegitimate purposes in the likely absence of direct evidence has been raised and addressed in other areas of constitutional law. Borrowing from the work of John Hart Ely,³⁹ Elena Kagan⁴⁰ and Jed Rubenfeld,⁴¹ I suggest that

government may not restrict speech because the ideas espoused threaten officials' own self-interest – more particularly, their tenure in office. The government, to use the same construction as above, cannot count as a harm, which it has a legitimate interest in preventing, that speech may promote the removal of incumbent officeholders through the political process. Third, and as a corollary to these proscriptions, the government may not privilege either ideas it favors or ideas advancing its self-interest – for example, by exempting certain ideas from a general prohibition. Justice Scalia summarized these tenets in *R.A.V.*: “The government may not regulate (speech) based on hostility – or favoritism – towards the underlying message expressed.” To this statement of illicit motive, one further gloss must be added: the government may not limit speech because other citizens deem the ideas offered to be wrong or offensive – or for that matter, because they see the ideas as threatening to incumbent officials. This ban echoes those just stated, except for the identity of the party (above the government, now the public) that disapproves the ideas; the theory is that this substitution of party name should make no constitutional difference. The key principle with respect to motive is that the government may not limit speech on grounds of mere disapproval, no matter whose or how widely shared.

Id. at 428-30 (footnotes omitted).

³⁶ For example, a rule banning students from wearing Confederate flag symbols.

³⁷ For example, a school might enforce a “no disruptive speech” rule against one viewpoint rather than against an entire subject matter if only that viewpoint proved disruptive.

³⁸ *Cf. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (“*Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only because it is substantially disruptive.”).

³⁹ DEMOCRACY AND DISTRUST (1980).

⁴⁰ Kagan, *supra* note 35.

⁴¹ Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

Tinker's substantial disruption test can function as a mechanism for "smoking out" the illicit ideological purposes of school officials in much the same way that equal protection strict scrutiny serves to smoke out racial animus.⁴² On my reading, then, the *Tinker* substantial disruption inquiry is really about two questions. The first is whether the school acted with the impermissible purpose of suppressing disfavored ideas. If so, the speech regulation is an instance of viewpoint discrimination and is unconstitutional – period. If not, the second question is whether the state's legitimate interest in preventing disruption to the educational environment is sufficiently weighty to justify the harm to free speech values imposed by the speech restriction. The first question is an effort to smoke out illicit purposes; the second is an effort to balance the costs and benefits of speech regulation.⁴³ *Tinker's* substantial disruption test is meant to answer both questions simultaneously: a speech regulation that is needed to avert substantial disruption is unlikely to be motivated by an impermissible purpose and brings benefits to the school's operations that outweigh its costs to speech values. With respect to *Harper*, for example, my view is that the case involved unconstitutional viewpoint discrimination precisely because there was inadequate evidence of substantial disruption (and inadequate evidence of the invasion of any interest that should count as a "right of others" under *Tinker*). In contrast, the Confederate flag cases seem rightly decided because evidence of substantial disruption is a sufficient guarantee that the school has acted for the permissible purpose of preventing harm rather than for the impermissible purpose of suppressing disfavored messages.

Yet aren't we missing something? *Tinker's* substantial disruption test does not look like the strict scrutiny formulas used to smoke out illicit purposes in other areas of constitutional law because it contains no narrow tailoring component. Indeed, *Tinker* is something of a constitutional anomaly in that its standards have no clear analogue in *any* other area of constitutional law.⁴⁴ I will argue that the lack of a narrow tailoring test makes *Tinker's* substantial disruption test an inadequate check against purposeful viewpoint discrimination in two areas.

The first involves cases where evidence suggests that a school may be selectively enforcing its speech restrictions. Courts applying *Tinker* typically

⁴² See Rubinfeld, *Affirmative Action*, *supra* note 41, at 436-37.

⁴³ See *id.* at 436-43 (explaining the contrast between strict scrutiny as a method of cost-benefit balancing and strict scrutiny as a method for smoking out illicit purposes). It can make a great deal of difference whether one envisions strict judicial scrutiny as cost-benefit analysis or as a device for smoking out impermissible purposes. For example, Rubinfeld argues that equal protection strict scrutiny must be understood as a way to police illicit purposes, and that the Supreme Court's failure to grasp this point has led it to adopt an incoherent approach to affirmative action. See *id.* at 438-44. In the *Tinker* context, however, I think the substantial disruption test is capable of answering both smoking-out questions and cost-benefit balancing questions at the same time. I do not have to claim that *Tinker* cannot be seen as a cost-benefit test; I need only claim that, if properly developed, *Tinker* can become an effective means for distinguishing between speech restrictions based on impermissible ideological purposes and those based on the legitimate desire to prevent harm.

⁴⁴ See Brownstein, *supra* note 20, at 19 (describing the *Tinker* standard as "*sui generis*").

examine the restricted speech and its potential for disruption in isolation. If the speech is disruptive, it may be restricted; if not, it cannot be restricted. But this leaves out an important possibility. Suppose that the plaintiffs whose speech has been restricted produce evidence that the school has failed to regulate similarly disruptive speech espousing a competing viewpoint. Such evidence creates a powerful inference that the school has acted unconstitutionally by restricting speech based on its disagreement with the speech's content. Underinclusive regulation of even substantially disruptive speech can be just as suggestive of unconstitutional viewpoint discrimination as the regulation of nondisruptive speech.

The second problem area involves cases where schools may have had reasonable options for preventing disruption that did not involve speech restrictions at all. A school that responds to fights at school by restricting the provocative speech rather than, say, raising penalties for the fighters is allowing some students to wield a heckler's veto against others. Unfortunately, forty years of applying *Tinker* have not made clear the degree to which *Tinker* allows schools to engage in a heckler's veto,⁴⁵ and the lack of a clear judicial commitment to the no-heckler's-veto principle creates unacceptably high risks that schools may be engaging in purposeful viewpoint discrimination. In sum, courts and commentators are right to be concerned that *Tinker* may be permitting improper viewpoint discrimination. The best way to address the problem, however, is by adding a narrow tailoring component to the substantial disruption test.⁴⁶

I believe my reading of *Tinker* provides significant protection for controversial student speech. As always, the precise extent of that protection depends on how seriously courts scrutinize school officials' predictions of disruption. I suspect, however, that an interpretation of *Tinker* as banning only purposeful viewpoint discrimination will be found unsatisfactory by many who desire to maximize protection for controversial student speech – especially controversial religious student speech like Tyler Harper's.⁴⁷ A more strongly protective reading of *Tinker* would invalidate any school speech restrictions that give rise to significant viewpoint-discriminatory effects. In practice, this would mean that a school worried about the disruptive effects of student speech condemning, for example, homosexuality, would face a choice between leaving that disruptive viewpoint unrestricted or broadening its restriction to include the entire subject-matter at issue. Even if we can coherently decide how broad the restriction would have to be to count as the regulation of subject matter rather than (religious) viewpoint,⁴⁸ a rule requiring viewpoint-neutral effects would, at the very least, push schools towards a Hobson's choice between very broad

⁴⁵ See *infra* notes 101-05.

⁴⁶ See *infra* notes 186-229 and accompanying text.

⁴⁷ A natural question to ask is whether the religious character of Tyler Harper's speech makes a constitutional difference. Does religious student speech receive greater protection than analogous secular speech? Should it? I argue that the answer to both questions is "no" in a companion piece to this article. See Taylor, *supra* note 33.

⁴⁸ The "if" here is a large one. See *infra* notes 248-66 and accompanying text.

speech restrictions or none at all. In fact, the appearance of a choice here may be illusory. Does it really make sense to say that the First Amendment would permit schools to restrict non-disruptive speech in order to keep the playing field level? If not, the implication of a rule requiring viewpoint-neutral effects would be that schools may only regulate disruptive speech where all competing viewpoints on a particular subject are roughly equal in their disruptive potential. This would be the only situation where speech restrictions could respect both the requirement that nondisruptive speech be protected and the requirement that speech regulations have viewpoint-neutral effects. It is difficult to believe, however, that such limited authority over student speech is compatible with *Tinker*. Most lower courts have not read *Tinker* to incorporate a ban on viewpoint-differential effects, and they have been right in refusing to take this step. The only viewpoint-neutrality requirement in *Tinker* concerns purposes, not effects.

The argument proceeds as follows. Part II discusses the reasons for the First Amendment's distrust of viewpoint discrimination and probes some of the uncertainties about how to define it. Part III explains the *Tinker* standard and sets it within the general context of the law governing student speech in the public schools, while Part IV discusses the ways in which the lower courts have analyzed or, more often, ignored issues regarding viewpoint discrimination in their application of the substantial disruption test. In Part V, I explain the importance of the distinction between viewing *Tinker* as a "purpose rule" and viewing it as an "effects rule." I then argue in Part VI that *Tinker's* substantial disruption test should be read as a mechanism for smoking out illicit purposes and that it should be supplemented with a narrow tailoring component so as to better accomplish this task. The question of whether *Tinker* should incorporate a separate requirement that school speech restrictions have viewpoint-neutral effects is explored in Part VII, and answered in the negative. Part VIII briefly discusses some of the problems raised by *Tinker's* little-used "rights-of-others" prong; and Part IX addresses the objection that, at the end of the day, there will be no practical differences between seeing *Tinker* as a purpose rule and seeing it as an effects rule. Part X provides a brief conclusion.

II. VIEWPOINT DISCRIMINATION

The case law and commentary are in broad agreement that viewpoint discrimination is a very bad thing. To explain why this is so, I begin by briefly sketching Geoffrey Stone's influential analysis and defense of the content-based/content-neutral distinction in free speech jurisprudence.⁴⁹ The basic distinction is that content-based restrictions regulate speech on the basis of the message conveyed while content-neutral restrictions regulate speech without regard to its message, though in practice the distinction is not always as clear as it

⁴⁹ Stone, *supra* note 34, is the classic account. Stone's basic conclusions are summarized more briefly in Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

initially sounds.⁵⁰ As a general matter, First Amendment law subjects content-based restrictions on speech to more stringent review than content-neutral restrictions. In the realm of high-value speech, content-based restrictions are generally subjected to strict scrutiny: the state must justify such restrictions by proving that they serve a compelling interest through narrowly tailored means.⁵¹ Restrictions of speech based on its viewpoint are considered the most problematic form of content-based speech regulation. Although in most contexts the Supreme Court evaluates all content-based speech restrictions by using strict scrutiny, in practice this test is applied most consistently and rigorously to viewpoint-based restrictions.⁵² The distinction between viewpoint-based restrictions and subject-matter restrictions becomes most critical when the state regulates speech in a non-public forum. In that context, restrictions of speech on particular subjects of discussion may be upheld if they are reasonable in relation to the forum's purpose while viewpoint-based restrictions are strictly scrutinized.⁵³ For example, a rule allowing pro-choice but not pro-life community groups to meet on school property after hours would surely constitute unconstitutional viewpoint discrimination. A rule barring all advocacy groups addressing abortion/family planning issues could potentially be upheld as a reasonable subject matter restriction.

The starting point in most discussions of the problems with viewpoint-based restrictions is that they distort the "marketplace of ideas" and the "thinking process of the community," and consequently impair the search for truth.⁵⁴ For example, if the government enacted an across-the-board ban on the expression of all viewpoints critical of the war in Iraq, it would distort public debate in dramatic ways. Yet even what Stone terms "modest" viewpoint-based restrictions, which apply to speech only in some limited contexts, are usually scrutinized just as severely as very broad viewpoint-based restrictions.⁵⁵ This aspect of Stone's analysis is significant for my purposes in this article; all restrictions of speech governed by *Tinker* would qualify as relatively modest in Stone's sense because students are restricted in their speech at school but are free to express themselves elsewhere.

⁵⁰ For discussions of some of the uncertainties involved in drawing the content-based/content-neutral distinction, see John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103 (2005); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

⁵¹ Stone, *supra* note 34, at 196-97.

⁵² Kagan, *supra* note 35, at 444.

⁵³ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

⁵⁴ The classic expression of these ideas is found in the work of Alexander Meiklejohn, especially his *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965).

⁵⁵ Stone, *supra* note 34, at 200-01. Stone provides a memorable example in discussing *Schacht v. United States*, 398 U.S. 58 (1970), where the Supreme Court struck down as viewpoint-discriminatory a federal statute that prohibited actors from wearing an armed forces uniform if the actor's portrayal tended "to discredit that armed force." *Id.*

Stone gives three reasons why even modest viewpoint restrictions are strictly scrutinized.⁵⁶ First, even modest viewpoint-based restrictions have some constitutionally significant consequences in that they distort debate and impede the search for truth to some degree.⁵⁷ More significantly, Stone argues that it would be “extraordinarily difficult” for courts to draw lines between modest and significant distorting effects.⁵⁸ This suggests that courts ought to adopt the prophylactic approach of strictly reviewing even apparently modest viewpoint-based restrictions so as to guard against the danger of underestimating the distorting effects of particular restrictions.

Second, Stone points out that all viewpoint-based regulations, modest or general, are quite likely to be improperly motivated.⁵⁹ The government may *never* restrict the expression of ideas “merely because public officials disapprove the speaker’s views,”⁶⁰ and when speech is identified for restriction on the basis of its viewpoint, the risk of improper motivation is sufficiently high that a presumption of unconstitutionality is warranted:

When a restriction is directed at a particular idea, viewpoint, or item of information, however, the risk of improper motivation is quite high, for government officials considering the adoption of such a restriction will almost invariably have their own opinions about the merits of the restricted speech and there is thus a substantial risk that, in deciding whether to adopt the restriction, they will be affected, either consciously or unconsciously, by an improper motive. . . . In such circumstances, the most sensible course might be simply to presume improper motivation and to put the burden of proving the absence of improper motivation on the government. The government could meet this burden by proving, for example, that the challenged restriction was the least restrictive means of achieving a compelling governmental interest, for such proof would effectively demonstrate that the government would have adopted the restriction even in the absence of improper motivation.⁶¹

Third, modest viewpoint-based restrictions of speech are suspicious because they are triggered by the “communicative impact” of the speech; i.e. how the message conveyed by the speech affects other people.⁶² Specifically, such regulations usually respond to fears that the speech will persuade others to act in disfavored ways or that others will take offense or react with hostility to the

⁵⁶ Here I draw upon the more concise discussion in Stone, *supra* note 49.

⁵⁷ *Id.* at 464.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Stone, *supra* note 34, at 227 (quoting *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 536 (1980)). For a brief expression of doubts about the proper scope of Stone’s categorical claim, see *supra* note 34.

⁶¹ Stone, *supra* note 34, at 231.

⁶² Stone, *supra* note 49, at 464.

speaker's message.⁶³ Either of these justifications for restricting speech is constitutionally disfavored. To prohibit speech because people might agree with or act on it is objectionably paternalistic, for the government ordinarily may not restrict the expression of particular ideas, viewpoints, or items of information because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression.⁶⁴ Similarly, the government ordinarily may not act to protect people from offense or to prevent hostile reactions from others.⁶⁵ Such intolerance-based justifications have too great a potential for suppressing dissenting points of view by giving the majority's preferences the force of legal backing.⁶⁶ To say that these justifications are constitutionally disfavored is not to say that the government may *never* act on them. For example, the government may intervene to prevent people from being persuaded by speech that is likely to incite "imminent lawless action" under *Brandenburg v. Ohio*.⁶⁷ The justifications are disfavored in the sense that the costs of leaving speech unrestricted must be very high before the government can be allowed to act on these reasons. In this respect, disfavored justifications are distinct from the categorically forbidden purpose of repressing ideas simply because of disagreement with the message.⁶⁸

Stone's account goes a long way toward explaining what is troublesome about viewpoint discrimination. It is somewhat less clear, however, what viewpoint discrimination actually is. As is the case in other areas of the law that involve the concept of discrimination,⁶⁹ the question is trickier than it might first appear. Consider the following possibilities, which by no means exhaust the field:

- (1) A rule that facially forbids the expression of a particular viewpoint on the basis of disagreement with that viewpoint and concern that others might adopt and act on it. (For example, *Morse v. Frederick*,⁷⁰ where the school

⁶³ Stone, *supra* note 34, at 212-16. Stone mentions a third type of communicative effect, where speech is restricted on the basis of its attracting or distracting potential. *Id.* at 216-17. This sort of situation, Stone says, is considerably rarer than the other two, *id.*, though the distraction argument has a long lineage in school speech cases dating back at least to Justice Black's *Tinker* dissent. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 518 (1969) (Black, J., dissenting).

⁶⁴ Stone, *supra* note 34, at 213.

⁶⁵ *Id.* at 215.

⁶⁶ *Id.* at 215-16.

⁶⁷ 395 U.S. 444, 448-49 (1969).

⁶⁸ Kagan, *supra* note 35, at 436-37.

⁶⁹ See, e.g., Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735 (2006); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) (discussing problems in defining discrimination under the Equal Protection Clause); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (same).

⁷⁰ 127 S. Ct. 2618 (2007); see also Laycock, *supra* note 28, at 116 (stating that the school's action restricting a "Bong Hits 4 Jesus" banner in *Morse* was "squarely and explicitly based on viewpoint" and that "[t]he school claimed power to punish speech it disagreed with").

forbade pro-drug speech and conceded that these were the justifications for its rule).

(2) A rule that is facially viewpoint-neutral (or even content-neutral), but that was enacted for the purpose of suppressing a particular viewpoint. (For example, the school rule against wearing black armbands that was adopted in *Tinker*).

(3) A rule that is facially content-based or even viewpoint-based, but that is justified by considerations of harm that might flow from the speech rather than by disagreement with its point of view. (This is arguably the proper characterization of the racial harassment policies at issues in cases like *Sypniewski v. Warren Hills Regional Board of Education*.⁷¹) By hypothesis, rules of this sort are not viewpoint-discriminatory in purpose but will clearly have viewpoint-differential effects.

(4) A rule that is facially viewpoint-neutral (or even facially content-neutral) that gives rise to viewpoint-discriminatory effects. (For example, a rule that simply prohibits disruptive speech could be enforced in such a way as to produce viewpoint-differential effects on the basis of judgments that some viewpoints are more prone to cause disruption than others).

Is viewpoint discrimination a matter of text (facial categorization), purpose, effects, or some combination of these (and perhaps other) factors? The answer depends in part on the question asked. "Viewpoint discrimination" can be a label for something that the government may not do, a conclusion that a speech regulation is unconstitutional in a particular way. So understood, viewpoint discrimination must be a matter of acting on a forbidden purpose.⁷² A speech restriction that is viewpoint-based on its face or in its effects may be constitutional, but a restriction purposely imposed on the basis of agreement or disagreement with the ideas expressed cannot be. Further, the conclusion that a speech restriction had such an illegitimate purpose will come at the end rather than the beginning of constitutional analysis. Usually, though, we apply labels like "viewpoint-based restriction" (as opposed to "subject matter restriction") and "content-based restriction" (as opposed to "content-neutral restriction") in the course of asking which legal standard should be used to assess a particular speech regulation. In the context of this question, labeling a restriction as content-based or viewpoint-based is not to say it is unconstitutional. It is to say that the restriction is sufficiently worthy of suspicion to warrant strict review. What we suspect in calling a law "viewpoint-based" in this review-triggering sense are the dangers of distortion, impermissible purpose, and disfavored justification discussed by Stone. We review the law strictly to assure ourselves that these dangers are absent or sufficiently justified.

What, then, do we need to trigger review of a statute under the strict standards normally applied to viewpoint-based restrictions? Outside the public forum context, the question of the appropriate trigger is usually discussed in terms of whether or not a given restriction should be treated as content-based, the assumption being that even content restrictions that are not viewpoint-based

⁷¹ 307 F.3d 243 (3d Cir. 2002).

⁷² See Kagan, *supra* note 35, at 451.

should be subjected to strict review. Yet even if we ask about what counts as content-based discrimination for purposes of triggering strict review, the answer is not entirely clear. One scholar recently summarized the state of the law regarding what counts as content discrimination by noting that “[t]he law . . . has not consistently approached the issue of motive in speech discrimination cases” and that the best summary of the current doctrine would “say that generally a regulation of speech is content-based if it is justified by reference to speech content, or if it facially discriminates on the basis of speech content, but that the Supreme Court has occasionally found exceptions to both principles.”⁷³ The Supreme Court’s decision in *Hill v. Colorado*⁷⁴ appears to indicate that “a law is not content-based merely because it disproportionately affects speakers of a particular viewpoint,”⁷⁵ yet such disproportionate effects can be powerful evidence of a content (or viewpoint) discriminatory purpose.⁷⁶ It seems, then, that a viewpoint-discriminatory purpose (i.e., the government restricts speech because it disagrees with the ideas being expressed) will always count as viewpoint-discrimination, but restrictions lacking this invidious purpose may or may not be considered to be viewpoint-discriminatory based on their text. Viewpoint-discriminatory effects appear to matter mainly as evidence of invidious purposes. With this initial treatment of the idea of viewpoint discrimination in hand, let us now turn to how these ideas might play themselves out in the context of student speech restrictions governed by *Tinker*.

III. *TINKER* AND THE REGULATION OF STUDENT SPEECH

Tinker applies to all content-based regulation⁷⁷ of student speech that is not school-sponsored,⁷⁸ not lewd, indecent, or offensive,⁷⁹ and not advocacy of

⁷³ Fee, *supra* note 50, at 1132-33. McDonald, *supra* note 50, at 1385-99, argues that the Supreme Court’s free speech jurisprudence now contains two relatively independent and inconsistent lines of cases regarding how the content-neutral/content-based distinction should be drawn. This results in a situation where the initial label tends to determine the outcome of cases, yet the Court has tremendous discretion about which label to apply because of the existence of parallel lines of authority. *Id.* at 1401.

⁷⁴ 530 U.S. 703 (2000) (upholding a regulation of speech and leafletting within eight feet of unwilling patrons of medical facilities despite fairly obvious evidence that the statute would primarily affect those espousing the viewpoint that abortion is immoral).

⁷⁵ Fee, *supra* note 50, at 1130.

⁷⁶ *Id.* (citing *United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (anti-flag burning statute only explainable as effort to restrict expression of particular viewpoints)).

⁷⁷ Courts occasionally describe *Tinker* as a standard applying only to viewpoint restrictions, *see, e.g.*, *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442 (5th Cir. 2001) (stating that *Tinker* applies to “school regulations directed at specific student viewpoints”), but this must be incorrect. A school rule that forbade the wearing of any T-shirts with political messages would presumably be a subject-matter restriction under *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding exclusion of political speech from subway ads as a valid subject matter restriction in a nonpublic forum), yet the proper test for evaluating the rule would be *Tinker*. *Cf.* Laycock, *supra* note 28, at 127 (stating that the *Tinker* Court would not have accepted a subject matter restriction on student discussion of the Vietnam War without a showing of substantial disruption). Courts

illegal drug use.⁸⁰ It is, in short, the default standard that applies to students' "personal expression that happens to occur on the school premises."⁸¹ In the vast

have divided on whether *Tinker* governs content-neutral speech restrictions. Compare *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp. 965, 973 (C.D. Ill. 1989) (applying forum analysis rather than *Tinker* to time, place, and manner restrictions on student distribution of non-school related materials) with *Raker v. Frederick County Public Sch.*, 450 F. Supp.2d 634, 639-40 (W.D. Va. 2007) (applying *Tinker* to a similar policy to the one considered in *Nelson*). Courts appear more consistent in not extending *Tinker* to incidental speech regulations. See, e.g., *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (evaluating free speech challenge to school uniform policy under *United States v. O'Brien*, 391 U.S. 367 (1968)); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (same).

⁷⁸ Speech that can reasonably be seen as bearing the imprimatur of the school or as part of the curriculum is governed by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* applies to school-sponsored student speech, such as that which occurs in school newspapers or theatrical productions. It is also commonly applied to student classroom speech and speech in the context of school assignments, though this application has been questioned on the ground that such speech often is *not* likely to be seen as bearing the imprimatur of the school. See *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 157-58 (6th Cir. 1995) (Batchelder, J., concurring) (suggesting that a student's choice to write a paper on the life of Jesus should not be governed by *Hazelwood* because "[t]here is no way to make a colorable claim that this paper is speech which might be viewed by the community as bearing the imprimatur of the school"). Where *Hazelwood* applies, schools may impose any regulation of speech that is reasonably related to a legitimate pedagogical purpose. Brownstein, *supra* note 20, argues that school regulation of school-sponsored speech (including classroom and school-assignment speech) should be immune from judicial review under the Free Speech clause.

⁷⁹ Such low-value speech is governed by *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and is essentially without First Amendment protection in the context of the public schools. Courts do not appear to apply any standard of review to restrictions of lewd or offensive speech, and I am aware of no decision where a court treated *Fraser* as the applicable standard yet ruled against the school district. The main controversy regarding the application of *Fraser* is whether offensiveness refers to the manner in which a message is conveyed or can also include the offensiveness of the message itself. The more usual, and I think the correct, view is that offensiveness refers to the manner of expression. For example, a federal district court has ruled that restriction of a shirt saying "Drugs Suck!" was governed by *Fraser* even though the school agreed with the message. *Broussard v. School Bd. of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992); *but see Boroff v. Van Wert City Bd. Of Educ.*, 220 F.3d 465, 471(6th Cir. 2000) (holding that *Fraser* allowed a school to restrict a Marilyn Manson T-shirt because of the shirt's offensive message). *Morse* supports the *Broussard* court's reading, in that the Court rejected arguments that a "Bong Hits 4 Jesus" banner advocating illegal drug use could count as offensive under *Fraser*. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

⁸⁰ *Morse* holds that schools have the authority to regulate student speech falling within this narrow description. I discuss the case in Taylor, *supra* note 33, at 227-31. The extent of *Morse*'s impact on questions not involving illegal drug use remains to be seen; some courts and commentators think the case has given schools broader authority to regulate speech in the interests of student safety quite generally. See *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768-72 (5th Cir. 2007) (stating that *Morse* guides analysis of speech about a mass school shooting); Waldman, *supra* note 33, at 489-91 (suggesting that *Morse* may give schools additional authority over student speech that is potentially hurtful to other students).

⁸¹ *Hazelwood*, 484 U.S. at 271. The lower courts have developed fairly standard patterns of analysis for deciding which of the Supreme Court's student speech cases should govern, and

majority of cases, *Tinker* requires courts to apply what I will call the “substantial disruption rule”: schools may regulate speech based on a reasonable prediction that it will “materially and substantially interfere with the requirements of appropriate discipline” or the work of the school.⁸² *Tinker* also states that schools may restrict speech that unduly interferes with the rights of others,⁸³ the aspect of the opinion that was (controversially) relied upon by the Ninth Circuit in *Harper v. Poway Unified School District*.⁸⁴ This much is familiar enough. Courts can recite *Tinker*’s key phrases like “material and substantial interference” by heart, and in most cases they reach relatively predictable results about when *Tinker* should apply.⁸⁵ The sense of normalcy conveyed by these observations is misleading, however. As Alan Brownstein has said, the real puzzle about *Tinker* is not when it applies, but how to apply it.⁸⁶ And if courts do not seem puzzled about this, perhaps they are not paying attention.

A. Unanswered Questions About *Tinker* and Substantial Disruption

It is remarkable that the United States Supreme Court has not decided a single case applying *Tinker* in the nearly forty years since the case was decided. Consequently, some very basic questions about the substantial disruption standard remain unanswered. The “rights of others” prong of *Tinker* is even more underdeveloped. Yet looking back at *Tinker* in its historical context, it should not be surprising that it gives us very little guidance in facing the questions about student speech that we confront today.⁸⁷

Tinker drew its formulation of the substantial disruption rule largely from a pair of Fifth Circuit cases decided on the same day in 1966: *Burnside v. Byars*⁸⁸ and *Blackwell v. Issaquena County Board of Education*.⁸⁹ Both cases involved school rules forbidding students to wear “freedom buttons.” The students won in *Burnside*, but lost in *Blackwell*. According to the Supreme Court, the primary difference between the two cases was that the students in *Blackwell* had “harassed” students who did not wear the freedom buttons and thereby “created much disturbance,”⁹⁰ while the students in *Burnside* had simply worn the buttons without creating any sort of disturbance. The *Blackwell* opinion described the

typically they proceed by eliminating the other options first and concluding that all remaining student speech is governed by *Tinker*. See, e.g., *Guiles v. Marineau*, 461 F.3d 320, 324-41 (2d Cir. 2006).

⁸² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁸³ *Id.* at 513.

⁸⁴ 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

⁸⁵ There are, of course, some borderline cases. See e.g., *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp.2d 633, 640-46 (D. N.J. 2007) (discussing cases and hypotheticals mapping the border between *Tinker* and *Fraser*).

⁸⁶ Brownstein, *supra* note 20, at 20.

⁸⁷ For a very interesting look at the background of *Tinker*, see generally Kristi Bowman, *The Civil Rights Roots of Tinker* (unpublished manuscript on file with the author).

⁸⁸ 363 F.2d 744, 749 (1966).

⁸⁹ 363 F.2d 749 (1966).

⁹⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 n.1 (1969).

students who sought the protection of the First Amendment as “accosting other students in the corridors and halls of the buildings and placing these pins on the clothing of the children whether they wanted them or not.”⁹¹ *Blackwell* is the paradigm case of what would count as substantial disruption under *Tinker*, yet there the disruption had more to do with the conduct of the student speakers than with the message they conveyed. In ruling against the students, the Fifth Circuit may have done little more than reaffirm the idea that the disruptive conduct of the students would not be immunized from school discipline simply because the conduct had expressive aspects. That, in any event, is how the Supreme Court saw *Blackwell*.⁹²

In contrast, the *Tinker* students wore black armbands as part of a passive protest against the Vietnam War. The students participating in the protest did nothing to create any sort of disturbance; their symbolic actions were “pure speech.”⁹³ Nor was there any evidence of disruption to the school’s activities from any source other than the participating students.⁹⁴ On these facts, there were really only two arguments that might have justified the school’s restriction of the armbands. The first was the argument that, in the words of the school officials in the case, “schools are no place for demonstrations.”⁹⁵ In other words, students have no First Amendment rights within schools at all and schools therefore have no obligation to justify any of their decisions about student speech to the courts. The second argument was that even if schools must justify restrictions of student speech by appealing to the harms the speech might cause, courts should defer completely to school officials’ judgments and predictions about the links between speech and harm. *Tinker*’s rejection of the first argument is captured by its famous claim that students do not “shed their constitutional rights to freedom of speech or expression at the school house gate.”⁹⁶ Requiring schools to show that their actions restricting speech were “caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” was the opinion’s rejection of the second argument.⁹⁷

Though we take these aspects of the opinion for granted, they represent significant achievements. Accepting either argument was a live option for the

⁹¹ *Blackwell*, 363 F.3d at 751 n.2 (quoting an affidavit from school officials as an accurate account of the incidents in the case).

⁹² *Tinker*, 393 U.S. at 513 (“[C]onduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”). The quotation is immediately followed by a *cf.* citation to *Blackwell*.

⁹³ *Id.* at 505.

⁹⁴ The majority opinion characterized the only evidence of disturbance created by the armbands as “a few students” who made “hostile remarks” to the protestors. *Id.* at 508.

⁹⁵ *Id.* at 509 n.3 (quoting memo prepared by school officials listing their reasons for banning the armbands).

⁹⁶ *Id.* at 506.

⁹⁷ *Id.* at 509.

Court at the time, and of course Justice Black did embrace the argument that students have no speech rights.⁹⁸ Nonetheless, appreciating these points helps to emphasize how little concrete guidance *Tinker* provides for courts today. The primary intellectual work of the opinion was justifying its rejection of the arguments that might have changed the outcome, not defining notions like “material and substantial interference” with the school’s work or “the right of others to be secure and to be let alone.” We know that the Court thought the disruptive speech/conduct mix in *Blackwell* constituted a substantial disruption and perhaps also interference with the rights of other students, but that is not to know very much.

To illustrate the point, *Blackwell* involved disruptive conduct by the students whose speech was restricted. Can the disruptive conduct (actual or threatened) of other students justify restrictions on student speakers? Many *Tinker* cases decided by lower courts involve violent confrontations in which other students have been provoked by the restricted speech, so perhaps this has been settled as a practical matter.⁹⁹ Yet the answer is not clear from the *Tinker* opinion.¹⁰⁰ Moreover, if the threat of violent reaction from other students *can* constitute substantial disruption, doesn’t that run afoul of the principle that the First Amendment does not create a heckler’s veto?¹⁰¹

⁹⁸ *Id.* at 521-22 (Black, J., dissenting). Justice Thomas has recently adopted Justice Black’s position that students do shed their First Amendment rights at the school house gate. See *Morse v. Frederick*, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring).

⁹⁹ To illustrate, all the Confederate flag cases listed *supra* note 11 involved histories of violent clashes among students; see also, e.g., *Gov. Wentworth Reg. Sch. Dist. V. Hendrickson*, 421 F. Supp. 2d 410 (D. N.H. 2006) (student suspended for wearing “anti-Nazi” patch because of patch’s relationship to prior threats of violence between student groups).

¹⁰⁰ Snippets of text from *Tinker* can be used to support both sides of the argument here. On one hand, the Court noted that there was no disorder “on the part of the petitioners,” *Tinker*, 393 U.S. at 508, which can be taken to imply that only the conduct of the participants was relevant. On the other hand, the Court noted that although other students made hostile remarks to the plaintiff students, “there were no threats or acts of violence on school premises.” *Id.* This can be read to imply that if other students had acted violently or credibly threatened violence, the Court would have taken this as evidence of substantial disruption. Similar textual arguments can be made pro and con about other questions regarding *Tinker*’s interpretation. For example, the *Harper* panel majority made much of *Tinker*’s statement that, “Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” *Id.* at 511. According to Judge Reinhardt, this meant that singling out a particular opinion for prohibition (i.e. facial viewpoint discrimination) *would* be justified by sufficient evidence of disruption. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1184-85 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). Perhaps this is true, but at the end of the day these arguments are little more than parsing dicta.

¹⁰¹ *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (explaining that speech cannot be suppressed on the basis of hostile reactions unless the speech has been shown “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest” because the alternative would produce “standardization of ideas either by legislatures, courts, or dominant political or community groups”). The phrase “heckler’s veto” was

Tinker appeared to adopt the no-heckler's veto principle by quoting *Terminiello* with approval,¹⁰² and one part of this principle has been the idea that if speech threatens a hostile audience reaction, the state's first response should be to restrict the audience members who would resort to violence rather than restricting the speaker. The principle is not absolute – the state in its capacity as sovereign may restrict the speaker whose words meet the *Brandenburg* test, for example – and the state in its capacity as educator ought to have somewhat more authority to decide that restricting the speaker is the only viable way to preserve order. No one would require school officials to line their corridors with police in full riot gear to protect a student's right to engage in incendiary speech. Courts applying *Tinker*, however, have not consistently recognized this aspect of the no-heckler's-veto principle at all. Some jurists insisted from the beginning that schools could not restrict speech under *Tinker* on the basis of hostile audience reactions without a showing that the problem could not be handled by disciplining the unruly hearers rather than the speaker,¹⁰³ and one can find similar statements in some more recent decisions.¹⁰⁴ But many courts apply *Tinker* to uphold student restrictions on speakers without any concern about whether the anticipated disruption would be caused by the speakers or by their audience.¹⁰⁵

To give one more illustration, there is also considerable uncertainty about what kinds of interferences with the school's work can count as substantial

introduced by Harry Kalven, Jr. and has been used ever since to describe the principle announced in *Terminiello*. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140-45 (1965).

¹⁰² *Tinker*, 393 U.S. at 508-09. Interestingly, scholars vary in whether they describe *Tinker* as sanctioning or rejecting the idea of a heckler's veto in the schools. Compare, e.g., Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1662 (1986) (*Tinker* gives students a limited heckler's veto), and Alison G. Myhra, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71, 121, n.286 (1992) (same), with Eva DuBuisson, Comment, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C. L. REV. 301, 328 (2006) (*Tinker* makes clear that it "is not opening the door for a heckler's veto"). These different characterizations are partly a function of how low the threshold of disturbance must be before a commentator is willing to say that mere heckling has justified a school's suppression of student speech. That other students make some negative remarks or take offense at speech does not amount to material and substantial disruption, *Tinker*, 393 U.S. at 509 (noting that "the discomfort and unpleasantness that always accompany an unpopular viewpoint" are not enough to justify school speech restrictions), but a more significant showing of hostile reaction will permit some speech regulation under *Tinker*.

¹⁰³ See, e.g., *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 706 (5th Cir. 1968) (Tuttle, J., dissenting) (stating that schools should prohibit the acts of students who "would disrupt the serenity or calm of the school" rather than "expressions of individuality by the suspended students").

¹⁰⁴ See, e.g., *Holloman v. Harland*, 370 F.3d 1252, 1274-76 (11th Cir. 2004) ("[W]e cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason.").

¹⁰⁵ See, for example, any of the Confederate flag cases cited *supra* note 11. On *Tinker*'s ambivalent stance regarding the heckler's veto problem, see generally Mark Yudof, *Student Discipline in Texas Schools*, 3 J.L. & EDUC. 221, 228-29 (1974) (suggesting that the *Tinker* Court "evidenced little awareness of the distinction between expressive behavior which is itself disruptive and expressive behavior which causes others to disrupt" and that *Tinker* ought to more clearly require schools to explore alternative responses involving the discipline of hearers before restricting student speech).

disruptions. It is clear that violence disrupts the school's mission, but what if speech is shown to negatively affect the learning environment for some students? Can this be a substantial disruption under *Tinker*?

This list of uncertainties about the meaning of the substantial disruption test is not exhaustive, but it is sufficient to emphasize that *Tinker's* familiar formulas are still in great need of doctrinal development and clarification. As Alan Brownstein explains in a forthcoming paper, this is partly because the *Tinker* standard is "sui generis" and operates "in isolation from the more formalized and conventional standards of review that are applied in most free speech contexts."¹⁰⁶ Courts do not have the luxury of drawing on experience gained with the substantial disruption standard in other areas where it is applied, for there are none. Indeed, *Tinker* may be a kind of doctrinal dinosaur, as Brownstein suggests that its conceptual roots lie in the now-discarded "functional compatibility approach" to the regulation of private speech in non-traditional public fora.¹⁰⁷ In navigating the tensions between *Tinker's* substantial disruption rule and general First Amendment norms about viewpoint discrimination, we would do well to remember that one way of dealing with those tensions is to take advantage of the large space for doctrinal development left by *Tinker's* silences.

B. Viewing the Substantial Disruption Test Through Stone's Theory of the Wrongfulness of Viewpoint Discrimination

Schools sometimes incorporate the *Tinker* standard directly into their policies governing student conduct by saying, for example, that disruptive speech or conduct will not be tolerated.¹⁰⁸ Where schools adopt this strategy, the resulting policy will of course make no reference to the content of the message conveyed by the speech. Nonetheless, the *Tinker* standard licenses speech regulation that is content-based as applied¹⁰⁹ because whether speech is substantially disruptive (or interferes with the rights of others) will usually turn on the communicative impact of the speech.¹¹⁰ As Stone has explained, laws that

¹⁰⁶ Brownstein, *supra* note 20, at 19.

¹⁰⁷ *Id.* at 19-20 (explaining that *Tinker* seems consistent with speech doctrines in the late 1960's that allowed government restrictions of private speech on public property only when the speech would interfere with government uses of the property).

¹⁰⁸ See, e.g., *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 494 (D.S.C. 1997) (school rule prohibited "[a]cting in a manner so as to interfere with the instructional process (disruptions, etc.)").

¹⁰⁹ Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286-87 (2005) (arguing that laws are "content-based as applied" when the law's application is triggered by the content of the speech and that such laws "should be presumptively unconstitutional, just as facially content-based laws are presumptively unconstitutional").

¹¹⁰ Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 81-82 n.3 (1978-79); Stone, *supra* note 34, at 208 ("A law prohibiting any person from making a speech that may provoke a breach of the peace is

are content-neutral on their face but turn on the reaction of a listener to what is said are generally scrutinized just as strictly as content-based restrictions because censoring speech on the basis of hostile reactions is a constitutionally disfavored justification.¹¹¹ If the government can restrict speech simply because the speech gives offense or provokes a hostile reaction, the majority can effectively silence the expression of dissenting voices and thereby undermine critical First Amendment interests.¹¹² This is why the First Amendment generally prohibits the law from serving as a channel through which hostile listeners can wield a heckler's veto. These basic points already indicate that *Tinker* stands in some tension with the free speech principles that apply when the government regulates the speech of the general public. Because *Tinker* arguably involves a kind of heckler's veto,¹¹³ it explicitly contemplates that sometimes intolerance-based justifications for restricting speech will be found satisfactory despite the entirely foreseeable risk that this result will allow a majority to effectively use school officials and policies as a tool to silence dissenting voices. Further, because viewpoints likely to cause offense may also be rejected by school officials, there is a significant risk that school officials who use their authority under *Tinker* to regulate student speech may actually be acting to suppress ideas they disagree with. If *Tinker* imposes no viewpoint-neutrality requirement on school speech regulation, it also allows for significant distortion of the marketplace of ideas in an environment that is supposed to be peculiarly the marketplace of ideas.¹¹⁴ The obvious explanation for the tension between *Tinker* and general free speech law is that the *Tinker* Court understood the dangers just canvassed, but nonetheless felt that some shaping of general First Amendment principles was necessary to allow schools to do their work. Whatever the problematic character of the heckler's veto in First Amendment law generally, schools have a distinctive and extraordinarily important role to play in preparing the next generation of citizens, and they cannot afford to have that educational mission disrupted,¹¹⁵ even by speech that merely happens to occur on school premises.¹¹⁶ *Tinker* resolved the conflict between the general ideals of the First Amendment and the institutional

content-neutral on its face, but turns in application on the reaction of individuals 'to what the speaker is saying.'")

¹¹¹ Stone, *supra* note 34, at 215-16.

¹¹² Kagan, *supra* note 35, at 429.

¹¹³ See *supra* notes 101-105 and accompanying text.

¹¹⁴ *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). The image of the public school as a marketplace of ideas is misleading in some respects. See Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 53, n.59 (2008) (characterizing the suggestion that primary and secondary school classrooms are peculiarly the marketplaces of ideas as "improbable"). For more discussion, see *infra* notes 236-46 and accompanying text.

¹¹⁵ A similar point can be made about *Tinker*'s rights-of-others prong. At the point where speech begins to interfere with a student's right to be safe and secure, the school must have some authority to regulate that speech because it must have an opportunity to ensure that educational goals are met with every student.

¹¹⁶ Under *Hazelwood*, schools have greater leeway than *Tinker* provides to regulate student speech that occurs as part of the curriculum. See *supra* note 78. This additional leeway can also be justified in terms of the institutional mission of the school.

needs of the school by requiring not just any disruption, but a material and substantial one, and by placing the burden on the school to prove that such disruption had already occurred or would soon occur.¹¹⁷

It follows from all this that as a threshold matter, the degree of protection afforded to controversial speech in the schools depends on how high courts set the bar for a school district to prove the existence or reasonable anticipation of a material and substantial disruption. Nondisruptive speech cannot be restricted without such a showing.¹¹⁸ Some courts give the substantial disruption rule less bite than others, and in any event the question of what counts as sufficient evidence of disruption is a highly specific matter.¹¹⁹ If properly interpreted and taken seriously, the substantial disruption rule often does a fairly effective job in protecting controversial student speech.¹²⁰ My question here, however, is about circumstances in which sanctioning disruptive speech under *Tinker* also appears to be an instance of viewpoint discrimination.

I will argue that *Tinker* should be read to prohibit purposeful viewpoint discrimination, even against speech that would otherwise be unprotected by the substantial disruption rule. A much stronger interpretation of a viewpoint neutrality requirement would say that *Tinker* requires schools to craft their regulations of substantially disruptive speech in such a way that the regulations have no substantial viewpoint-differential effects.¹²¹ Whether *Tinker* requires this kind of effects rule is the most significant question about *Tinker* and viewpoint discrimination. And, as a practical matter, that question will take the following form: Assuming that the expression of a particular student viewpoint (for example, the religiously motivated, anti-gay student T-shirt at issue in *Harper*) is sufficiently disruptive (or sufficiently interferes with the rights of others) to be restricted under *Tinker*, is the school constitutionally required to

¹¹⁷ The *Tinker* opinion implies that school officials have the burden of proof on the issue of material and substantial disruption, and lower court opinions following *Tinker* have properly made this allocation of proof explicit. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

¹¹⁸ Actually, there would be an exception to this principle if *Tinker* required speech regulations to be substantially viewpoint-neutral in their effects. On such a reading, *Tinker* would require schools to restrict nondisruptive viewpoints along with disruptive ones within the same subject matter. See *infra* notes 230-83 and accompanying text.

¹¹⁹ Bowman, *supra* note 24, at 203.

¹²⁰ For decisions protecting provocative speech under *Tinker*, see *Chandler*, 978 F.2d at 526, 530-31 (protecting students' buttons with the word "scab" referring to replacement teachers during a strike), and *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847, 849, 860 (E.D. Mich. 2003) (protecting T-shirt with picture of President George W. Bush and a caption reading "International Terrorist").

¹²¹ There would have to be some substantiality requirement here before a rule prohibiting viewpoint-differential effects would be triggered. All speech regulations – even fully content-neutral ones – have some viewpoint-differential effects, and it would be impossible for school speech regulations to produce perfectly viewpoint-neutral effects. Stone, *supra* note 34, at 218; cf. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1233 (1990) (explaining that substantiality requirements temper the consequences of effects tests in constitutional law).

restrict a broader category of speech (even if less disruptive) in order to preserve viewpoint neutrality? Answering “yes” and treating *Tinker* as requiring viewpoint-neutral effects would provide very significant additional protection for student speech, but I will argue that this reading is mistaken.

While I will have much more to say about purposeful viewpoint discrimination and viewpoint-differential effects, questions about whether the text of a school speech regulation is content- or viewpoint-based turn out to be less important. *Tinker* gives schools the right to restrict student speech that violates the substantial disruption rule, and many schools choose to exercise this authority through student conduct rules that essentially incorporate the *Tinker* standard.¹²² Student speech rules of this sort are facially content-neutral and probably not unconstitutionally vague, given the extra leeway courts extend to schools on that issue.¹²³ Yet they certainly do not provide as much guidance as they could to students who might wish to know what sorts of speech will and will not be tolerated by school officials. As a result, it is not surprising that schools sometimes seek to provide more clarity by adopting subsidiary rules that apply the *Tinker* standard by restricting certain types of speech on the ground that they are materially and substantially disruptive. For example, a school that had experienced racially charged altercations among students¹²⁴ or a pattern of severe harassment against gay students might adopt a policy banning speech that denigrates students on the basis of race or sexual orientation.¹²⁵ These rules will be content-based or even viewpoint-based on their face and will often have viewpoint-discriminatory effects, but their justification under the substantial disruption rule is harm-based.

¹²² See *supra* note 108 and accompanying text.

¹²³ See *Sypniewski v. Warren Hills Reg. Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002).

¹²⁴ For example, here is the racial harassment policy adopted by the school board in *Sypniewski*:

District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other hate group. This list is not intended to be all inclusive.)

Sypniewski, 307 F.3d at 261 n.17. Most of this policy was upheld against a facial challenge on overbreadth grounds. *Id.* at 258-67. The court excised the portion of the policy relating to material that is racially divisive or creates ill will or hatred. *Id.* at 265. A similar policy was upheld in toto by the Tenth Circuit in *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000).

¹²⁵ Adopting this kind of policy has both pros and cons for the school district. The pro is that harassment policies and the like may do a better job of guiding the conduct of students who wish to abide by the school's rules. The con is that such policies also invite overbreadth challenges on the ground that they cover a substantial amount of student speech that could not be restricted under *Tinker*.

Where a school chooses to provide more guidance to students through the adoption of subsidiary rules applying the *Tinker* standard, the question of the permissibility of viewpoint discrimination is thrown into sharp relief: can such a policy restrict speech identified by viewpoint on the ground that the speech has been judged by the school to violate the substantial disruption rule? May such a subsidiary rule classify speech on the basis of its viewpoint, or must the rule use only subject matter classifications? I think that essentially the same questions are posed, however, when a school simply incorporates the *Tinker* standard into its speech code and regulates speech directly on the basis of judgments about the regulated speech's potential for disruption. Application of that kind of rule can also have viewpoint-discriminatory effects that are just as predictable as those that flow from a rule that picks out speech by its content. In either case, the question is ultimately whether *Tinker* allows schools to regulate disruptive speech in ways that have viewpoint-discriminatory effects.

The transition from a facially content-neutral anti-disruption rule to a facially content- or viewpoint-based speech policy need not reflect any change in the school's regulatory stance and ordinarily should make no difference for purposes of judicial review under *Tinker*. If a school is allowed to restrict speech based on reasonable forecasts of disturbance, there is no reason why it may not identify in advance the content of speech that is likely to prove disruptive. I conclude, then, that the basic questions are the same whether a school adopts a subsidiary rule implementing *Tinker* or merely incorporates the substantial disruption standard into its code of conduct. In either case, the court will have to decide whether there is sufficient evidence to treat the speech as disruptive and whether there has been purposeful viewpoint discrimination. If *Tinker* also should be read as an effects rule, the operation of that rule will be the same regardless of the wording of the policy being evaluated.

Having forecast my conclusions, it is time to make the case. I begin with a look at the ways in which the lower courts have addressed (or, more often, failed to address) the issue of viewpoint discrimination under the substantial disruption rule.

IV. SUBSTANTIAL DISRUPTION AND VIEWPOINT DISCRIMINATION IN THE LOWER COURTS

As *Tinker* has been applied over the years, concerns about the viewpoint-discriminatory effects of the standard have rarely given courts pause. To illustrate, consider the facts of *Phillips v. Anderson County School District Five*, where the federal district court in South Carolina upheld the suspension of a student disciplined for his refusal to cease wearing a jacket made to look like the Confederate battle flag.¹²⁶ The school had in recent years experienced at least five incidents of altercations between white and African-American students in which the conflict was either initiated or escalated due to white students wearing

¹²⁶ 987 F. Supp. 488, 496 (D.S.C. 1997).

clothing that incorporated the Confederate flag.¹²⁷ While the official school dress code simply (if vaguely) invoked *Tinker* by saying that “attire should not interfere with classroom instruction,”¹²⁸ the school’s history of racial incidents led it to adopt an informal rule that any student wearing clothing with the Confederate flag would be asked to remove the clothing or turn it inside out.¹²⁹ The student was suspended for failing to comply with this rule.¹³⁰

Unsurprisingly, the court had no difficulty at all in concluding that the student’s suspension under the informal anti-Confederate flag clothing policy satisfied *Tinker*.¹³¹ The prior history of racial incidents tied directly to the Confederate flag gave the school authorities far more than a reasonable basis for forecasting disruption. Indeed, one is tempted to say that this is about as easy a case for a school to win under *Tinker* as could be imagined. Notably absent from *Phillips*, however, is any discussion of whether the school policy constituted viewpoint discrimination. The most natural reading is that the policy was adopted by the school on the assumption that the wearing of the Confederate flag was taken by African-American students and likely also intended by at least some white flag-wearers to convey hostility toward African-Americans through positive identification with a political regime that systematically subordinated African-Americans and fought a war to preserve that subordination. The policy seems to throw the school’s weight against a particular viewpoint¹³² that it likely found distasteful as well as disruptive, yet there is no discussion of whether the anti-Confederate flag rule skewed debate within the school or involved the

¹²⁷ *Id.* at 490-91. While a number of courts have engaged in thoughtful discussions about whether display of the Confederate flag necessarily signals racial animus (as opposed to pride in Southern heritage), see, e.g., *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001); *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000); *Bragg v. Swanson*, 371 F. Supp. 2d 814 (S.D. W. Va. 2005), that discussion may have seemed beside the point in *Phillips* because in one of the previous incidents, when a student was asked “‘what he meant’ by wearing the [Confederate] Flag, [he] responded that he disliked black people.” *Phillips*, 987 F. Supp. at 490.

¹²⁸ *Phillips*, 987 F. Supp. at 490.

¹²⁹ *Id.* at 491.

¹³⁰ *Id.*

¹³¹ *Id.* at 493.

¹³² Putting things this way raises additional questions. If the school prohibited expression of a particular viewpoint expressed by wearing Confederate flags, what is the relevant subject matter? Is it discussion of the Confederacy? Of race relations? The answer determines how broad a swath of speech the school would have to suppress to satisfy a rule requiring viewpoint-neutral effects. Would the policy apply to a student wearing a T-shirt with an image of the Confederate battle flag surrounded by a red circle with a red diagonal line through the flag? If so, could it be argued that the school has enacted a narrow subject matter restriction against all viewpoints regarding the Confederacy or the Confederate flag? As we will see shortly, the Sixth Circuit grappled with these questions in *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008). The difficulty of answering such questions is one practical reason against reading *Tinker* to require viewpoint-neutral effects. See *infra* notes 248-66 and accompanying text.

school's attempt to silence dissent.¹³³ Perhaps this is because the parties failed to raise a viewpoint discrimination argument; perhaps there were no facts that could have been used to support such an argument.¹³⁴ Still, the district court in *Phillips* acted in a typical manner by focusing on the disruptive effects of the restricted speech in isolation.

A significant exception to this, and the reported case that most sharply poses the issue of viewpoint discrimination under *Tinker*, is the Sixth Circuit's decision in *Castorina ex rel. Rewt v. Madison County School Board*.¹³⁵ In *Castorina*, two students were suspended for wearing T-shirts purchased at a Hank Williams, Jr. concert which included two Confederate flags and the words Southern Thunder on the back.¹³⁶ The school sanctioned the students for violating a policy that banned clothing containing any illegal, immoral, or racist implications. The students, however, claimed that they wore the shirts to celebrate the birthday of Hank Williams, Sr., and to proclaim their pride in their southern heritage.¹³⁷ The trial court had granted summary judgment for the school district, but the Sixth Circuit reversed.¹³⁸ All the members of the panel agreed that the case needed to be remanded so that the district court could make factual findings about the extent of any prior racial disturbances at the school.¹³⁹ In remanding the case, however, the majority opinion placed considerable emphasis on the plaintiffs' claim that the school had permitted some students to wear T-shirts with an X symbol that is associated with Malcolm X and the Black Muslim movement while prohibiting students from wearing shirts bearing the

¹³³ One possible contrast between *Phillips* and a case like *Harper*, of course, is that the moral wrongness of racial animus is socially settled in a way that questions about the moral status of homosexuality are not. Students who want to wear the Confederate flag typically say they do not intend a racially divisive message; they do not argue that the school is attempting to prescribe an orthodox view about racial equality and to silence expressions of viewpoints espousing "white pride." Students wearing T-shirts condemning homosexuality on religious grounds leave no doubt about the message they intend to convey. There is surely truth to the observation that schools have more de facto authority to prescribe well-settled orthodoxies than to create new orthodoxies, but *Tinker* is supposed to check a school's authority to prescribe both settled and emergent orthodoxies through the suppression of competing student speech.

¹³⁴ When attorneys fail to raise any question about how the school treated potentially competing student viewpoints, there are at least three potential explanations. One is that students simply failed to express viewpoints that could be seen as competing with the suppressed speech; a second is that any messages that could be seen as expressing competing viewpoints were also restricted; a third is that attorneys do not pursue the matter because they expect courts to proceed as the *Phillips* court did by asking only whether the particular speech of the plaintiffs threatened substantial disruption. Which of these explanations is most common is an empirical question that would be difficult to answer, but from the armchair I would wager that the third is the winner.

¹³⁵ 246 F.3d 536 (6th Cir. 2001).

¹³⁶ *Id.* at 538.

¹³⁷ *Id.*

¹³⁸ *Id.* at 544.

¹³⁹ *Id.*

Confederate flag.¹⁴⁰ According to the court, the school board could not “single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed.”¹⁴¹ If the policy was enforced only against Confederate flags and not against Malcolm X T-shirts, the court said this would be unconstitutional viewpoint discrimination, and the students should prevail even if the school had experienced significant incidents of racial unrest.¹⁴²

In a concurring opinion, Judge Kennedy took a very different stance on the issue of viewpoint discrimination. In her view, the Malcolm X T-shirts were irrelevant to the question of whether the school had the authority to ban Confederate flag clothing.¹⁴³ In either case, the question was whether the speech in question would cause material and substantial disruption to the school environment because “evidence of likely disruption is both *sufficient* and *necessary* to justify regulation of protected speech in a school setting.”¹⁴⁴ If the evidence showed that Confederate flags were likely to cause disruption but Malcolm X symbols were not, there would be no need – and perhaps no authority

¹⁴⁰ *Id.* at 541. The court’s seeming assumption that Malcolm X T-shirts and Confederate flag T-shirts could be treated as mirror images of each other (i.e., white power vs. black power) is a bit tendentious. Malcolm X was a complex figure, to say the least, and an X shirt is at least as multivalent a symbol as a Confederate flag. Further, expressions of black pride and self-reliance do not carry the same valence as expressions of white pride in the structural context of American society. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 n.28 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 180 & n.275 (1982); Charles Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 453-56 (1990); *but see Barr v. Lafon*, 538 F.3d 554, 574 (6th Cir. 2008) (stating that both parties to the litigation accepted the claim that Confederate flag iconography and Malcolm X iconography were mirror images). In fairness, it should not necessarily be assumed that the *Castorina* court failed to appreciate these points. In the context of concerns about the disruptive potential of speech, the court might have thought it enough to simply say that some white students could perceive (whether intended or not) a racially divisive message from an X shirt just as some black students could perceive (whether intended or not) a racially divisive message from a Confederate flag shirt.

¹⁴¹ *Castorina*, 246 F.3d at 542; *see also id.* at 544 (“[E]ven if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on [some] racially sensitive symbols and not others.”); *id.* at 543 (distinguishing *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000), by noting that in that case there was more evidence of prior racial violence and there was no evidence that the school district enforced the Racial Harassment and Intimidation policy in a manner that favored one type of potentially racially divisive symbols over another). The majority opinion also distinguished the facts of the case from an earlier Sixth Circuit decision, *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), where a student had been suspended for wearing a jacket with a Confederate flag patch in the wake of demonstrated racial tensions relating to the school symbol (the Confederate flag), its team name (Rebels), and its fight song (Dixie). *Melton*, however, is far more representative than *Castorina* in lacking any discussion of the possible viewpoint-discriminatory consequences of the school’s “no Confederate flags” policy.

¹⁴² *See Castorina*, 246 F.3d at 543-44.

¹⁴³ *Id.* at 546 (Kennedy, J., concurring).

¹⁴⁴ *Id.* at 547 (Kennedy, J., concurring) (emphasis added).

– under *Tinker* to level the playing field by banning Malcolm X shirts as well.¹⁴⁵ In other words, if different viewpoints have different potential for disruption on the school environment, *Tinker* might actually *require* the result that the majority called viewpoint discrimination.¹⁴⁶

The differences between the majority and concurring opinions in *Castorina* appear to be quite stark, though one wonders to what extent they may be talking past one another. Because the record was unclear about the way in which the school's policies were enforced and the history (or lack thereof) of disruption in the educational environment, it is not entirely clear whether the majority's condemnation of viewpoint discrimination extends only to purposeful viewpoint discrimination or also to foreseen but unintended viewpoint-discriminatory effects.¹⁴⁷ One possibility is that Malcolm X shirts and Confederate flag shirts had similar histories of having sparked or exacerbated student conflicts.¹⁴⁸ If that were the case, a school's decision to sanction Confederate flags but not Malcolm X shirts would suggest that the school purposely chose to treat the two viewpoints differently because it was more sympathetic to one message than the other. *Tinker* is not meant to be a license for schools to regulate speech on the basis of disagreement with the ideas expressed, and so this kind of purposeful discrimination between viewpoints seems impermissible because it suggests that something is going on other than a good faith effort to forecast disruption. On these facts, the majority would surely (and properly) regard the school action as unconstitutional. If, however, the school's experience with the shirts had suggested that Confederate flag shirts were far more likely to prompt disturbances than X shirts, differential treatment would be justified by harm-based considerations rather than ideological ones. This would be permissible under a purpose rule, but not under an effects rule. As will become clear in what follows, I believe that the majority opinion is right to think the Malcolm X shirts matter, but wrong to the extent it implies that treating Confederate flag shirts

¹⁴⁵ *Id.* (Kennedy, J., concurring). Judge Kennedy clearly states the argument that *Tinker* is concerned only with whether particular instances of student speech cause disruption, and that viewpoint-discriminatory effects may therefore be ignored. She goes on, however, to suggest that the school's policy should be seen as a content-neutral standard and, therefore, evaluated under *United States v. O'Brien*, 391 U.S. 367 (1968). *Castorina*, 246 F.3d at 547-48 (Kennedy, J., concurring). As explained earlier, *see supra* notes 109-11111 and accompanying text, however, regulations barring disruptive speech turn on the reactions of the audience and should, therefore, be treated as content-based.

¹⁴⁶ Concerns similar to those in *Castorina* are raised in *Bragg v. Swanson*, 371 F. Supp. 2d 814 (S.D. W. Va. 2005), which involved a student who wore a belt buckle bearing the Confederate flag. The court cited *Castorina*'s concerns about viewpoint discrimination, but the principal difficulty for the school in that case was that there was no evidence of any kind of disruption tied to the wearing of Confederate symbols. *Id.* at 827.

¹⁴⁷ The language of the opinion is perhaps more naturally read to say that it is automatically viewpoint-discrimination if the X shirts and Confederate shirts were treated differently. But because the facts were so underdeveloped, it is not certain that the court meant to embrace an effects rule.

¹⁴⁸ If there had been no history of conflict regarding either message, *Tinker* would clearly prohibit regulation of either Malcolm X shirts or Confederate flag shirts.

differently from X shirts is always impermissible viewpoint discrimination. Judge Kennedy, on the other hand, is wrong to suggest that *Tinker* makes the school's treatment of competing viewpoints irrelevant and that each instance of suppressed speech can be evaluated in isolation.

Whatever the ambiguities in the *Castorina* majority opinion, the Sixth Circuit's recent decision in *Barr v. Lafon*¹⁴⁹ commits that court to the principle that speech restrictions justified under *Tinker*'s substantial disruption test must be content-based rather than viewpoint-based. *Barr* is another Confederate flag case, and as in *Phillips* there was a significant history of racial tension at the school including physical altercations between white and African-American students, racist graffiti at the school making general threats against African-Americans, and graffiti containing "hit lists" with the names of specific students.¹⁵⁰ The school's clothing policy banned, among other things, clothing that "causes disruption to the educational process."¹⁵¹ During a school assembly, Principal Lafon told students specifically that they could not wear images of Confederate flags at school or anything else that would be a disruption to the school.¹⁵² Other school officials characterized the school policy as banning the wearing of "racially divisive symbols" because of their demonstrated potential to cause disruption to school activities.¹⁵³ When the school enforced this policy against students who wore shirts with images of the Confederate flag to school, the plaintiffs first unsuccessfully sought a preliminary injunction and then lost their case when the district court granted summary judgment to the school defendants.¹⁵⁴

On appeal, the Sixth Circuit affirmed the district court's grant of summary judgment in an opinion by Judge Moore.¹⁵⁵ In the initial part of its analysis, the court addressed the plaintiffs' claim that there had been no disruption in the past caused specifically by the wearing of Confederate flag clothing and properly concluded that *Tinker* "does not require that the banned form of expression itself actually have been the source of past disruptions."¹⁵⁶ It was enough that the school could reasonably forecast disruption from wearing the flag based on the school's history of racial tensions, which included the representation of a Confederate flag next to a noose amidst graffiti containing threats to African Americans.¹⁵⁷

¹⁴⁹ 538 F.3d 554 (6th Cir. 2008).

¹⁵⁰ *Id.* at 557-59.

¹⁵¹ *Id.* at 556.

¹⁵² *Id.* at 557. As is often the case, we have a general rule that is facially content-neutral but content-based as applied, supplemented by a subsidiary content-or viewpoint-based rule applying the general policy.

¹⁵³ *Id.* at 560.

¹⁵⁴ *Id.* at 561.

¹⁵⁵ *Id.* at 575.

¹⁵⁶ *Id.* at 565.

¹⁵⁷ *Id.* at 565-66. The court's analysis included two interesting and correct observations about *Tinker*. First, the court noted that *Tinker*'s substantial disruption standard applies to more than violent confrontations. Second, the court explained that offense and disruption are distinct ideas in

The court then considered the argument that the ban on Confederate flag symbols was unconstitutional viewpoint discrimination. Acknowledging the complexity of Sixth Circuit precedents in this area, the court noted that its earlier decision in *Melton v. Young*¹⁵⁸ appeared to uphold a facially viewpoint-discriminatory ban on the Confederate flag and associated symbols, while the more recent decision in *Castorina* indicated that the substantial disruption rule does not allow schools to restrict speech through viewpoint-specific rules. It regarded the *Castorina* decision as authoritative, reasoning that the Supreme Court's intervening decision in *Rosenberger v. Rector of University of Virginia*¹⁵⁹ gave the *Castorina* panel the authority to modify the *Melton* court's reading of *Tinker*. *Castorina* "applied the principles set forth in *Rosenberger* to the high-school setting, holding that schools' regulation of student speech must be consistent with both the *Tinker* standard and *Rosenberger*'s prohibition on viewpoint discrimination."¹⁶⁰ It appears, then, that with *Barr* the Sixth Circuit has eliminated whatever ambiguities remained in *Castorina* and now requires speech rules governed by *Tinker* to be viewpoint-neutral both on their face and in their application.

Having read the circuit case law to import *Rosenberger*'s ban on viewpoint discrimination¹⁶¹ into *Tinker*, the court next had to decide whether the school's speech rule against racially divisive symbols was a permissible content-based speech restriction or an impermissible viewpoint-based restriction. The school argued that "racially divisive speech" is a subject encompassing different viewpoints about which race ought to be privileged over others, and claimed that the school had banned all these viewpoints.¹⁶² The plaintiffs, on the other hand, argued that racially divisive speech and racially inclusive speech are both viewpoints within the broader subject matter of race, and that the school's ban of racially divisive speech was a viewpoint-based ban.¹⁶³ Unsurprisingly, the court agreed with the school's characterization, largely on the ground that it would be absurd for any public school to ban all student discussions of race.¹⁶⁴ Finally, the court acknowledged that the school would have engaged in unconstitutional viewpoint discrimination if it had enforced the ban against some racially divisive

Tinker analysis. In rejecting the argument that the school's action was illegitimate because school officials said they worried that the Confederate flag might be offensive to African American students, the court stated: "That Hord determined the Confederate flag to be *offensive* to African-American and other students, however, does not negate his reasonable belief that the flag was also *disruptive* and would cause material and substantial *interference* with schoolwork and school discipline." *Id.* at 567.

¹⁵⁸ 465 F.2d 1332 (6th Cir. 1972).

¹⁵⁹ 515 U.S. 819 (1995).

¹⁶⁰ *Barr*, 538 F.3d at 571.

¹⁶¹ Implicit in the opinion is the idea that the prohibition against viewpoint-discriminatory rules is absolute.

¹⁶² *Barr*, 538 F.3d at 571.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 572 ("Considering the salience of race to our nation's history and contemporary political and social debates, any public school would seriously hamper its ability to foster thoughtful and responsible citizens by prohibiting all student speech and expression about any topic dealing with race.").

symbols and not others. Specifically, the parties had agreed that Malcolm X iconography was the flip side of Confederate flag iconography, and thus the school had to prohibit both if it prohibited either.¹⁶⁵ This did not help the plaintiffs avoid summary judgment, however, for the court found no disputed issue of fact about whether Malcolm X shirts had been worn at the school.¹⁶⁶

V. SETTING UP THE QUESTIONS: PURPOSE RULES AND EFFECTS RULES

The issues raised by *Castorina* and *Barr* exist in parallel form with controversial religious speech. Consider, for example, a school where some students wear shirts like the one at issue in *Harper v. Poway Unified School District* (“Be Ashamed. Our School Embraced What God Has Condemned. Homosexuality is Shameful. Romans 1:27”) and others wear shirts saying “Gay is Fine by Me.”¹⁶⁷ These shirts are most naturally read as voicing opposing viewpoints on the moral status of homosexuality, and for a school to purposely favor the pro-gay message over the anti-gay message because it agrees with one but not the other would count as viewpoint discrimination if anything does.¹⁶⁸ We can illustrate the shape of the viewpoint discrimination issue in *Tinker* by sketching some simple hypothetical scenarios.¹⁶⁹

- (1) The wearing of *both* anti-gay and pro-gay T-shirts has led to material and substantial disruption in the past. The school restricts both types of shirts. (both disruptive, both restricted)
- (2) The wearing of *both* anti-gay and pro-gay T-shirts has led to material and substantial disruption in the past. The school bans only one viewpoint (presumably the anti-gay viewpoint). (both disruptive, anti-gay restricted)

¹⁶⁵ *Id.* at 574.

¹⁶⁶ *Id.* at 575.

¹⁶⁷ Cf. Jennifer Skalka, *T-shirt campaigns divide school; Students stand up for their beliefs*, CHICAGO TRIBUNE, Apr. 20, 2005 at 3 (discussing controversy where students were permitted to wear T-shirts saying “gay? fine by me” but not permitted to wear shirts with contrary messages).

¹⁶⁸ Labels like “pro-gay” and “anti-gay” are obviously crude, and they elide various possible distinctions: for example, between those who advocate “tolerance” for gays and lesbians and those who seek full cultural and legal equality for gays and lesbians on the pro-gay side, and between distaste for homosexual people and disapproval of homosexual conduct (“Love the sinner, hate the sin”) on the anti-gay side. But cf. *Harper*, 445 F.3d at 1181 (“Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong.”). Nonetheless, the crudeness of the labels is true to the ways in which these sorts of conflicts seem to be experienced by participants in the public school culture wars, and perhaps that is reason enough to use them.

¹⁶⁹ Needless to say, these scenarios are sketched rather lifelessly in the hope that keeping the facts at the level of simple stipulation will facilitate the analytical points I wish to make. Readers will judge whether the simplification adds to or detracts from the analysis.

The first scenario poses no problem of viewpoint discrimination at all, and by hypothesis the substantial disruption rule is satisfied. The second would present an equally clear instance of purposeful viewpoint discrimination if a school simply admitted the facts to be as described in the hypothetical. If both viewpoints pose threats of substantial disruption yet they are treated differently, there is an irresistible inference that the school is suppressing the anti-gay shirts because it disagrees with the message conveyed. This would be purposeful viewpoint discrimination within the class of speech that could otherwise be legitimately restricted because of its character as substantially and materially disruptive, and it would have to be unconstitutional under *R.A.V. v. City of St. Paul*.¹⁷⁰ A school could remedy the constitutional defect either by restricting both kinds of speech or allowing both.

The real lesson of (2) lies elsewhere, however. It is difficult to imagine that a school would ever simply admit the posited state of facts. Instead, the school is going to say that there really was a difference in the disruptive history and/or potential of the pro-gay and the anti-gay shirts and that this was the basis for their differential treatment. This means that if courts are to guard against purposeful viewpoint discrimination under *Tinker*, they are going to have to exercise some independent review of a school's judgment that different speech viewpoints have different disruptive effects.¹⁷¹ It follows that evidence of how the school treated opposing viewpoints and of the disruptive potential of those viewpoints will be relevant to whether the school has acted constitutionally. A court cannot simply limit its inquiry to the question of whether one type of student expression (for example, anti-gay or racist T-shirts) threatens material and substantial disruption. At least in this respect, the *Castorina* court was completely correct to seek evidence from the remand about the school's treatment of Malcolm X T-shirts and their disruptive potential.

Now suppose there is evidence that anti-gay T-shirts (often expressing religious grounds for disapproval of homosexuality) tend to provoke more hostile reactions or otherwise interfere with the educational process to a far greater degree than pro-gay T-shirts,¹⁷² and further suppose that a reviewing court could

¹⁷⁰ 505 U.S. 377 (1992) (holding that content- or viewpoint-based discrimination within the otherwise proscribable category of fighting words violates the First Amendment).

¹⁷¹ As discussed more fully below, *see infra* notes 186-228 and accompanying text, this inquiry will not be an easy one. One advantage of an effects rule is that it would eliminate the need for this inquiry. Courts would simply ask whether the result of the school's policy would have a significant skewing effect on the student speech environment. This would certainly seem true on the facts posited in scenario (2), so an effects rule would invalidate the school's policy without courts needing to consider whether the school made a correct judgment about the potential for harm posed by the different shirts. I argue below that this advantage of an effects rule is outweighed by its disadvantages. *See infra* notes 247-82 and accompanying text.

¹⁷² It might be particularly plausible for a school to reach that judgment if one accepts Judge Reinhardt's argument in *Harper* that exposure to anti-gay messages may undermine the educational performance of gay students, 445 F.3d at 1179-80, as it may be less likely that the presence of pro-gay or gay tolerance messages would have similar effects on religiously conservative students who disapprove of homosexuality.

be satisfied that the school's judgment about these differential disruptive effects is both made in good faith and essentially accurate. Now the school has two options: it can restrict discussion of the entire subject matter (no T-shirts commenting pro or con on the morality of homosexuality) or it can restrict only the disruptive T-shirts:

(3) Anti-gay (and mostly religiously motivated) shirts have significant disruptive potential while pro-gay shirts do not. The school restricts only the anti-gay shirts. (anti-gay disruptive, anti-gay restricted)

(4) Anti-gay (and mostly religiously motivated) shirts have significant disruptive potential while pro-gay shirts do not. The school restricts all shirts discussing the subject of the morality of homosexual conduct. (anti-gay disruptive, both restricted)

By hypothesis, in (3) the school has applied the *Tinker* standard in good faith (i.e., this is not purposeful viewpoint discrimination) but the policy has significant and wholly foreseeable viewpoint-differential effects. Again by hypothesis, students wishing to wear anti-gay shirts cannot challenge the policy on the grounds that their shirts are immune from sanction under *Tinker*. Their complaint would be that the school must either allow their T-shirts or ban all T-shirts expressing views on the morality of homosexual conduct. To connect this charge to First Amendment theory, their complaint is that the school's stance causes distortion of the marketplace of ideas. In (4), the school actively manages the marketplace of ideas to level the playing field, but does so at the cost of restricting student expression it has judged not to threaten its educational work. Interpreting *Tinker* to include an effects rule would require schools to choose (4) over (3).

These hypothetical scenarios raise two questions, which I will address in turn in Parts VI and VII below. The first concerns purposeful viewpoint discrimination. There is no indication that *Tinker* changes the general First Amendment principle that the government may not restrict speech simply because it disagrees with the message conveyed, and *Morse* seems to reaffirm the notion that schools cannot simply identify certain ideas for suppression as inconsistent with their basic educational missions.¹⁷³ Scenario (2) ("both disruptive, anti-gay restricted") raises the question of how courts can effectively police viewpoint discrimination, a task that *Tinker's* substantial disruption rule

¹⁷³ In its briefs to the Supreme Court in *Morse v. Frederick*, the Solicitor General's Office argued that school officials had the authority to prevent students from displaying a "Bong Hits 4 Jesus" sign at a school event outside school grounds because schools may restrict any speech that is inconsistent with their educational missions. Brief for the United States as Amicus Curiae Supporting Petitioners at 14, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278). Although the Court ruled for the school, it did not accept this rather sweeping argument. *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). Justice Alito's concurrence noted that the argument "can easily be manipulated in dangerous ways" and thus poses too great a threat to student speech. *Id.* (Alito, J., concurring).

doesn't adequately address. The question, then, is how to tweak *Tinker* to deal adequately with the problem of detecting purposeful viewpoint discrimination.

The second question, posed by scenarios (3) and (4), is whether *Tinker* should be read as an effects rule, requiring that school speech restrictions be substantially viewpoint-neutral in their effects. On such a reading, all speech restrictions governed by *Tinker* would have to be sufficiently broad to count as subject-matter restrictions rather than viewpoint restrictions.

VI. APPLYING *TINKER* TO SMOKE OUT PURPOSEFUL VIEWPOINT DISCRIMINATION

The first question concerns the difficulty of distinguishing between permissible harm-based justifications for restricting student speech and impermissible ideological justifications. Often, though not always, messages likely to provoke hostile reactions will be messages that also conflict with the school's favored point of view.¹⁷⁴ This is obviously true, for example, of the anti-gay T-shirt in *Harper*. Further, school officials' judgments about the disruptive potential of student speech may be influenced as much by their own opinions about the merits of the ideas as their predictions about others' reactions to those ideas.¹⁷⁵ How can courts possibly tell whether school officials have restricted speech because of its disruptive effects or because they disagree with the message? Direct efforts at proving bad motive seem unpromising. School officials will not admit that they restrict ideas simply because they do not like those ideas, so a search for direct evidence of the real motive will often be fruitless. Further, judicial searches for the "real motives" of government actors have downsides in addition to the frequent lack of a "smoking gun" indicating the true motives of the actor. For example, school officials will generally be on record saying under oath that they did not restrict speech for ideological reasons, and thus a court finding of impermissible purpose would amount to a declaration

¹⁷⁴ *Governor Wentworth Regional School District v. Hendrickson*, 421 F. Supp. 2d 410 (D.N.H. 2006), seems to be a counterexample. There, a student was suspended from school for wearing a "No Nazis" patch, a sentiment not likely to provoke disagreement from school officials. *Id.* at 411. Yet the patch was worn in the context of a history of conflict between a group of students generally known as the "homophobes" or "rednecks" and a group of gay students. *Id.* at 412-13. In this context, school officials saw the patch as a provocation and forbade the student from wearing it. *Id.* at 415. On one interpretation, the patch was simply a message of tolerance and, therefore, actually echoed the message the school had been trying to send in order to quell the dispute. *Id.* at 418-19. But even if the patch was understood as a swipe at the opposing group (which was characterized by such practices as observing White Power Wednesdays), it is difficult to believe that the school officials would not have been more sympathetic to this point of view than the alternative. On either interpretation, this seems to be a case where concern about disruption was more likely the reason for the school's restriction of the anti-Nazi patch than disagreement with the message conveyed.

¹⁷⁵ Kagan, *supra* note 35, at 434-35 (explaining that different persons will judge the harms threatened by speech differently and that "these divergent judgments about the harm the speech causes and the need to limit it rest in part on what . . . cannot count in the equation: the desire of persons, conscious or not, to suppress ideas that challenge (just because they challenge) and to privilege ideas that ratify (just because they ratify) their own belief systems").

that state governmental actors have perjured themselves. This is a conclusion courts reach with understandable reluctance.¹⁷⁶ The problems with searching for direct evidence of bad motive are not unique to the *Tinker* context, of course. To some extent, they dog any definition of discrimination that distinguishes between intended and merely foreseen effects.¹⁷⁷ Following the work of Elena Kagan¹⁷⁸ and David Strauss,¹⁷⁹ I believe the best approach to thinking about purposeful discrimination is through use of a “reversing the ideas” test:

The critical inquiry is whether the government would have imposed the restriction in the absence of impermissible factors, solely on the basis of a neutral and legitimate evaluation of harm. Or to put the question in another way, it is whether the government would have treated (or did treat) identically ideas with which it disagreed, ideas with which it agreed, and ideas to which it was indifferent, to the extent those ideas caused the same harms.¹⁸⁰

Where a speech restriction fails this reversal test, the government’s disagreement with a message is a but-for cause of the restriction and results in purposeful viewpoint discrimination.¹⁸¹ This is a helpful first step, but raises fairly obvious problems of its own. The reversing the ideas test involves a counterfactual inquiry, and questions about whether a school would have restricted anti-gay shirts if it agreed with the message conveyed by those shirts may seem just as unpromising as looking directly for evidence of the school’s real motive.

¹⁷⁶ See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 128-30 (1971) (discussing arguments about the impropriety of inquiries into the motives of government decisionmakers). I thank Kristi Bowman for urging me to be more explicit about the problems with direct evidence discussed in this paragraph. For an interesting argument that direct searches for illicit motive tend to corrupt constitutional discourse, see Steven D. Smith, *Free Exercise and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 576 (1994) (stating that the Supreme Court’s Religion Clauses jurisprudence “leads to a constitutional discourse in which contending parties accuse each other of hostility, persecution, and bad faith” and that the Court’s equal protection doctrine makes “success in challenging a facially neutral law . . . depend upon characterizing the motivation of legislators, voters, or government officials as racist, sexist, or homophobic”).

¹⁷⁷ As does the Court’s approach to equal protection. See, e.g., *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (explaining that discrimination means a choice to disadvantage a protected class is made “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects” on that class).

¹⁷⁸ Kagan, *supra* note 35.

¹⁷⁹ Strauss, *supra* note 69.

¹⁸⁰ Kagan, *supra* note 35, at 431 & n.56. Kagan draws the “reversing the ideas” label from Strauss’s identification of a “reversing the groups” test as the best indicator of discrimination under the Equal Protection Clause. Strauss, *supra* note 69, at 956-57 (explaining that the reversing the groups test asks whether the government would have made the same decision even if the races of those affected had been reversed).

¹⁸¹ Kagan, *supra* note 35, at 439 (explaining that her conception of impermissible motive turns on but-for causation).

A. The Substantial Disruption Rule as an Indirect Test for Ideological Motive

Kagan's proposal for dealing with this difficulty is to view free speech doctrine generally as an *indirect* means for identifying when government has acted on an impermissible motive by restricting speech based on "hostility, sympathy, or self-interest."¹⁸² Where circumstances raise a suspicion that such a motive may be operating, doctrinal tests like strict scrutiny raise a rebuttable presumption that illicit motive is operating and thus enable courts to sidestep the difficulties in proving motive through direct evidence.¹⁸³ She acknowledges that the doctrinal tests cannot perfectly track the presence of impermissible motives,¹⁸⁴ but they may be more reliable than seeking proof through direct evidence.

Whether or not Kagan's approach can explain most of First Amendment doctrine, I believe it provides a very useful way to think about *Tinker*. Regulation of speech under the substantial disruption rule is inherently suspicious because the possibility that a school is acting on the basis of an ideological motive is *always* present. *Tinker* puts the burden on the school to rebut this, and requiring a showing of substantial disruption provides some confidence that the school's agreement or disagreement with the message is not driving its decisions.¹⁸⁵ This makes sense for two reasons. First, making the school show a

¹⁸² *Id.* at 442. Both Kagan and Jed Rubenfeld, whose approach to free speech also emphasizes illicit motive, see *supra* note 41, acknowledge the affinity of their ideas with John Hart Ely's well-known approach to equal protection in *DEMOCRACY AND DISTRUST* (1980).

¹⁸³ *Id.* Kagan's approach to speech doctrine illustrates the benefits of distinguishing between what Mitchell Berman terms constitutional operative propositions, which "represent the judiciary's understanding of the proper meaning of a constitutional . . . provision," and constitutional decision rules, which tell "courts how to decide whether a constitutional operative proposition is satisfied." Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004). On Kagan's view, the fundamental constitutional operative proposition for the Free Speech Clause is that the government may not regulate speech on the basis of ideological motives, but a variety of decision rules are needed for courts to be able to monitor compliance with that proposition. Kagan, *supra* note 35, at 437.

¹⁸⁴ Kagan, *supra* note 35, at 441.

¹⁸⁵ Cf. Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1070 (1978) (making the analogous point about the compelling interest requirement in the equal protection context). Note that the function of the substantial disruption standard looks somewhat different if we think of *Tinker* as a mechanism for detecting illicit motives rather than as a cost-benefit analysis that weighs the harms of abridged speech rights against the needs of the school. See Rubenfeld, *Affirmative Action*, *supra* note 41, at 436-42 (explaining the distinction between cost-benefit and smoking out models of strict scrutiny). On the former understanding, regulations genuinely triggered by speech's harmful effects do not impose costs that need to be outweighed by benefits to the school's mission. Instead, the requirement of a material and substantial disruption helps to establish that the rationale for the restriction is genuinely harm-based. On the latter, disruptions need to be substantial because only then could the benefits of the speech restriction outweigh the significant constitutional costs of regulating speech on the basis of its communicative impact.

significant institutional need before restricting speech increases the likelihood that the school would have acted the same way even if it agreed with the suppressed ideas. Strong reasons are less likely to be pretextual than weak ones. It also makes sense by reducing the overall cost of error in the application of the test. Since we are dealing with an indirect test for impermissible motives, it is inevitable that the test will sometimes identify an improper motive when none is present (false positives) or fail to identify an improper motive where one is present (false negatives). Requiring a substantial showing of disruption to rebut the inference of improper motive obviously reduces false negatives. It also creates a greater risk of false positives, but limits the cost of these errors for the effective operation of the school. Limiting a school's authority to impose speech restrictions that were not improperly motivated is less costly when the speech in question was not substantially disruptive.

B. Adding a Narrow Tailoring Test to *Tinker*

Tinker's substantial disruption requirement, then, can provide a meaningful check against purposeful viewpoint discrimination. But does it go far enough? There are at least two reasons to worry that it does not.

The first reason is well illustrated by *Castorina* and hypothetical scenario (2) ("both disruptive, anti-gay restricted"). While requiring a school to prove a threat of substantial disruption provides some assurance that the school is not simply acting to suppress disfavored ideas, the "one problem at a time" approach of the standard *Tinker* analysis fails to capture the ways in which differential enforcement can be a sign of impermissible intent.¹⁸⁶ If pro-gay shirts also threaten disruption, the decision to restrict only anti-gay shirts is underinclusive in relation to the asserted objective of preventing disruptions of the school environment. The lack of fit between means and ends suggests the presence of an improper motive,¹⁸⁷ but *Tinker* does not tell courts how to guard against this possibility.

The second reason brings us back to *Tinker's* incomplete commitment to the no-heckler's-veto principle. Consider this example from Judge Kozinski's *Harper* dissent:

Say, for example, one school group – perhaps the Young Republicans – were to organize a day of support for the war in Iraq by encouraging students to wear a yellow armband. And suppose that other students responded by wearing t-shirts with messages such as "Marines are Murderers" and "U.S. Bombs Kill Babies." If a student whose brother was killed in Iraq assaulted a student wearing one of the anti-war t-shirts, would we approve a school's

¹⁸⁶ This is the weakness of Judge Kennedy's approach in *Castorina*, described *supra* at notes 143-46 and accompanying text.

¹⁸⁷ Testing of means-end fit is a familiar part of the tiered scrutiny standards (strict, intermediate, and rational basis) often employed in other constitutional law contexts. See Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 448-56 (1989) (explaining the centrality of judicial testing of classificatory fit in constitutional law).

response that banned the t-shirts but continued to permit the yellow armbands?¹⁸⁸

This is a thought-provoking example, and not just because it turns the tables on liberal readers of *Harper* who might be ideologically sympathetic to the suppression of anti-gay speech but not anti-war speech. Judge Kozinski's rhetorical question is meant to suggest that one-sided suppression here would automatically constitute viewpoint discrimination, and that the school should (preferably) leave the speech of both sides unrestricted or (as a last resort) restrict both sides. The example does seem suggestive of purposeful viewpoint discrimination, but the reasons why this is so are not so straightforward as Judge Kozinski's rhetorical question might suggest.¹⁸⁹

¹⁸⁸ *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting).

¹⁸⁹ One angle not explored by Judge Kozinski is whether it should matter that the slogans on the anti-war shirts are inflammatory, especially compared to the yellow armbands (an obvious analogy to the facts of *Tinker*) worn by the other side. Would it make any difference, for example, if the anti-war shirts simply said, "U.S. Out of Iraq"? It is possible that one or both of the anti-war shirts in Judge Kozinski's example might be judged to have used an "offensive" manner of presenting their message under *Fraser*, though some courts would flatly reject this argument on the ground that *Fraser* applies only to speech with sexual overtones. See *Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006). It is also worth noting that a school could leave the yellow armbands alone while restricting an anti-war shirt that clearly would fall under *Fraser* – for example, a shirt with an outline map of Iraq superimposed with the words, "Marines Suck" – without being accused of viewpoint discrimination. Presumably, the thought is that such restriction would leave plenty of room for other ways of expressing opposition to the war and so would not significantly change the overall speech market at the school.

Leaving *Fraser* aside, one might wonder whether schools should have some authority to promote civil, reasoned debate about public issues even with respect to speech that is neither school-sponsored nor part of the school curriculum. Granting the point that the "high school t-shirt debate" is not a genre with great potential for subtlety, there is a significant difference in fairness and persuasiveness to one's opponents between decrying the "collateral damage" inflicted on Iraqi civilians and characterizing (all?) marines as "murderers." Perhaps schools ought to have broader authority to fight the coarsening of public debate. And although *Cohen v. California* suggests general skepticism about government efforts to police the civility of the public square, 403 U.S. 15, 25-26 (1971), *Cohen* is out of place in the public schools. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986) (stating that "the First Amendment gives a high school student in the classroom the right to wear *Tinker*'s armband, but not *Cohen*'s jacket" (quoting *Thomas v. Bd. of Educ.*, *Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring))). The contrary argument, which I ultimately find more persuasive, is that even in the school context a general power to police the civility of non-school sponsored speech is far too likely to become a vehicle for purposeful viewpoint discrimination. Schools do have very great authority to teach civility, fairness, and intellectual honesty in their regulation of school-sponsored speech, so an appropriate balance might be to limit the school's reach over student speech governed by *Tinker*. Cf. Brownstein, *supra* note 20, at 87 ("Because public school students spend so much time in school sponsored activities in which they have virtually no free speech rights as participants in educational programs, it may be particularly important to vigorously protect their freedom of speech elsewhere in the school environment.").

The real worry here starts from the observation that, as is so often true in *Tinker* cases, the disruption here is directly caused by the voluntary decisions of some students to react violently against student speakers. The natural question is why we should sanction the speakers rather than sanctioning those who have resorted to violence.¹⁹⁰ At least on these facts, the school has options besides doing nothing, suppressing one side of the debate, or suppressing both. Instead, it can punish the student(s) who resorted to violence, reiterate the need for mutual respect, and seek to deter future violence with warnings about the consequences that will follow future disruptions.

What has all this to do with viewpoint discrimination? A school's decision to restrict only anti-war shirts raises suspicion that school officials may have been influenced by their own support for the war, and *Tinker's* substantial disruption test is meant to test the likelihood that this kind of purposeful viewpoint discrimination has occurred. One question that might be raised is whether one fight constitutes a sufficiently substantial disruption to rebut the presumption that the school may have acted for ideological reasons. My main point, however, is this: If the substantial disruption test is meant to satisfy us that school speech restrictions are truly harm-based, wouldn't we expect decisionmakers to try to address the harm at issue without suppressing speech? Pursuant to the "reversing the ideas" test, *Tinker* is meant to assure us that the school would have taken the same action even if it agreed with the speech being suppressed. But school officials who agreed with the anti-war message would likely explore ways to address the harm – fighting – independently of the speech. To adequately incorporate this point, *Tinker* needs to be understood to say not just that schools may regulate speech that threatens substantial interference with the work of the school, but also that regulations of speech must be *necessary* to prevent that disruption. Where restrictions on conduct would be able to prevent disruption, speech restrictions should not be used. In other words, courts must commit themselves to the no-heckler's-veto principle in a more thorough and consistent fashion if the substantial disruption test is to serve as an adequate means for smoking out purposeful viewpoint discrimination.

Both the differential enforcement and heckler's veto scenarios raise concerns that even school restrictions of substantially disruptive speech could mask purposeful viewpoint discrimination. And in each case, the lack of fit between the school's chosen means (suppressing particular instances of student speech) and its asserted end (preventing substantial disruption to the work of the school) is the warning signal that an ideological purpose may be afoot. Evaluating means-end fit as a way of testing the sincerity of the government's asserted motives is a standard feature of constitutional doctrine,¹⁹¹ but it is not

¹⁹⁰ Admittedly, Judge Kozinski raises this point in his *Harper* dissent. See *Harper*, 445 F.3d at 1195 n.5 (Kozinski, J., dissenting).

¹⁹¹ See, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1308-10 (2007).

mentioned in the *Tinker* opinion or in the lower court cases applying *Tinker*.¹⁹² As noted earlier, one of the difficulties in applying *Tinker* is its lack of connection to other areas of constitutional law. We can move toward normalizing *Tinker* as a constitutional doctrine by drawing from the tiered scrutiny framework made familiar in many areas of constitutional jurisprudence.

Courts use different standards to describe the level of means-end fit required to pass constitutional muster. In contexts said to involve strict scrutiny, the most common phrases are that the means must be “narrowly tailored” to the end or “the least restrictive means” of achieving the end.¹⁹³ The intermediate scrutiny applied to gender classifications under the Equal Protection Clause requires that means be substantially related to an important governmental interest.¹⁹⁴ Judging degree of fit involves both empirical judgments about the actual relationships between the government’s means and its ends, and normative judgments about how tight these relationships must be to meet the relevant standard.¹⁹⁵ The government will have (or at least should have) made its own empirical judgments about the degree of fit in crafting its regulations in the first place, and so one important question about judicial review here is the degree to which courts should defer to the empirical judgments of the other branches. Demanding standards of review signal both that courts will make a relatively independent determination of the empirical relationships (i.e., they will be less likely to defer to the government’s empirical judgments) and that they will expect a high degree of fit between means and ends based on the empirical relationships they have found to exist. In the context of student speech cases, the question of deference is of special importance as the Supreme Court’s school law cases generally stress the need to provide sufficient latitude for local educators to do their jobs.¹⁹⁶ As will become clear in what follows, however, faithful application of *Tinker* requires courts to second guess school officials’ judgments about disruption in some respects. The case is therefore something of an exception to

¹⁹² It is perhaps not surprising that the *Tinker* opinion did not talk explicitly about fit issues since the no-armband policy there failed to pass constitutional muster because of the lack of evidence of disruption. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

¹⁹³ *Ward v. Rock Against Racism*, 491 U.S. 781, 796-99 (1989) (discussing both phrases and the differences between them in the context of content-neutral speech regulations).

¹⁹⁴ *E.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996). Ordinary rational basis review does not require significant fit testing at all.

¹⁹⁵ Simons, *supra* note 187, at 451-56; Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2424 (1996).

¹⁹⁶ This is a consistent refrain in the Court’s public school jurisprudence. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985); *Ingraham v. Wright*, 430 U.S. 651, 680-82 (1977). *See also* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1369 (2000) (stating that across a number of constitutional domains the Supreme Court “has justified adopting special standards for schools on the ground that school officials need sufficient authority to preserve and protect the ‘educational process’”); Post, *supra* note 34, at 1771-74 (discussing the need for judicial deference when government acts in a managerial capacity).

the Court's general mantra that the federal judiciary should not run the public schools.

How should we describe the level of review needed to make *Tinker* an adequate check against purposeful viewpoint discrimination? Labels in this area may not tell us much apart from concrete evidence of judicial practice. What, in the abstract, is the difference between requiring that means be narrowly tailored to ends and requiring that they be substantially related to those ends? Given this important caveat, however, I want to begin from the proposition that we should model *Tinker's* substantial disruption test on the standard language of strict scrutiny and qualify that where necessary.¹⁹⁷ Though the various aspects of strict scrutiny overlap and reinforce one another in various ways, it will be helpful to treat them separately. No doubt each of the topics to be addressed warrants more detailed discussion. Here, I can only sketch the basic shape of the inquiries I recommend.

C. "Compelling" Interest

Normal strict scrutiny requires the government action to serve compelling interests. In other contexts, it can be unclear which interests are the sort that ought to count as compelling.¹⁹⁸ *Tinker* avoids this problem at least to some degree by saying that in the school context, the interests of preventing interference with the work of the school and protecting the rights of others count as strong enough to justify some restrictions on student speech.¹⁹⁹ As emphasized earlier, this leaves questions about what sorts of harms to the school's work count as cognizable "disruptions" under *Tinker*.²⁰⁰ Schools must justify their speech restrictions by pointing to specific consequences that either have occurred or that they believe will occur in the absence of the speech restrictions. They have the burden of proving what is at stake. Deciding whether

¹⁹⁷ In some respects, my project of "normalizing" *Tinker* by (qualified) analogy to strict scrutiny tests is in sympathy with Scott Moss's interesting arguments against excessive institutional tailoring of the First Amendment in schools, prisons, and the government workplace. Scott A. Moss, *Students and Workers and Prisoners – Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007). Moss concludes, however, that intermediate scrutiny is the proper model for the public schools. *Id.* at 1676-77. He chooses this label in part because of the "strict in theory, fatal in fact" associations of the strict scrutiny standard in some constitutional law contexts; and certainly I agree with Moss that judicial review of school speech restrictions should not be "fatal in fact." Given the vagueness of labels, it is not clear to me how much we differ in the strictness of the review we would advocate under *Tinker*.

¹⁹⁸ See generally Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917 (1988).

¹⁹⁹ *Tinker* contemplated these interests in relation to student speech at school. Increasingly frequent litigation over school restrictions on student cyberspeech (and other off-campus speech) raises additional questions. See generally Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008).

²⁰⁰ The same can be said of the more mysterious "rights of others" prong, though discussing that point is not to my purpose here.

particular kinds of consequences – fights, distractions from class work, diminished educational performance, injured feelings – are the sorts of disruptions contemplated by *Tinker* is a question of law for courts, and they should decide it without deference to school officials just as they decide other questions of law de novo.

If a particular consequence identified by the school is legally cognizable as a disruption, the next question is whether it counts as substantial. Is the harm identified by the school of sufficient importance to justify the speech restriction in question? The protections of the substantial disruption rule would be largely undermined if schools could simply define any set of disruptive consequences as substantial, so again I believe that courts should grant no deference to school officials here.

The more complicated questions involved in modeling *Tinker* on the strict scrutiny formula concern the idea of narrow tailoring. Eugene Volokh has helpfully suggested that deciding whether a legal rule is narrowly tailored is a practical inquiry that requires courts to ask the following four questions:

- (1) Does the rule advance the governmental interest?
- (2) Is the rule the least restrictive means of advancing the interest?
- (3) Is the rule overinclusive, restricting more speech or behavior than is necessary to advance the interest?
- (4) Is the rule underinclusive, leaving unrestricted speech or behavior that is just as damaging to the asserted interest as the restricted speech or behavior?²⁰¹

Describing how courts should approach each of these questions will flesh out the proper balance between skepticism and deference appropriate for ensuring that school speech restrictions are narrowly tailored to preventing substantial disruptions of the school's work.

D. Advancement of Interest

In the context of the substantial disruption rule, the question here is whether the school's speech restriction will actually help to prevent the substantial disruptions feared by the school. Conversely, we could ask whether the absence of the speech restriction would materially undermine the school's interest in preventing substantial disruption.

In the school context, these two forms of the question are not entirely mirror images of one another. School officials must receive considerable deference on the question of whether school speech restrictions are likely to be effective. To illustrate, imagine a situation where two groups of students have baited each other through, among other things, an escalating T-shirt war: Confederate flags versus Malcolm X, condemnations of homosexuality versus condemnations of homophobia, etc. The t-shirt war has erupted into violence on

²⁰¹ Volokh, *supra* note 195, at 2422-23.

several occasions, and many students have been suspended. The school now proposes a speech restriction to end the T-shirt war in the hopes of defusing tension and reducing conflict. No one knows, of course, whether this will actually be effective in stopping the violence. Yet it would be perverse for courts to demand proof of effectiveness before allowing the school to proceed.

The second inquiry has more bite. To ask whether the absence of the speech restriction would undermine the school's interest is to ask about the likelihood that the dire consequences predicted by the school will actually occur. If there is little reason to predict substantial disruption in the absence of the speech restriction, the school has no reason to act. Questions about the likelihood of the predicted disruption are intertwined with questions about substantiality, and here a similar lack of deference is appropriate.²⁰²

E. Least Restrictive Means and the Heckler's Veto

The narrow tailoring inquiry should require courts to ask whether there is some less speech-restrictive approach that would do roughly as good a job in preventing substantial disruptions to the work and discipline of the school. In the *Tinker* context, this question dictates a firmer commitment to the no-heckler's-veto principle. This is most obviously critical in the many *Tinker* cases where the disruption the school seeks to prevent is violent confrontations between students. A school should be required to make some showing that it has tried and failed to solve the problem through conduct regulation or that efforts in this direction would be futile. If punishing the disruptive conduct provoked by speech would adequately address the issue, speech restrictions are not justified. As described earlier,²⁰³ a half-hearted judicial commitment to this inquiry is an insufficient check on purposeful viewpoint discrimination.

While more explicit attention to the no-heckler's veto principle would be salutary, that principle must also be tailored to the school context. Obviously, a school is not required to use riot police to protect provocative student speakers from violent hecklers. Nor does a school need to suspend half the student body for violence before it can restrict the speech that precipitates this violence. Schools have important work to do which would be undermined if they were fully governed by *Terminiello* and *Brandenburg*.

Frank recognition of these points also makes it difficult to gauge the degree to which schools and courts have diverged from the no-heckler's-veto principle. Although the *Tinker* case law involving violent confrontations generally does not discuss the point, one assumes that in most circumstances prior violent

²⁰² On my analysis, there are three questions: (1) Are the consequences cited by the school as the justification for its actions of the right sort to count as disruptions under *Tinker*? (2) Will those consequences, if they occur, be sufficiently severe to justify the speech restriction? (3) How likely are the consequences to occur if the school does nothing? I have treated the third question as an aspect of deciding whether speech restrictions advance the school's interest, but one could equally well lump the second and third questions together and treat both as aspects of deciding whether the school's claimed interest is substantial.

²⁰³ See *supra* notes 190-92 and accompanying text.

disruptions would already have been addressed through the school disciplinary process. Further, one assumes that students generally understand that fighting exposes them to disciplinary action, and that this has some deterrent effect. In cases where the history of prior violence is significant, perhaps courts assume as a matter of course that punishing the resort to violence has been tried and has failed. Nevertheless, demanding more attention to the no-heckler's-veto principle could not hurt and might help. The idea of narrow tailoring demands nothing less. The remaining aspects of the narrow tailoring inquiry, overinclusiveness and underinclusiveness, warrant somewhat different treatment even though both can potentially evidence purposeful viewpoint discrimination. The *Tinker* case law deals reasonably well with problems of overinclusiveness, but the courts have not yet developed an adequate approach to allegations of underinclusiveness.

F. Overinclusiveness

The question posed is whether the school has restricted more speech than is needed to prevent substantial disruption of the school's mission. This question makes sense whether one thinks of strict scrutiny formulas as cost-benefit analysis, as tools for smoking out illicit purposes, or as both. From a cost-benefit perspective, overinclusive restrictions impose costs on First Amendment freedoms without the benefits of preventing harm to the school. From a "smoking out" perspective, speech restrictions not needed to deal with disruption suggest that some improper purpose might be at work.

i. Reviewing school judgments that restricted speech is disruptive

The fourth hypothetical scenario discussed above, where a school limits both anti- and pro-gay T-shirts even though the evidence indicates that only the anti-gay shirts are significantly disruptive, can be used to illustrate the proper approach to overinclusive speech restrictions. Students wishing to wear pro-gay T-shirts under these circumstances will argue that the school's speech restriction is overinclusive because their expression does not violate the substantial disruption rule,²⁰⁴ and *Tinker* contemplates that courts will make an independent review of the record concerning the past and potential disruptive consequences of

²⁰⁴ This way of putting things should make it clear why I say that *Tinker* deals more adequately with overinclusiveness problems: the overinclusiveness inquiry just requires courts to ask the same questions they would ask in considering any speech restriction under *Tinker*. The language of overinclusiveness here adds only the wrinkle that on the facts as imagined, the speech restriction is concededly valid as to the anti-gay T-shirts and only its extension to the pro-gay T-shirts is being challenged. It is worth noting that an effects rule, if valid, would enable the school to answer such a charge by simply saying, "No, your speech is not disruptive, but the speech of your ideological opponents is, and we have to restrict your speech in order to level the playing field." That this sort of argument never appears in judicial opinions (or in briefs, so far as I know) suggests that if *Tinker* does contain an effects rule, courts and lawyers have yet to figure this out.

the restricted speech.²⁰⁵ This review is necessary in part because of the potential that school officials' judgments about disruptive effects will be shaped by their reactions to the speech's message.²⁰⁶ Courts also appear to give no deference to school officials' judgments about when the disruptive consequences of speech are big enough to count as material and substantial. The line is a necessarily vague one, of course, but it appears that courts review the school's drawing of that line *de novo*.²⁰⁷ The theme here, in short, is independent judicial review of school claims about disruption.

ii. Reviewing school judgments that restricted speech is similar to disruptive speech

If a school cannot meet its burden of showing that the pro-gay T-shirts are disruptive, it can only justify their restriction on the basis of their similarity to demonstrably disruptive speech.²⁰⁸ Allowing the restriction of nondisruptive speech simply because of its associations with other speech proven to be disruptive creates the potential for viewpoint discrimination because judgments of similarity can easily become a pretext for the suppression of disfavored ideas. Yet to require a specific history of disruption before any speech can be restricted would be inconsistent with the common sense recognition that school districts must have "the power to act to prevent problems before they occur[]." ²⁰⁹ A school must be allowed some leeway to make judgments that speech with no specific history of disruption is restrictable because of its similarity to proven

²⁰⁵ Though courts no doubt vary in the zeal with which they conduct this independent review, there is no question that the *Tinker* Court took its own look at the evidence of disruption caused by the armbands and gave no deference to the school's reading of the facts. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

²⁰⁶ See *supra* note 61 and accompanying text (citing Geoffrey Stone's account of this intertwining). Of course, judicial judgments about disruption can also be colored by a judge's reaction to the message, but presumably the risk is a good deal smaller in the cool of chambers than in the public education trenches.

²⁰⁷ *Tinker* does say that school officials need only be able to reasonably forecast disruption, *Tinker*, 393 U.S. at 514, and this sounds a note of deference to school judgments. The force of this deference is limited, however. The language refers to a school's efforts to predict future disruption (that presumably would have occurred had the school not acted). Some kind of deference is inevitable here as there is no way to independently review a possible future that never occurred. See also Post, *supra* note 34, at 1773-74 (discussing the independent character of the review contemplated by *Tinker*).

²⁰⁸ *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 254-56 (3d Cir. 2002), explains that schools will have a well-founded fear of disruption based on past incidents where the restricted speech caused a disturbance, but fears can also be well-founded where there have been past incidents involving similar speech. The court also notes that on rare occasions a school might be able to reasonably forecast disruption in the absence of any history, imagining an incident where a student at the school appeared "dressed in black face, wearing a rope around his neck." *Id.* at 255 n.11. Unfortunately, this example is not as far-fetched as it might seem. See, for example, the list of incidents of racial intimidation compiled in Lawrence, *supra* note 140, at 431-33.

²⁰⁹ *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1367 (10th Cir. 2000).

disruptive speech, but courts should review the similarity judgments with some strictness.

The Third Circuit's decision in *Sypniewski* takes a sensible approach here. One issue in that case was whether a T-shirt featuring the redneck humor of comedian Jeff Foxworthy could be banned because of its alleged similarity to speech (including Confederate flag shirts) that had caused past racial disturbances at the school. More specifically, the school contended that the word redneck functioned as a synonym for hick, and a group of students identified as "the Hicks" had been instigators of racially-charged incidents in the past.²¹⁰ The court rejected these claims:

It may be argued the school was entitled to conclude the T-shirt was likely to lead to disruption because Thomas Sypniewski's wearing of the shirt amounted to a promotion of values consistent with the items and activities that had caused racial unrest. . . . [But] [w]here a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption In other words, it is not enough that speech is generally similar to speech involved in past incidents of disruption, it must be similar in the right way. Most commonly, the prior speech will have carried an offensive or provocative meaning, and the similar speech will have a similar meaning.²¹¹

This skeptical stance toward similarity arguments strikes an appropriate balance between allowing schools to be proactive in dealing with threats to the school environment and providing a shield against school censorship of disfavored messages.²¹²

The reasoning of the *Sypniewski* court suggests that it would rarely, if ever, be appropriate for a school to restrict student speech on the ground that it was similar to an opposing viewpoint that had proven to be disruptive, and thus in our hypothetical a court ought to reject the claim that pro-gay T-shirts can be censored solely on the ground of their similarity to anti-gay T-shirts. This stance

²¹⁰ *Sypniewski*, 307 F.3d at 255.

²¹¹ *Id.* at 257. *Sypniewski* considered some alternative ways in which messages might display the required similarity, including the claim that in the school context, the term "redneck" had come to be identified with the group that called themselves "the Hicks." *Id.* at 255. The court would have regarded this as an appropriate sort of similarity, but it did not think the school district had presented enough evidence of the association. *Id.*

²¹² Interestingly, the *Sypniewski* court took its relatively hard line on similarity judgments in a context that was less suggestive of purposeful viewpoint discrimination than many. The Foxworthy T-shirt was printed with jokes listing the top ten reasons that someone might be a "Redneck Sports Fan." *Id.* at 249-50. School officials may have thought the shirt was dumb or in poor taste, but the shirt does not convey much in the way of message, and it seems doubtful that school officials were acting on the basis of ideological opposition. It is more likely that they made a sincere, if ultimately indefensible, judgment about the associations the shirt might prompt.

is more speech protective and should be preferred on that ground even though it licenses predictable viewpoint-differential effects.²¹³

G. Underinclusiveness

The underinclusiveness component of the narrow tailoring inquiry asks whether the school has failed to restrict some speech that is just as (potentially) disruptive as the speech it has chosen to restrict. As Volokh has explained, a positive answer is constitutionally worrisome.²¹⁴ It could suggest that the disruption feared by the school is not substantial after all, or that the school's actual purpose was ideological rather than harm-based. If the school was really concerned about disruption, would it not have restricted all the speech that seemed likely to lead to disruption? Further, treating similar speech differently conflicts with ideas of equal treatment and thus seems objectionable in itself. Given my purpose of developing a *Tinker* standard more responsive to the problem of purposeful viewpoint discrimination, I am most concerned with the ways in which underinclusive speech restrictions may suggest illicit purpose.

The problem of underinclusiveness is well-represented in scenario (2) above. There, the school chooses to restrict only anti-gay shirts even though there is evidence suggesting that non-restricted pro-gay shirts have also led to disruption.²¹⁵ We should assume for discussion purposes that the school has adequate grounds for restricting the anti-gay shirts on the ground that they have led to disruptive incidents in the past. Accordingly, the students wishing to wear anti-gay shirts can challenge the restriction of their speech only on the ground that the school's refusal to restrict pro-gay shirts is sufficiently underinclusive to suggest purposeful viewpoint discrimination. The school will respond that it has made two judgments that together show why this is not so. First, it has judged that there are real differences in the histories of disruption concerning the anti-gay and pro-gay T-shirts. Second, it has decided that pro-gay shirts are not similar enough to the anti-gay shirts to justify their preemptive restriction. The plaintiff students want a court to second guess these judgments.²¹⁶ To what

²¹³ If such effects are a problem, it would be better to deal with them honestly through adopting an effects rule rather than allowing schools to restrict nondisruptive speech on the ground of its similarity to disruptive speech.

²¹⁴ Volokh, *supra* note 195, at 2423.

²¹⁵ I have described the problem here as "underinclusion" in keeping with the terminology of testing for classificatory fit. Where a school chooses to restrict only some of the speech that threatens substantial disruption of its educational mission, there is a misfit between the school's end (restricting disruptive speech) and the particular speech restriction ("no anti-gay T-shirts") purportedly chosen as the means to promote that end. Professor Emily Waldman has helpfully suggested that I might also describe the test here as a "parity test" – the problem is the lack of parity in treatment given to two categories of speech that are relevantly similar in their disruptive potential.

²¹⁶ Whether there is a real need to review both judgments depends on the history at the school. If the school has had an extensive history of both anti-gay and pro-gay T-shirts being worn, the only real question for review is whether to accept the school's judgment that the different types of shirts

extent should it do so? How should a court respond to the sort of underinclusiveness challenge imagined in my hypothetical?²¹⁷

i. Would Tinker have allowed a more inclusive speech restriction?

My proposal is that a court should begin by asking whether the school would have been justified under *Tinker* if it had chosen to restrict the pro-gay shirts. In other words, the court should imagine that the pro-gay shirts had been restricted and then ask whether this could be justified under the substantial disruption rule. In seeking to answer this question, the court would show exactly the same level of deference (i.e., very little) to the school's judgment as in the usual substantial disruption inquiry,²¹⁸ and it would have to address both potential justifications based on past experience with the shirts and arguments based on the similarity of the shirts to previously disruptive speech.²¹⁹ Following the *Sypniewski* analysis I endorsed a few paragraphs ago, a court should take a skeptical stance toward any similarity arguments for restricting the pro-gay shirts and should independently review the record of disruptive history regarding the shirts.²²⁰ If the court finds that the pro-gay shirts could not be restricted under the substantial disruption test, then obviously there is an adequate basis for differential treatment and the plaintiffs' argument of purposeful viewpoint discrimination must fail.

have had different consequences for the school environment. If the school is right about that, its actions are proper. If the school's judgment is wrong, its actions are unconstitutional. Either way, the shirts are demonstrably similar or dissimilar in their disruptive potential. Review of the school's judgments about similarity would become important in a situation where, for example, the school had much more experience with anti-gay than with pro-gay T-shirts and the limited experience with the pro-gay T-shirts had produced little disruption. In that situation, the anti-gay plaintiffs would challenge the school's judgments about disruptive potential but might also argue that the school should be more willing to restrict the pro-gay shirts on the ground of their similarity to the anti-gay shirts.

²¹⁷ The situation I have imagined is likely similar to what the trial court must have confronted on the *Castorina* remand, which is unreported. The school would no doubt have defended its decision to restrict Confederate flag shirts but not Malcolm X shirts on the ground that the latter did not cause disruption and were not "similar" to the Confederate flag shirts.

²¹⁸ See *supra* notes 205-13 and accompanying text.

²¹⁹ Admittedly, the litigation incentives created by the imagined procedure are a bit odd. Since the school chose not to restrict the speech, its incentive will be to soft-pedal the evidence that would have supported restrictions. The students will have to develop the potential justifications that might have supported the hypothetical restriction.

²²⁰ To clarify, the skepticism I have endorsed about similarity arguments is limited to arguments where speech taking one viewpoint is alleged to be similar to speech taking a different viewpoint on the same subject matter (e.g., pro-gay shirts as similar to anti-gay shirts). A court would quite often be justified in treating different sorts of expression conveying roughly the same message as similar to one another and therefore concluding that past experience with one would give rise to a well-founded expectation of disruption as to the other.

ii. Does a school have discretion to restrict less speech than *Tinker* would permit?

Suppose, however, the court finds that the school had the authority to restrict the pro-gay T-shirts under *Tinker* but chose not to exercise that authority. Does this automatically prove purposeful viewpoint discrimination? I think the correct answer is almost, but not quite. Given the skeptical line on similarity arguments I have endorsed, a court finding that the school could have restricted the pro-gay shirts will almost always have done so on the ground of prior disruptions occasioned by the shirts. Where this is so, courts ought to conclusively presume the presence of purposeful viewpoint discrimination. In theory, a school could still claim that the anti-gay shirts were more disruptive than the pro-gay shirts even if both led to substantial disruptions and that it can hold itself to a more speech protective standard than the First Amendment requires by banning only the more disruptive shirts. But if the disruptive effects were enough to satisfy *Tinker*, they posed a genuine threat to the school's mission. In that context, a school's picking and choosing on the basis of degrees of disruption is almost certain to be tainted by its attitudes toward the competing messages of the restricted and unrestricted speech and should be regarded as unconstitutional.

The "almost" from the previous paragraph would apply in the instances where the speech could have been justifiably restricted under *Tinker* not on the ground of its own history, but on the ground of its similarity to speech with a proven history of disruption. In other words, we are imagining situations where a school could have chosen to lump different instances of speech together as similar and yet chose not to do so. Here, I think that courts should give schools slightly more leeway.

To paint with a very broad brush here, we can imagine a continuum of similarity judgments. At one extreme would be judgments that speech is similar to other speech simply because it addresses the same general subject (for example, pro-gay shirts are similar to anti-gay shirts) or because it promotes values consistent with the items and activities that had caused past disruption.²²¹ Courts should simply reject arguments at this end of the continuum. These sorts of arguments should not be allowed to justify speech restrictions under *Tinker* in the first place. At the opposite end of the continuum are instances of speech that carry the same message and convey that message in a similar manner. To give a trivial example, suppose that a school had experienced fights prompted by shirts declaring that homosexuality is sinful²²² and had restricted those shirts, only to have students come forward with new shirts carrying the arguably milder message that homosexuality is wrong. These two shirts are so obviously similar, so obviously variations on a theme, that a school's refusal to treat them as such

²²¹ See, e.g., *Sypniewski*, 307 F.3d at 257.

²²² Cf. *Nixon v. Northern Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005) (discussing student T-shirt that read, "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!").

would suggest that school officials were reluctant to suppress the speech because of sympathy with the message. But in the great middle of the continuum, similarity is a matter of degree, and judgments are more contestable. Suppose, for example, that shirts condemning homosexuality as shameful have proven disruptive and have been justifiably restricted when a student appears at school wearing a shirt saying that marriage is between a man and a woman. This may be taken as another anti-gay shirt, but the message is milder in tone and a good deal more limited in scope. Indeed, some people believe that homosexuality is not morally wrongful yet oppose gay marriage.²²³ It is a close question whether this shirt could be treated as similar to the other anti-gay shirts. I have already urged that courts should be speech-protective by taking a skeptical view where schools have relied on disputable similarity judgments to justify speech restrictions. But suppose a reviewing court decides that this constitutes a permissible similarity judgment. The flip side question is whether a school's decision not to treat speech as similar when the Constitution would allow it to do so should also be reviewed strictly. To put the point in terms of my example, should a court say that a school's decision not to restrict the shirt is underinclusive simply because the school could have restricted the shirt and chose not to? Requiring a school to walk this sort of knife edge in an area of disputable judgments is wholly inconsistent with the Supreme Court's repeated insistence that school officials must be given the space to do their jobs.²²⁴ A school must have some discretion here, and should be encouraged to err on the side of being speech protective when making similarity judgments. When the school chooses to adopt a wait and see attitude as to whether speech that is arguably similar to previously disruptive speech will prove disruptive in fact, this should not be treated as the sort of underinclusion that suggests purposeful viewpoint discrimination.

H. Concluding Thoughts on the Fit Test

While many questions require further exploration, the project of reframing the substantial disruption test by analogy to the strict scrutiny formula used in other areas of constitutional jurisprudence shows promise. Some of current judicial practice is reasonably consistent with the reframing proposed. For example, my account of the overinclusiveness analysis is broadly consistent with what courts are generally doing under *Tinker*, though it would bring a greater degree of explicitness to the current practice. Courts so far, however, have paid little attention to the problems of underinclusive speech restrictions under *Tinker*,

²²³ Gallup's Values and Beliefs poll of 2008 finds that fifty-seven percent of respondents feel homosexuality is an acceptable alternative lifestyle, fifty-five percent of respondents think homosexual relations should be legal, and forty-eight percent of respondents consider homosexual relations to be morally acceptable; yet only forty percent of respondents think that marriages between same sex couples should be recognized by law as valid. Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, <http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx>.

²²⁴ See *supra* note 196 and accompanying text.

and have also underemphasized the no-heckler's-veto principle that flows from the requirement that schools employ the least restrictive means of preventing disruptions to their mission. The underinclusiveness analysis proposed in this article fills a gap in the case law and would provide some additional speech protection beyond what is present in standard, one-case-at-a-time readings of *Tinker's* substantial disruption rule. Even if a school can justify its restriction of one speech viewpoint under that rule, student plaintiffs can still point to evidence of viewpoint differential enforcement and require the school to prove that its speech restrictions are not underinclusive. If the government fails to carry that burden, the school's action is unconstitutional.

This leaves the question of remedy. Presumably, a school could respond to a judicial finding of underinclusiveness by either extending the speech restriction²²⁵ or abandoning it altogether.²²⁶ Because we are dealing with substantially disruptive speech, it may seem more likely that the school will choose to extend its restrictions rather than dropping them altogether. This would result in a fairly limited victory for the student plaintiffs, who would remain equally unable to express their point of view but would have the satisfaction of seeing their ideological opponents muzzled as well. It is also possible, however, that a school will be less willing to restrict speech if it must restrict speech it finds agreeable. As Justice Jackson famously pointed out, there is no better way "to assure that laws will be just than to require that laws be equal in operation."²²⁷ By increasing the costs of speech restrictions in the eyes of the school, the underinclusiveness requirement may result in an environment that is marginally more speech protective for students who voice controversial views. In practice, then, the additional protection provided by the underinclusiveness inquiry is limited but still important. It will likely play a role in relatively few cases, and as a procedural matter plaintiffs ought to have the burden of production on the differential enforcement issue. If plaintiffs put forward no such evidence, the court need not worry about the underinclusiveness of the speech restriction. But once the plaintiffs have met their burden of production, the government should bear the burden of proof on fit just as it does on the question of substantial disruption.²²⁸

²²⁵ This would be justifiable because a finding of underinclusiveness would mean that the school has the authority to restrict both the previously restricted speech and the previously unrestricted speech.

²²⁶ This would be justifiable because a school is never constitutionally required to exercise its authority to restrict speech.

²²⁷ *Ry. Express Agency v. New York*, 336 U.S. 106, 113 (1949) (Jackson, J., concurring).

²²⁸ It makes practical sense to require plaintiffs to raise the issue of underinclusion as evidence of purposeful viewpoint discrimination. Intuitive recognition of this point may explain why courts so rarely address the issue. As noted above, *see supra* notes 126-34 and accompanying text (discussing *Phillips v. Anderson County School District Five*), most courts simply address the question of whether the sanctioned speech was sufficiently disruptive to justify restriction without any consideration of evidence about competing viewpoints. This could mean that courts implicitly share Judge Kennedy's view that proof of substantial disruption is both necessary and sufficient for speech restrictions under *Tinker*, or it could just mean that no one brought up the issue of

To sum up, I have argued that school speech restrictions under *Tinker* should be narrowly tailored to the end of preventing material and substantial interference with the work of the school.²²⁹ Restrictions narrowly tailored to prevent substantial disruption pose acceptably low risks of purposeful viewpoint discrimination even if they employ facially viewpoint-based rules and give rise to viewpoint-discriminatory effects. An important lesson emerges from the discussion: what is needed to address legitimate concerns about viewpoint discrimination under *Tinker* is less a new requirement imported from other areas of speech law (like public forum doctrine) than a better understanding of how the substantial disruption test ought to work. If this understanding can be developed, the issue of viewpoint discrimination will take care of itself.

VII. SHOULD *TINKER* BE READ TO IMPOSE AN EFFECTS RULE?

I now turn to the question of whether *Tinker* should be read to include an effects rule, a requirement that school speech regulations be crafted so as to eliminate any substantial viewpoint-differential effects. To set the stage for the discussion, we can again refer back to the stylized hypothetical scenarios (3) and (4). To pose the issues as clearly as possible, let us imagine a school where students wear T-shirts with both anti- and pro-gay messages. There is solid evidence of disruption with respect to the anti-gay shirts, but little or no evidence of disruption concerning the pro-gay shirts. The school's own stance promotes tolerance for gays, and arguably promotes the full moral equivalence of gay and straight lifestyles.²³⁰ Under these circumstances, the school faces a choice of

underinclusion. Even if the facts to support underinclusion arguments are rarely present, it is worthwhile for the law to clearly recognize the principle so that plaintiffs and their attorneys will know there is a point to looking for evidence of underinclusive enforcement.

²²⁹ One feels some obligation to describe the review contemplated by using an accepted formula, and this one is as good as any for the approach I have described in the preceding pages. I would strongly emphasize, however, that these sorts of formulas are compatible with a very wide range of variation in what courts actually do. Cf. Fallon, *supra* note 191, at 1303-11 (describing at least three distinctive approaches to judicial review that occur under the strict scrutiny formula of compelling interest and narrowly tailored means). I have tried to sketch the ways in which different parts of my "narrow tailoring" test might require different degrees of deference to the judgments of school officials. The actual practice of courts would need to be more complex than my descriptions, and certainly more complex than the label "narrow tailoring" could capture. As noted above, *see supra* note 197, modeling my approach from the starting point of strict scrutiny is not intended to suggest review that is strict in theory but fatal in fact. As Fallon points out, much of the work that courts do within the terminology of strict scrutiny does not fit the "strict in theory, fatal in fact" description. *See* Fallon, *supra* note 191, at 1271 (identifying a form of strict scrutiny that amounts to little more than weighted balancing). Religion Clause scholars, for example, are well aware that the "strict scrutiny" employed by the Supreme Court in free exercise cases between 1963 and 1990 was better described as "strict in theory, ever so gentle in fact." Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992). It is fair to say I am aiming for something in between.

²³⁰ Cf. George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 555 (2007) (describing a "gay movement" that "first sought only tolerance – the removal

doing nothing, restricting only the anti-gay shirts (perhaps via a facially viewpoint-based rule banning, for example, clothing bearing messages that denigrate other students on the basis of sexual orientation) or restricting both types of shirts (perhaps via a facial subject-matter restriction banning clothing bearing messages on the subject of homosexuality). Doing nothing may seem the safer course legally,²³¹ but this safety would come at the high price of allowing substantial disruption of the school's mission. A school that chooses to act in the imagined situation by restricting both pro-gay and anti-gay shirts will likely face a legal challenge from students wishing to wear pro-gay shirts, a challenge that it *will* lose *unless Tinker* actually requires the school to restrict more speech in order to avoid viewpoint-differential effects.

This leaves the option of restricting only the anti-gay shirts. But consider how things look from the standpoint of students wishing to wear such shirts if the school chooses to restrict only their side of the debate. They will cry viewpoint discrimination, and will support that charge by pointing out that (1) their viewpoint, and only their viewpoint, has been restricted, (2) school officials demonstrably disagree with their viewpoint and agree with the unrestricted viewpoint, and (3) student debate and discussion on the topic of homosexuality no longer takes place on a level playing field. They will further claim that (1)

of legal burdens on homosexuality and an end to violence against homosexuals" but now presses for "approval of homosexuality as legally and socially equal to heterosexuality").

²³¹ This is usually the safer course – but there are some limits to the idea that schools face no legal risk from allowing speech. On an extreme set of facts, for example, a school's hands-off attitude toward student speech could lead to Title IX liability for student-on-student sexual harassment. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 640-44 (1999) (recognizing that school districts can be held liable for some severe instances of peer sexual harassment if actual notice of the harassment has been given to a person who has the authority to take corrective action but reacts with deliberate indifference to the harassment). Some courts have recognized sexual-orientation harassment as actionable under *Davis*. *See, e.g., Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 834 (S.D. Iowa 2004). Indeed, the school in *Harper* had been successfully sued under Title IX for failing to respond to harassment of gay students by their peers. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1172 n.6 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). School districts may feel they must walk a fine line between violating the First Amendment and violating Title IX, but in truth the line is not all that fine. Title IX liability requires that the harassment be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652. This standard generally requires conduct that goes far beyond the general expression of anti-gay views. *See generally* RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 4:12 n.47 (collecting cases that turned on whether peer harassment was severe and pervasive under Title IX). In *Harper*, for example, a gay student testified that other Poway High School students "repeatedly called him names, shoved him in the hallways, threw food at him and spit on him" and also made "disparaging remarks about gays and lesbians on a nearly daily basis." *Harper*, 445 F.3d at 1172 n.6; *cf. Doe*, 316 F. Supp. 2d at 815-18 (ruling that harassment was severe and pervasive where students directed anti-gay epithets toward the plaintiff, threatened him with violence, pushed him in the halls, and urinated on him in the shower room). The case law generally suggests that the remarks alone would not have been enough to subject the school to any threat of liability, and it should have been possible for school officials to recognize that permitting Tyler Harper's anti-gay T-shirt would not have exposed the school to any credible threat of legal liability under Title IX.

and (2) together suggest purposeful viewpoint discrimination: the school restricted their speech precisely because it disagreed with that speech. At the very least, the school was substantially certain that viewpoint-discriminatory effects would flow from its actions, which would be good enough to count as intentional in tort law.²³² The concerns raised by this line of argument are real enough, and have led some judges and commentators to describe schools that restrict one side of a debate as necessarily engaged in viewpoint discrimination.²³³

Yet viewpoint discrimination is not a univocal concept, and it is necessary to unpack different meanings. It is possible that the charge of viewpoint discrimination simply means that the school has engaged in purposeful viewpoint discrimination, which is clearly impermissible. It is also possible that the charge means that the speech restriction is suspicious enough to warrant serious scrutiny, another point that is clearly correct. Yet one suspects that when lawyers, judges, and commentators charge a school with viewpoint discrimination in this sort of situation, their thought is that the facts listed in the preceding paragraph – propositions (1) through (3) coupled with at least foresight of and possible desire for viewpoint-differential effects – establish forbidden viewpoint discrimination *without more*; i.e., without proof that the school restricted the anti-gay shirts *because* it disagreed with their message. Advocates of this position seek what I have called an effects rule, which would forbid school speech regulations that produce significant viewpoint-differential effects.²³⁴ This rule would provide significant additional protection for controversial student speech on the plausible assumption that if forced to choose between restricting all speech on a given subject and restricting none, schools will choose to restrict none. That is the position I wish to explore.

To do so, let's tweak the hypothetical still further. As I have already discussed at length, *Tinker* ought to allow our imaginary anti-gay shirt-wearing plaintiffs an opportunity to prove purposeful viewpoint discrimination by making underinclusiveness and no-heckler's-veto arguments. Let us suppose that they have made these arguments without success. The narrow tailoring inquiry, then, suggests that the school has made a legitimate harm-based judgment rather than an ideological judgment. Will this outcome dispel concerns about viewpoint

²³² RESTATEMENT (SECOND) OF TORTS § 8A (1965) (stating that an actor intends consequences if she desires those consequences or "believes that the consequences are substantially certain to result" from her act). Note the stark contrast between the viewpoint-differential effects of this sort of speech restriction, which are entirely predictable and foreseeable even when they are not intended in the strictest sense, and the far less predictable viewpoint-differential effects that might result from a content-neutral speech regulation. See Stone, *supra* note 34, at 221.

²³³ See *Harper*, 445 F.3d at 1183 n.28 (9th Cir. 2006) (Kozinski, J., dissenting); Posting of Eugene Volokh to The Volokh Conspiracy, *Sorry, Your Viewpoint is Excluded from First Amendment Protection*, <http://volokh.com/posts/1145577196.shtml> (April 20, 2006).

²³⁴ An effects rule could be tweaked in various ways. For example, the rule might require that the effects be foreseen and/or that the school is known to favor one side of a controversy, but these conditions will likely be present in any event and thus including or excluding these elements would often make little practical difference.

discrimination? Almost certainly not. There is a lingering sense that somehow the school's actions must still be unconstitutional viewpoint discrimination. Why might someone think this? Two reasons come to mind. The first is the suspicion that the school really did engage in purposeful viewpoint discrimination, but the *Tinker* test failed to pick it out. The second is the claim that enacting a rule with highly predictable and significant viewpoint-differential effects simply *is* unconstitutional viewpoint discrimination without proof of anything more. These reasons suggest two arguments for interpreting *Tinker* as an effects rule. We can call them the prophylactic argument and the marketplace distortion argument.

A. Two Arguments for an Effects Rule

The prophylactic argument undeniably has some force. Even if refined to include the narrow tailoring inquiry I have outlined, the substantial disruption test is a necessarily imperfect mechanism for flushing out impermissible motives. It is entirely possible that in some instances a school has really engaged in purposeful viewpoint discrimination, but the test failed to catch it. Capitalizing on this point, the prophylactic argument urges that preventing real, purposeful viewpoint discrimination is so important that we cannot afford the false negatives allowed by the testing regime I have endorsed. Instead, we must conclusively presume purposeful viewpoint discrimination when faced with facts like those in my hypothetical. On this line of reasoning, an effects rule forbidding a school from producing significant viewpoint-discriminatory effects would be justified as a prophylactic rule that overenforces the prohibition against purposeful viewpoint discrimination.²³⁵

The marketplace distortion argument cuts more deeply against my position because it proceeds from different premises about the structure of free speech law. Following Kagan, I have tried to show how *Tinker's* substantial disruption test can serve as a mechanism for sniffing out illegitimate purposes. The marketplace distortion argument attends less to the purposes of speech restrictions than to their effects. More specifically, it focuses less on speakers' interests in self-expression than on the effect that speech restrictions have on the audience for the speech. An effects rule plays these interests against one another to some extent, as it could be read to sanction the idea that the expressive interests of some individuals should be trumped by an interest in preserving a speech environment in which the audience is exposed to an appropriately broad and balanced spectrum of ideas. On this approach, anti-discrimination interests in speech law can outweigh competing, speech-maximizing interests. The overriding focus is avoiding distortion in the public school marketplace of ideas.²³⁶

²³⁵ Though the propriety of prophylactic constitutional rules has been questioned, *see* *Dickerson v. United States*, 530 U.S. 428, 457-61 (2000) (Scalia, J., dissenting), they are pervasive and entirely defensible. *See generally* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

²³⁶ Among Stone's reasons for strict review of viewpoint-based restrictions, marketplace distortion is the only one available to drive the argument for the effects rule on the facts I have imagined. *See*

The marketplace distortion argument has obvious resonance. Indeed, the idea of speech market distortion is probably the most common explanation for the wrongness of viewpoint discrimination. The application of the “marketplace” metaphor to the public schools, however, is more complex than it would initially appear and needs to be unfolded in several steps.

First, it must be observed that any viewpoint-differential consequences allowable under *Tinker* are modest (in Stone’s parlance), in that they affect only student speech at school.²³⁷ For example, there are ample opportunities for students to express their anti-gay views in other settings, and the effect on the overall speech marketplace is much less dramatic than if the government were to pass an (obviously unconstitutional) law prohibiting “the wearing of any apparel denigrating gays in any public place.” This point about the modest character of viewpoint-discriminatory effects in the schools is worth noting, but its weight is limited by an obvious counterargument. Students spend an enormous amount of time in the public schools, and they do so at a time when their characters and world views are still developing. The climate of ideas within the school is thus considered enormously important, as the hard-fought nature of many controversies about public schooling attests.²³⁸ Further, public schools and the education system generally are supposed to be places that are peculiarly the marketplace of ideas. They are meant in part to serve as learning grounds for the sort of wide open public deliberation that the First Amendment is meant to facilitate.²³⁹ These points would suggest that in the public school context, even modest viewpoint-differential effects are problematic.

This, too, oversimplifies the situation because the metaphor of the free market of ideas is considerably overblown with respect to the public schools. While government is not given a free hand to manipulate public debate by suppressing some private speech at the expense of other speech, government is allowed to participate in the marketplace of ideas and to voice its own point of view in that marketplace in order to influence the course of public debate. Perhaps its most important outlet for doing so is the public schools. The lofty

supra notes 56-68 and accompanying text. Concerns about impermissible justifications based on paternalism (here, the fear that students will be persuaded by the anti-gay message and be moved to adopt opinions contrary to the ones the school wishes to teach) or intolerance (here, worries about how others will react to the message conveyed by the shirts) are of course present, as they usually are with speech regulation authorized by *Tinker*. But *Tinker* represents a determination that these consequences are acceptable in the school setting if the speech restriction is justified by the substantial disruption rule. And, again by hypothesis, the idea that the school’s action is improperly motivated has been ruled out. Consequently, the primary reason for adopting an effects rule in the school setting would be concerns about distortion of the school speech market.

²³⁷ *Supra* note 55 and accompanying text.

²³⁸ A particularly good recent account of the public school as a battleground in the so-called “culture wars” is JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA’S PUBLIC SCHOOLS* (2004).

²³⁹ See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 321 (1991) (describing *Tinker* as espousing a model of democratic education that “understands the purpose of public education to be the creation of autonomous citizens, capable of fully participating in the rough and tumble world of public discourse”).

rhetoric of *West Virginia State Board of Education v. Barnette*²⁴⁰ notwithstanding, the public schools seek through their own speech to teach a good many orthodoxies: that drugs are bad, that democratic capitalism is good, and, in some cases, that homosexual behavior is morally permissible.²⁴¹ In transmitting these messages to a captive audience, schools are not bound by any viewpoint discrimination requirement, and they are neither required to nor do they actually seek a neutral marketplace of ideas. While the case law recognizes some limits on the schools' authority to indoctrinate students through the schools' own speech²⁴² and some scholars have proposed more,²⁴³ it seems widely acknowledged that some indoctrination is unavoidable.²⁴⁴

The marketplace of ideas image, then, fails in important respects to accurately depict the public school environment because the state as educator is not in the business of putting all ideas on a level playing field.²⁴⁵ This does not mean, however, that protecting student speech that dissents from the official state viewpoint is unimportant. Because school is the setting where the government's own voice is most likely to dominate the marketplace of ideas, a robust marketplace of student speech can serve as a counterweight and check on the government's ability to indoctrinate students through public education.²⁴⁶ Because the viewpoint-differential effects of restricting student speech under *Tinker* will tend to make student expression echo the school's preferred viewpoint, allowing viewpoint-discriminatory effects is cause for concern. This is clearly the case with my example in which a school bans anti-gay T-shirts while allowing pro-gay shirts. This tends to make the student speech environment mirror the school's official position, and so it is understandable that conservative Christians would complain that such a rule threatens to make the public schools a place where students are treated as closed-circuit recipients of only that which the State chooses to communicate.²⁴⁷

²⁴⁰ 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.").

²⁴¹ Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 636-40 (2003).

²⁴² Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion limiting school authority to remove books from a school library for ideological reasons).

²⁴³ Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 103 (2002) (arguing for an "anti-indoctrination" principle that would apply to all aspects of the educational process that are not "an inherent by-product of pedagogical choices").

²⁴⁴ *Id.* at 104 (acknowledging that to "prohibit schools from conveying values . . . would effectively preclude schools from teaching anything"); Ryan, *supra* note 196, at 1419.

²⁴⁵ Cf. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 416-17 (1991) (explaining that a core function of university education includes "the regulation of expression to enhance its quality" and that academic speech "is subject to disciplinary norms deemed to facilitate criticism and discourse").

²⁴⁶ See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 224-25 (1983); Buss, *supra* note 6 at 533.

²⁴⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Both the marketplace distortion argument and the prophylactic argument point to the same outcome: a rule that would require speech restrictions within *Tinker*'s domain to have substantially viewpoint-neutral effects. Consequently, both arguments suffer the same practical flaws insofar as they lead to consequences that are incompatible with *Tinker* and the institutional needs of public schools. I argue that an effects rule, whatever its justification, is ultimately indefensible because of the bad results its implementation would produce. I will first outline the practical difficulties and unacceptable consequences that would flow from the adoption of an effects rule. I then briefly question whether the underlying premises of the marketplace distortion argument are attractive ones, especially from the standpoint of advocates who seek to protect the rights of public school students to publicly declare their opposition to homosexuality while at school.

B. A Consequentialist Argument Against an Effects Rule

An effects rule would require that all *Tinker*-governed regulations of student speech have viewpoint-neutral effects. If we imagine speech regulations that will be facially content-based (as is the case with most restrictions governed by *Tinker*), the rule would require that any school restrictions on speech take the form of subject-matter restrictions rather than viewpoint-based restrictions. Whatever the rationale supporting an effects rule, its consequences seem deeply incompatible with the logic of *Tinker*. Here's the basic argument: First, the implementation of an effects rule would depend to an unacceptably great degree on the extremely murky distinction between viewpoint-based restrictions and subject-matter restrictions. This murkiness leads to uncertainty in application, of course, but that could be said of a great many legal rules. Of more import is that intellectually honest application of the distinction will require *Tinker*-governed speech restrictions to be fairly broad in scope. If we make the very plausible assumption that not all viewpoints within a given subject matter are equally disruptive,²⁴⁸ a requirement that schools regulate student speech by subject matter would leave schools on the horns of a dilemma. Impaling themselves on the first horn, schools could impose subject-matter restrictions that would cover both disruptive and nondisruptive speech; but schools would likely find this unpalatable as a matter of policy and the restriction of nondisruptive speech would be unconstitutional to boot. The other horn of the dilemma consists in accepting the proposition that under *Tinker* schools can only regulate where all speech covered by the restriction meets the substantial disruption standard *and* the regulation has no substantial viewpoint-differential effects. In other words, schools would be powerless to act in situations where not all viewpoints are

²⁴⁸ For example, compare a T-shirt with a picture of a burning cross surrounded by hooded figures wearing white and a T-shirt with a picture of Dr. Martin Luther King, Jr. giving his "I Have a Dream" speech at the Lincoln Memorial. These shirts can be seen as expressing different viewpoints on the subject of race relations, but their potential to disrupt the work of the school seems quite different. See Bowman, *supra* note 24, at 203 ("Simply stated, some viewpoints are more disruptive than others.").

equally disruptive. Such a rule would hamstring schools' abilities to perform their educational missions to a greater degree than *Tinker* would ever contemplate. Any reading of *Tinker* that would lead to these consequences must be incorrect. That is the consequentialist argument in a nutshell. I now turn to developing the argument in more detail.

Suppose that a school has found that Confederate-flag speech or anti-gay speech is disruptive and wants to restrict the wearing of Confederate flags or the communication of anti-gay messages. Under an effects rule, a school wishing to restrict these categories of speech must broaden its speech restriction to a point where it can be said to regulate on the basis of subject matter rather than viewpoint. Unfortunately, the distinction between subject-matter and viewpoint restrictions is, to say the least, amorphous. The difficulties are especially great where the controversial student speech is religiously motivated, as much controversial speech in the schools surely is.²⁴⁹ As *Lamb's Chapel*, *Rosenberger*, and *Good News Club* indicate, the Supreme Court seems willing to treat a category as broad as religious speech as a viewpoint.²⁵⁰ In at least some contexts, then, it appears that a rule would have to be quite broad to count as a permissible subject-matter restriction rather than an impermissible viewpoint restriction. And the more this is true, the greater the costs of a *Tinker* viewpoint-neutrality requirement in either suppressing nondisruptive speech or restricting schools' authority to limit speech that disrupts the schools' work. In addition, the viewpoint/subject-matter distinction seems to be a function of the level of generality at which we describe the subject matter at issue,²⁵¹ and thus any requirement turning on that distinction will prove difficult to administer.²⁵²

²⁴⁹ See generally *id.*

²⁵⁰ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

²⁵¹ Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 354 (1997) ("One way of viewing the difficulties in characterizing a regulation as content-neutral, content-based, or viewpoint-based is that it largely depends on the level of generality of the question asked."). Judge Reinhardt provides a memorable illustration of the point:

[S]hould a library's decision to exclude all books concerning astrology be treated as content discrimination, because astrology is a subject matter about which astrologers (and others) may have different views, and the library has excluded all discussion of that subject matter? Or should such a policy be treated as viewpoint discrimination because with respect to the subject matter of the study of the heavens, the library affords preferential treatment to the science of astronomy and bans the study of astrology?

Giebel v. Sylvester, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001). The answer to these rhetorical questions depends entirely on the level of generality at which the topic of conversation is defined, and for this reason Judge Reinhardt describes the subject matter/viewpoint discrimination distinction as "tenuous." *Id.*

²⁵² Of course, one ready response to this is that current Supreme Court doctrine sometimes makes results turn on the distinction, and thus it is at least administrable enough. The point is fair, though

The basic idea of the distinction between subject-matter and viewpoint-based restrictions is that in the first instance, the government chooses to remove a certain topic (and thus all the competing positions on that topic) from the agenda for discussion.²⁵³ This may impoverish public discourse and will reduce overall opportunities for speech, but (at least in theory) it generally will not have much effect in skewing public debate in favor of some ideas at the expense of their natural competitors.²⁵⁴ All are equally disadvantaged by the loss of one set of opportunities for expression and thus must shift their expressive energies to other venues. In contrast, viewpoint restrictions skew debate by giving some competing viewpoints free rein at the expense of others. Yet to decide whether all the positions on a particular subject are excluded from debate or only some are, we need to know how to describe what the debate is about. The problem, of course, is that "the debate" can be described at different levels of generality; whether a restriction appears to concern a viewpoint or a subject matter depends on the level of generality chosen.²⁵⁵ To illustrate the last point, consider some different possible characterizations of the subject matter/viewpoint distinction in the context of different pairs of student T-shirts.

Consider the contrast between a shirt that reads, "Homosexuality is shameful. Romans 1:27," and another that reads, "It's OK to be gay." These shirts adopt opposing viewpoints on the moral permissibility of homosexual conduct. To allow one point of view rather than the other looks like viewpoint discrimination within this debate. But what happens if we compare the first shirt with another that simply says "Tolerance"? In the context of a particular school, such a shirt might be seen as speaking to matters of sexual orientation (among other things) and saying that tolerance in these matters is a good thing. Would allowing the "Tolerance" shirt but not the "Homosexuality is shameful" shirt involve viewpoint discrimination? That depends on how we characterize the subject. In the previous example, the subject matter was characterized as a discussion of the moral permissibility of homosexual conduct. A shirt proclaiming the virtue of tolerance might express the idea that we should tolerate homosexuality (among other things) because there is nothing wrong with it, but tolerance is usually understood as an attitude taken toward things the speaker does not altogether approve.²⁵⁶ The message might then be: Whatever the moral status of homosexual conduct, gay people should not be harassed or mistreated.²⁵⁷ On that interpretation, this is not a position on the morality of

I think it also can fairly be said that the Supreme Court's efforts to administer the distinction have not inspired confidence.

²⁵³ Sadurski, *supra* note 251, at 323-24.

²⁵⁴ The claim that subject-matter restrictions do not skew public debate may be too optimistic in many circumstances. See Laycock, *supra* note 28, at 126 ("To prohibit discussion of animal rights, or estate taxes, or the Electoral College, is to prevent any criticism of an entrenched status quo, and to silence a minority that vigorously disagrees with that status quo.").

²⁵⁵ Sadurski, *supra* note 251, at 322; Kagan, *Changing Faces*, *supra* note 26, at 70.

²⁵⁶ Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 310 (1990).

²⁵⁷ Unfortunately, the case law indicates that even this minimal message is not universally accepted. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996) (describing brutal pattern of harassment and violence against gay student).

homosexual conduct, and so we might say that it could be allowed even if both the shirts in the prior example are disallowed. Yet it is also possible and probably more plausible to see the tolerance shirt as a viewpoint in a broader debate about the proper attitude to take toward homosexuals, an attitude in which viewpoints of moral condemnation, moral approval, and tolerance (perhaps here a kind of moral agnosticism) all compete.

Obviously, the same problems of characterization can arise with respect to racial issues. In *Castorina*, for example, the court expressed concern that Confederate flag T-shirts were prohibited but X shirts were not.²⁵⁸ Both types of shirts are subject to multiple interpretations. While both can arguably be worn to express pride in the wearer's identity, both can also be seen as carrying messages that are racially divisive. Both can be seen as advocating positions that portray whites and blacks as at odds with each other.²⁵⁹ It is at least understandable, then, why the *Castorina* court thought that allowing X T-shirts but not Confederate flag shirts would involve viewpoint discrimination. To put it very crudely, the court's thought seemed to be that if Confederate flag shirts are pro-white and anti-black and X shirts reverse those values, treating them differently would be viewpoint discrimination. But what of a T-shirt with a picture of black and white hands clasped in an image of racial harmony?²⁶⁰ Or a shirt proclaiming the need for racial diversity? Would allowing these shirts be an instance of viewpoint discrimination if the Confederate flag shirts and the X shirts are disallowed? It depends on how broadly we characterize the subject matter. If it is permissible to consider racially divisive speech as a subject matter and to treat exhortations toward racial harmony as falling outside that subject matter, then allowing the "harmony" or "diversity" T-shirts would not lead to viewpoint-discriminatory effects. On the other hand, at least some wearers of Confederate flag T-shirts will no doubt feel that the debate is being skewed and that endorsement of racial harmony, equality, or diversity is simply another viewpoint on the wider subject matter of race relations. To treat racially divisive speech as a subject matter may only seem to disguise the fact that the school's policy would produce an environment where student speech would be shaped to echo and reinforce the school's own message. If anything, the latter characterization seems more plausible.

The Sixth Circuit's opinion in *Barr v. Lafon*²⁶¹ illustrates the difficulty of the characterization issue even more vividly than *Castorina*. In *Barr*, students challenged the restriction of their Confederate flag shirts as viewpoint discrimination. The school's dress code forbid clothing that "causes disruption to the educational process," and the school had informally but explicitly identified Confederate flag symbols as disruptive. The court considered several different

²⁵⁸ *Castorina*, 246 F.3d at 541.

²⁵⁹ The characterizations here are admittedly crude. For qualifications and caveats, see *supra* note 140.

²⁶⁰ Cf. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 750 (5th Cir. 1966) (describing "freedom buttons" worn by African-American students which depicted "a black and white hand joined together with 'SNCC' inscribed in the margin").

²⁶¹ See *supra* notes 149-66 and accompanying text for the initial discussion of this case.

characterizations of the school rule constituted by these policies, including: (a) the rule as a ban on “racially divisive speech” which discriminated on the basis of viewpoint within the broader subject matter of race;²⁶² (b) the rule as a viewpoint-neutral ban on the subject matter of “racially divisive speech;”²⁶³ (c) the rule as a ban on “disruptive speech” which applied to all viewpoints that might give rise to disruption;²⁶⁴ and (d) the rule as a viewpoint-neutral ban on the subject matter of the Confederate flag.²⁶⁵

One problem with an effects rule, then, is that it would require courts to decide such questions as whether a rule prohibiting both X shirts and Confederate flag shirts but permitting shirts with messages of racial harmony is *really* a viewpoint-based restriction or a subject-matter restriction. The initial answer is that it is both, depending on how we describe the debate. It may be overly hasty, though, to conclude that there is no possibility at all of drawing lines here. Some characterizations of “what the debate is” may well be more illuminating and appropriate than others. But to the extent that this is so, broader characterizations of what the debate is about tend to be more illuminating. It is not going to be convincing, for example, to say that a ban on anti-gay or Confederate flag T-shirts is part of a subject matter restriction encompassing all viewpoints in a debate about “which race is superior” or “which sexual orientation” is superior.²⁶⁶ It is far more plausible to see the relevant debates as broader discussions about the proper attitudes to take towards sexual orientation and race.

If that is correct, an effects rule will require that schools craft their speech restrictions quite broadly. And the more broadly these restrictions are crafted, the more the effects rule seems to force schools onto the horns of a dilemma. It may well be the case, for example, that Confederate flag shirts tend to provoke disturbances in ways that shirts bearing images of racial harmony do not. If the school must restrict the entire subject matter of “speech concerning race relations” to maintain viewpoint-neutrality, it will have to restrict a good deal of

²⁶² Barr v. Lafon, 538 F.3d 554, 571 (6th Cir. 2008). The plaintiffs suggested that banning racially divisive speech but allowing racially inclusive speech constituted viewpoint discrimination within the subject matter of race relations.

²⁶³ *Id.* The school contended that racially divisive speech was a subject matter, and that its speech policies were viewpoint-neutral in restricting both Confederate flag iconography and Malcolm X iconography.

²⁶⁴ *Id.* at 572. The category of “disruptive speech” cannot really be said to identify a subject matter or a viewpoint. It is a facially content-neutral category which is “content-based as applied,” see *supra* note 109 and accompanying text. Such a rule can be said to be viewpoint-neutral in so far as it is enforced against all disruptive speech regardless of its viewpoint, but it will have viewpoint-discriminatory consequences to the extent that some viewpoints cause more disruption than others.

²⁶⁵ *Id.* (stating that “both proponents of racial tolerance and proponents of racial hatred are forbidden to display the Confederate flag” and “there is no evidence that the ban on disruptive symbols would not have been applied equally to a student displaying a Confederate flag in solidarity with hate groups, and another who displayed a Confederate flag in a circle with a line drawn through it”).

²⁶⁶ The point is more obviously correct with regard to debates about gay rights because, so far as I am aware, gays and their supporters (unlike their straight detractors) do not argue that their sexual orientation should be privileged over alternative ones.

nondisruptive speech. This seems preposterous, for how can it be consistent with *Tinker* to allow a school to suppress speech that neither disrupts the work of the school nor interferes with the rights of other students? A regulation that indiscriminately sweeps both disruptive and nondisruptive speech within its scope would appear to be invalid for overbreadth.²⁶⁷ Nor does it make any sense to imagine schools restricting all student expression on the subject of race relations when this is presumably a significant subject in the school's own curriculum.²⁶⁸ To ban shirts supporting racial harmony or appreciation of diversity is for schools to prevent students from echoing a message that the school itself is trying to put across. These consequences seem counterintuitive, to say the least. Further, the concept that the nonharmful speech of some can be restricted in order to amplify the voices of others has been said to be foreign to our First Amendment.²⁶⁹ For all these reasons, it is not surprising that (so far as I am aware) no one explicitly makes the argument that schools should restrict nondisruptive speech in order to level the speech playing field at the school.²⁷⁰ Instead, the assumption made by those who press for an effects rule seems to be that the school must simply leave both sides of a controversy unrestricted, even if this means tolerating substantial disruption of the school environment. In other words, the upshot of an effects rule is supposed to be that a school can only restrict speech where (a) all the speech being restricted is substantially disruptive and (b) the speech restriction would not give rise to significant viewpoint-differential effects.

This interpretation of what an effects rule might require is certainly more plausible than the alternative. But consider its consequence. It follows under this rule that where different viewpoints cause different degrees of disruption, the school would simply be powerless to act. To restrict the entire subject matter would impermissibly restrict nondisruptive speech in violation of (a), while restricting only the disruptive speech would violate (b). That, I submit, is an implausibly severe limitation on the level of school authority contemplated in *Tinker*. For all its rhetoric of individual rights, *Tinker* meant to preserve school

²⁶⁷ Granted, the overbreadth must be substantial, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001), but this requirement would easily be met on the facts I have imagined.

²⁶⁸ The *Barr* court made exactly this point in explaining its decision to treat the school's speech policies as restricting the subject matter of "racially divisive speech." *Barr*, 538 F.3d at 572. The court's instincts here were certainly sound, but its resolution of the characterization issue is frankly consequentialist. Rather than attempting to determine the "one true characterization" of the school's rule, it simply opted for the characterization that made sense as a policy matter. Under the approach advocated in this article, the *Barr* court ought to have decided whether the school's ban had to extend to racially inclusive speech as well as racially divisive speech by assessing the disruptive potential of both kinds of speech, not by applying (or manipulating) the distinction between subject-matter restrictions and viewpoint-based restrictions.

²⁶⁹ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

²⁷⁰ Even if it were constitutional for schools to choose to restrict nondisruptive speech in an effort to maintain viewpoint neutrality in the effects of their speech regulation, they would probably be unwilling to do so. The need to restrict so much speech the school would otherwise welcome would function as a kind of poison pill that would tend to discourage speech regulation.

authority to regulate speech that jeopardized the educational process.²⁷¹ Readings that would severely undercut this ability seem inconsistent with *Tinker*.

The upshot of my analysis, then, is that reading *Tinker* to require substantially viewpoint-neutral effects leads to consequences that either violate other First Amendment principles (by restricting nondisruptive speech) or clash with the case's reasoning and the institutional needs of the public school (by unduly restricting school authority over disruptive student speech). The only way to avoid these consequences would be for courts to take advantage of the manipulability of the subject matter-viewpoint distinction by declaring that, for example, Confederate flag bans are subject-matter restrictions and do not violate a viewpoint-neutral effects rule after all. This may be one explanation of how courts have largely managed to overlook the viewpoint-discriminatory effects in cases involving school restrictions on representations of the Confederate flag. What seems uncontroversial does not look like a viewpoint at all,²⁷² and the need for acceptance and understanding of racial differences is (deservedly) a contemporary orthodoxy. In contrast, the spectre of viewpoint discrimination is much more visible in cases like *Harper v. Poway Unified School District*²⁷³ precisely because issues involving gay rights are so socially contested. Nevertheless, an uncontroversial viewpoint is still a viewpoint; consequently, this "solution" to the dilemma posed by an effects rule is no solution at all. It is far better to frankly acknowledge the viewpoint-discriminatory effects of some school speech restrictions and to see these effects as an acceptable byproduct of school efforts to deal with the harms of disruptive speech. So long as there is no purposeful viewpoint discrimination, these effects pose no constitutional problems.

B. Meiklejohn and the Marketplace Distortion Argument: Be Careful What You Wish For

I have argued that the implications of adopting an effects rule are unacceptable. Probably the only constitutional way to implement the rule would leave schools with less authority to regulate disruptive speech than is contemplated by *Tinker*, and less authority than schools need. I believe these practical points compel rejection of both the prophylactic and marketplace distortion arguments for an effects rule. I now turn to an additional theoretical problem that is specific to the marketplace distortion argument for an effects rule. Even though the claim that viewpoint discrimination gives rise to distorting

²⁷¹ *Tinker* famously states that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393, U.S. 503, 506 (1969). Just as significantly, if less famously, the Court said that these speech rights must be "applied in light of the special characteristics of the school environment," and observed that it had "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 506-07.

²⁷² Kagan, *Changing Faces*, *supra* note 26, at 70.

²⁷³ 445 F.3d 1166, 1183 n.28 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

effects in the speech market is a standard feature of most accounts of the trouble with viewpoint discrimination, it ought to be greeted with some degree of skepticism.

To explain why this is so, I begin with Elena Kagan's suggestion that we distinguish between three broad approaches to the First Amendment: approaches that focus on the effects of speech restrictions on speakers, those that focus on the effects of speech restrictions on the audience, and those that focus on making sure that the government has not acted for illegitimate reasons.²⁷⁴ The first approach sees the value of speech largely from the standpoint of the individual's interests in autonomous self-expression, and as such any restriction on any individual's speech demands justification.²⁷⁵ From this standpoint, restricting non-disruptive speech in order to avoid viewpoint-discriminatory effects appears to interfere with individuals' autonomy interests without sufficient reason. Similarly, a purpose-based approach would suggest that there is no need to police viewpoint-discriminatory effects so long as it can be established that the government has not actually acted for an improper reason. Either of these approaches seems consistent with the *Tinker* opinion. It is really the audience-based theory that most strongly supports an effects-rule reading of *Tinker*.

From this point of view, most often associated with the work of Alexander Meiklejohn, the important point is not how restrictions affect individual speakers but how they affect the overall speech environment: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."²⁷⁶ This is where the problem lies. The idea that government should aim at an undistorted speech marketplace assumes some baseline for what that market would look like. But, as Kagan points out, it is entirely unclear how to define such a baseline.²⁷⁷ The working baseline might be the state of the speech market prior to the government intervention, but this baseline is hard to justify if the overall aspiration is to create an environment in which the search for truth is most likely to be successful. There is no particular reason to think that the status quo marketplace of ideas in the public schools is somehow pure or undistorted. For one thing, the speech marketplace is already shaped in a variety of ways by the structure of other laws.²⁷⁸ In addition, social pressure from peers, teachers, and administrators in the schools may effectively silence dissenting voices.

Consider in this regard the facts of *Bragg v. Swanson*,²⁷⁹ a case involving the suspension of a student for wearing a Confederate flag belt buckle. The court invalidated the suspension on the grounds that Confederate symbols had been regularly worn at the school for years without any disruption, and followed *Castorina* in suggesting that restricting only Confederate flags would amount to

²⁷⁴ Kagan, *supra* note 35, at 423-27.

²⁷⁵ *Id.* at 424.

²⁷⁶ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1965).

²⁷⁷ Kagan, *supra* note 35, at 448-50.

²⁷⁸ *Id.* at 448.

²⁷⁹ 371 F. Supp. 2d 814 (S.D. W. Va. 2005).

viewpoint discrimination in the school's marketplace of ideas.²⁸⁰ Yet consider the marketplace in question. The school had fourteen black students out of a student body of 1,000 or so,²⁸¹ so it is perhaps not mysterious that no one had ever protested the wearing of Confederate flag symbols. This is hardly an environment in which ideas are likely to compete on a level playing field. Similarly, at many schools peer pressure undoubtedly dissuades gay students from coming out and from expressing their opinions on some issues.²⁸² Why should it be assumed that a laissez-faire stance regarding speech about issues like race and gay rights will preserve or produce an undistorted speech market?

In fact, the idea that schools have a duty to maintain a neutral speech marketplace can lead toward exactly the kind of speech regulation championed in *Harper v. Poway Unified School District*. As Judge Reinhardt would have it, perhaps derogatory speech targeting core personality characteristics is so damaging that it must be restricted to remove pre-existing distortions in the speech market that silence gay and lesbian points of view. The question of the general viability of a collectivist, Meiklejohn-inspired approach to speech regulation is obviously well beyond the scope of this paper,²⁸³ but suffice it to say here that the idea is problematic within the public school context. It ought to seem especially worrisome to those who wish to provide greater protection for students like Tyler Harper, students who wish to express their religious dissent from what they regard as pernicious secular, liberal orthodoxies. Once the government is licensed to actively balance the speech market, there is no guarantee that the balancing will not cut in the other direction. These worries about the effects argument and the idea of an undistorted speech market provide a further reason for doubting the wisdom of an effects-rule approach to *Tinker*.

To sum up my claims about the operation of the substantial disruption rule, I contend that *Tinker* must be read to preclude purposeful viewpoint discrimination. Even where speech causes material and substantial disruption and hence is subject to regulation under *Tinker*, courts should examine the fit between the evidence of disruption and the viewpoints being regulated in order to ensure that the school's actions are truly harm-based rather than based on an impermissible, ideological purpose. Once it has been established that the restriction of speech is truly based on judgments about differential potential for harm, however, viewpoint-differential effects are acceptable. In a nutshell, *Tinker's* material and substantial disruption standard precludes speech regulations that are viewpoint discriminatory in purpose but allows regulations that are viewpoint discriminatory in effect.

²⁸⁰ *Id.* at 827, 828 & n.10.

²⁸¹ *Id.* at 816.

²⁸² Judge Reinhardt's opinion in *Harper* discusses social science literature that generally supports this conclusion. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 n.28 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

²⁸³ For commentary on this general question, see generally Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

VIII. HARPER AND THE RIGHTS OF OTHERS

The Ninth Circuit's panel decision in *Harper* did not rely on *Tinker's* substantial disruption prong, and it is unlikely that the evidence of disruption presented in the case would have been sufficient to satisfy that prong.²⁸⁴ On my analysis, then, the failure of the school to prove substantial disruption would leave un rebutted the inference that the school had acted on an impermissible ideological purpose in refusing to let Tyler Harper wear his T-shirt. It is the failure to prove substantial disruption, and not the viewpoint-differential effects per se, that make the school's actions in *Harper* subject to criticism as an instance of viewpoint discrimination. The *Harper* panel did not see the case this way, however, because it relied on the idea that Harper's T-shirt violated *Tinker's* rights-of-others prong.²⁸⁵ Given my analysis thus far, it will be no surprise that I believe viewpoint-differential effects on student speech may be acceptable as a byproduct of otherwise valid speech regulations under the rights-of-others prong. The more difficult question is what would count as an otherwise valid speech regulation under this prong.²⁸⁶

Giving independent force to the rights-of-others prong could substantially increase school authority to restrict student speech. Specifically, it might allow restriction of a good deal of religiously motivated speech critical of homosexual conduct and homosexuals. Yet courts have rarely relied on this aspect of *Tinker*.²⁸⁷ and it is unclear what it adds to the material and substantial disruption prong.²⁸⁸ One strand in the majority's argument in *Harper*, for example, is the

²⁸⁴ *Harper*, 445 F.3d at 1171 (summarizing history of disruptions that had arisen in connection with the observation of the previous year's "Day of Silence").

²⁸⁵ *Id.* at 1177-83.

²⁸⁶ This is not the place for a full attempt to answer this question, and what I say here is necessarily sketchy. I am, however, sympathetic to the general approach suggested by Emily Waldman. Waldman, *supra* note 33. Professor Waldman and I agree, for example, that schools should have significantly more authority to regulate speech directed at particular students than to regulate nondirected speech and that *Harper* gave insufficient weight to this point. *Id.* at 497. We differ in that I see these points as flowing from a proper interpretation of *Tinker's* rights-of-others prong, while she would root them in her reading of *Morse v. Frederick*. *Id.* at 496 & n.170.

²⁸⁷ In fact, *Harper* appears to be the only case ever to invalidate a student-speech restriction under the rights-of-others prong. Waldman, *supra* note 33, at 476. In *Nuxoll v Indian Prairie School Dist. No. 204*, 523 F.3d 668 (7th Cir. 2008), Judge Posner's majority opinion is strikingly reminiscent of Judge Reinhardt's *Harper* opinion in many respects. For example, Posner suggests that a school has the authority to restrict T-shirts bearing slogans like "blacks have lower IQs than whites" or "a woman's place is in the home" because it is reasonable to think the psychological effects of such statements will hamper educational performance. *Id.* at 674. Even so, Judge Posner declined to hold that a "Be Happy, Not Gay" T-shirt could constitute an invasion of the rights of others under *Tinker*. *Id.* at 672.

²⁸⁸ A minimal reading of what the rights-of-others prong might mean was offered by Judge Kozinski in his *Harper* dissent. *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) (stating that this prong "can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established"). Judge Kozinski also noted that while the First Amendment might permit the sanctioning of

idea that student condemnations of homosexuality or other verbal assaults based on a student's core identifying characteristics tend to interfere with the educational performance of those students.²⁸⁹ If *Tinker's* first prong stands for the idea that schools can temper the speech rights of students when this is necessary to fulfill the school's educational goals, surely this would allow a school to restrict speech that materially and substantially interfered with the ability of some students – or even one student – to learn. A school's responsibility to further the education of its charges should extend to each student individually, and not simply to the mass of students.²⁹⁰ In *Harper* itself, however, the majority and the dissent sharply disagreed about whether the school had produced the requisite evidence that restricting Harper's T-shirt was needed to preserve an environment where it would be possible for gay students to learn. The majority insisted it could take judicial notice of the negative educational affects on gays, where the dissent would have demanded record evidence on the issue.²⁹¹ No doubt there could be further disputes about what kind of evidence would be sufficient for a school to make a reasonable forecast that certain speech will substantially impact the classroom work of gay students.²⁹² On this reading, though, the rights in question are rights to fully participate in the educational mission of the school, and the gap between the first and second prongs of *Tinker* is not that great.

To the extent the rights-of-others prong does operate independently of the substantial disruption prong, it must be interpreted as consistent with the general principle that the government may not restrict expression simply because it disagrees with the message being conveyed. To be justifiable, speech restrictions must be based on the idea that some speech causes special harm to the rights of other students. Parts of Judge Reinhardt's reasoning fit into this mold, as he suggested that insults based on core identity characteristics cause a special kind

harassment sufficiently severe and pervasive to be "tantamount to conduct," *id.*, Harper's harassment was similar to the non-actionable "simple acts of teasing and name-calling" described in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting).

²⁸⁹ *Harper*, 445 F.3d at 1178-80.

²⁹⁰ *Accord* Waldman, *supra* note 33, at 501. Waldman suggests that a Third Circuit decision offers some judicial support for this position. *Id.* at 479 (citing *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

²⁹¹ *Compare Harper*, 445 F.3d at 1178-80 (majority opinion), *with id.* at 1198-99 (Kozinski, J., dissenting).

²⁹² For example, would social scientific literature documenting the general effect be enough or would some evidence more particular to the school (or even the individual students) be required? On the specific question of whether the evidence was sufficient in *Harper*, the dissent perhaps had the better argument. Certainly the problems of gay students are real, and some of the social science evidence cited by Judge Reinhardt reaches conclusions that seem like common sense. On the other hand, it is odd for the court to rely so heavily on evidence that is not undisputed in the social science literature, *id.* at 1199 (Kozinski, J., dissenting), and that had not been subjected to any sort of adversarial testing within the courtroom. Where a school restricts speech with which it demonstrably disagrees in ways that have highly predictable viewpoint-differential effects, a stronger showing ought to be necessary to rebut the inference that the school has acted for an impermissible ideological purpose.

of harm that other sorts of derogatory expression do not.²⁹³ But as my earlier discussion of the substantial disruption rule indicates, it can be difficult to determine when speech regulation is harm-based and when it is based on ideological reasons. Where the government believes that certain speech causes especially great harms to certain populations, it will very likely disagree with the message of that speech (at least assuming the government identifies with the needs of the affected population). Judgments about the harmfulness of the message and hostility to the message tend to influence each other, and it can be difficult to distinguish one from the other.²⁹⁴ Ultimately, and again as in the earlier discussion of the substantial disruption prong, the motivational question is whether the government would have regulated in the same way in the absence of impermissible factors. It should take a very serious inroad on a student's rights "to be secure and to be let alone"²⁹⁵ before a court should be confident that the school's speech regulation is harm-based rather than ideologically based.

Harassing speech directed at particular students would presumably qualify as a violation of the rights of others.²⁹⁶ A T-shirt declaring that homosexuality is sinful is one thing; a shirt declaring that God has condemned John Doe to hell for his acts of sodomy is another. A school need not tolerate the latter even if it must tolerate the former.²⁹⁷ But once we move away from speech that is directed at particular students, matters become more difficult. Part of the appeal of Tyler Harper's case was that he did little more than express (in a relatively mild way) his religiously grounded belief that homosexual behavior is wrong. If his T-shirt can be restricted, it is unclear what he *would* be allowed to say to express his opposition to the views of other students and of the school regarding gay rights.

These points suggest that *Harper's* reading of the rights-of-others prong poses especially high risks of allowing schools to engage in purposeful viewpoint discrimination. If, as Judge Kozinski suggested, the right violated by Harper's T-shirt was simply a right to be free from exposure to certain viewpoints,²⁹⁸ school efforts to enforce that "right" seem like purposeful viewpoint discrimination pure and simple. The majority, of course, responded that this characterization of its reasoning was too crude. The point, it said, is that verbal assaults based on core

²⁹³ *Harper*, 445 F.3d at 1181-82.

²⁹⁴ Kagan, *supra* note 35, at 435; Stone, *supra* note 34, at 225.

²⁹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

²⁹⁶ Perhaps some threshold for the severity of the harassing speech would be needed here; but if directed harassment meets that threshold, it ought to count as interference with the rights of others under *Tinker* even if the particular student targeted for harassment is so resilient that his or her educational performance is not affected.

²⁹⁷ Cf. Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863-67 (1992) (drawing a distinction between directed and non-directed harassing speech, and arguing that regulation of the former is less constitutionally problematic). Note that some of the nastiest sorts of harassing speech (racial or ethnic slurs, for example) would already be unprotected as "plainly offensive" under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). In the example given, in contrast, it is only the message that is offensive and not the manner of expression, so *Fraser* would not apply.

²⁹⁸ *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting).

identifying characteristics cause a special kind of harm that other sorts of insults do not.²⁹⁹ But the line between what counts as purposeful viewpoint discrimination and what counts as regulation based on the special harms experienced in response to certain speech is exceedingly thin. Indeed, some would say that even attempting to draw such a line is mere wordplay.³⁰⁰ Even if one can make the distinction in the abstract, it is not easy to see how this can be operationalized through a decision rule. The relationship between the content of the speech and the harm it causes is less contingent than in ordinary cases. Indeed, speech with a different content couldn't cause these particular harms. In contrast, typical cases decided under the substantial disruption test involve harms like violent confrontations that are contingently related to the speech that prompts the concern.³⁰¹

The challenge, then, would be to construct an interpretation of the rights-of-others prong that recognizes only invasions of rights serious enough to demonstrate that the school would also have responded in similar fashion if it had agreed with the ideas being expressed. It is not clear that this can be done at all, but at the very least the sort of nondirected speech at issue in *Harper* should not have been subject to restriction under the rights-of-others prong.³⁰² To the extent that *Harper* can be read to allow schools to regulate speech based on the general idea that nondirected remarks based on certain personal characteristics are especially harmful, it may well allow a good deal of purposeful viewpoint discrimination to survive judicial review. Its use of the rights-of-others prong thus poses special dangers of viewpoint discrimination beyond those that exist under *Tinker's* more prominent substantial disruption prong.

IX. PURPOSE AND EFFECTS RULES: AN OBJECTION AND RESPONSE

Before concluding, I pause to address what may be a lingering question for some readers: Will there really be any practical difference between my reading of *Tinker* as a purpose rule (implemented through a substantial disruption and narrow tailoring test) and the rejected reading of *Tinker* as a rule prohibiting viewpoint-discriminatory effects?

The schematic, hypothetical scenarios discussed in Part VI suggest a variety of circumstances where *Tinker* might justify a school in adopting a speech rule with viewpoint-differential effects. For example, a school might decide to ban only anti-gay T-shirts where these have proven disruptive and pro-gay T-shirts

²⁹⁹ See *id.* at 1182.

³⁰⁰ The charge of "wordplay" is part of the debate between Justice Scalia's majority opinion and Justice Stevens's concurrence in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392-93 (1992).

³⁰¹ For example, the Confederate flag cases previously discussed indicate that the wearing of representations of the Confederate flag is quite disruptive in some environments but causes little or no disruption in others.

³⁰² Such speech might be subject to restriction under the substantial disruption rule, however, with appropriate evidence of interference with the educational performance of other students. See *supra* notes 289-92 and accompanying text.

have not. One might wonder how often this could be true. Much of the time, one suspects, violent confrontations in school illustrate the adage that it takes two to tango. And if different groups of students are involved in a T-shirt "debate" that escalates toward violence, it will usually be difficult to say that one side's speech is the source of substantial disruption while the other's is not. Even if we imagine that in every altercation the first punch is thrown by the pro-gay faction, is it really logical to say this means that it is the anti-gay shirts that are prompting the disturbances and that only they should be restricted? If only one side of the debate is to be restricted, isn't there an (at least) equally strong argument that it should be the side that keeps throwing the first punches? Under circumstances like this, surely most school administrators would act by stopping the T-shirt debate altogether in an effort to defuse tensions and reduce the level of violence.

Tinker ought to allow school administrators to take this action, and on my reading it does. By hypothesis, the school has already tried to deal with the situation by punishing the students who participated in the confrontations, but this has not worked and the school should be allowed to take more drastic measures. It is easy enough to say that in the context of an ongoing T-shirt war, the school has ample ground to forecast disruption from the wearing of shirts on either side of the debate. Even if one wanted to press the idea that only the anti-gay shirts have actually prompted disruption, in this kind of context the shirts on the other side seem relevantly similar in their potential for violence. A decision in the imagined circumstances to restrict only one side of the debate would, on my analysis, raise serious questions of underinclusiveness that would suggest purposeful viewpoint discrimination. In a case like the one described, then, my analysis may reach the same conclusion as an effects rule: the school engages in forbidden viewpoint discrimination if it does not restrict the entire debate. A skeptical reader might well ask: "Given that conclusion, why insist so strongly that courts should not add a no-substantial-viewpoint-differential-effects rule to *Tinker*? To put it bluntly, so what?"

My first line of response is that there is a conceptual difference between seeing an even-handed restriction as required by the need for the school's actions to closely fit the goal of preventing disruptions and seeing the restriction as required by the school's obligation to keep the speech playing field level. The first concern is at the heart of *Tinker*, the second is not. And this conceptual difference affects how courts should conduct their analyses. Consider again the facts of *Barr v. Lafon*.³⁰³ There, the Sixth Circuit upheld a school speech rule banning "racially divisive symbols" on the ground that this was a viewpoint-neutral subject-matter restriction justified by fears of disruption based on past incidents of racial tensions and violence. In practical terms, this meant that the school prohibited Confederate flag iconography and Malcolm X iconography, but would not have prohibited racially inclusive iconography. Significantly, however, white students appeared to have been predominantly responsible for the prior racial incidents at the school. Confederate flag iconography had been involved in the prior racial incidents, but Malcolm X iconography had not.

³⁰³ See *supra* notes 149-66 and accompanying text.

The Sixth Circuit's analysis first asked whether the history of racial tensions gave the school a sufficient reason to ban Confederate flags, and concluded that it did. The rest of its analysis turned on the question of how broad the school's speech restriction had to be for it to be characterized as a permissible content-based subject-matter restriction rather than an impermissible viewpoint-based restriction. The court concluded that Malcolm X iconography had to be restricted because it expressed a competing viewpoint to Confederate flag iconography within the subject matter of "racially divisive" speech. Speech advocating racial harmony was not restricted since this was not a viewpoint within the subject matter of racially divisive speech.

This may well have been the right answer. I think the court was obviously right in not requiring the school to impose a restriction on the entire subject matter of race relations, although I find the question about the Malcolm X iconography to be closer. Yet even if the answer is right, making the analysis turn on the abstract and manipulable subject matter/viewpoint distinction is unsatisfying. The court ought to have evaluated the lines drawn by the school based on their responsiveness to the core value of preventing disruption. The reason why the school could not ban racial harmony shirts is not that "racially divisive speech" is best classified as a subject matter rather than a viewpoint. Applying the analysis developed in Part VI, I would say the real reasons such shirts could not be banned are that (a) there was no history of disruption tied to such shirts, and (b) the shirts were not similar to Confederate flag shirts in their disruptive potential. Malcolm X iconography presents a closer question because the similarity analysis is closer. Judgments about when speech is "similar" to other speech in its disruptive potential are not easy to make, and perhaps judgments about similarity are no more predictable than judgments about what counts as a subject of discussion and what counts as a viewpoint. Still, similarity judgments at least track the relevant values of *Tinker* in a way that application of the subject matter/viewpoint distinction does not; and this is a point in favor of my approach even where it may lead to the same result as an effects rule.

Further, I think the practical differences between my approach and an effects rule would be much greater if we move outside contexts where schools restrict speech to reduce the likelihood of violent confrontations. These situations are the most common form of disruption addressed in the case law, but they do not exhaust the meaning of substantial disruption. For example, I have already indicated that courts ought to recognize a substantial disruption under *Tinker* where speech is shown to substantially interfere with the educational performance of even one student.³⁰⁴ With a sufficient factual record regarding the effects on educational performance, even non-directed speech might be properly restricted by a school. The record in *Harper* was not sufficiently developed to substantiate this argument, and the question of what proof would be enough is difficult. In principle, however, Judge Reinhardt's argument that anti-gay speech undermines the educational performance of gay students could justify

³⁰⁴ See *supra* note 290 and accompanying text.

speech restrictions under *Tinker's* substantial disruption rule.³⁰⁵ In such a scenario, it would not be at all surprising if pro-gay speech were found not to have similarly negative educational effects on students who object to homosexuality. It would then follow on my view that *Tinker* would justify the school in restricting only the anti-gay speech, for that ban would be narrowly tailored to the goal of preventing the substantial disruption of the school's educational work. Proponents of an effects rule would, of course, see this scenario quite differently. This brief discussion raises many questions that are beyond the scope of this paper. For present purposes, it is enough to point out that even if the practical differences between my approach and an effects rule might be subtle in many situations governed by *Tinker*, they could be much more dramatic in other settings.

X. CONCLUSION

This article's conclusions about the substantial disruption rule can be briefly summarized. *Tinker* does not allow purposeful viewpoint discrimination, but it does allow viewpoint-discriminatory effects in the school speech environment as a byproduct of otherwise valid regulation. Because most school speech restrictions governed by *Tinker* are based on demonstrated or reasonably anticipated audience reactions and many are facially content- or viewpoint-based, all such restrictions are sufficiently suspicious to warrant heightened scrutiny via the substantial disruption test. If the school can prove that its speech restrictions are narrowly tailored to remedying or preventing a substantial disruption to the school environment, the suspicion of purposeful viewpoint discrimination is rebutted, and the speech restriction passes constitutional muster. If the school is unable to satisfy the substantial disruption test, the inference of purposeful viewpoint discrimination stands unrebutted, and the restriction violates the First Amendment. More tentatively, the article also suggests that *Harper's* expansive reading of the rights-of-others prong is troublesome, but holds out that the possibility that more cautious applications of that prong could be justified without regard to their viewpoint-discriminatory effects.

The common theme with respect to both *Tinker* prongs is that even if concerns about purposeful viewpoint discrimination can be seen as the driving force behind *Tinker*, the terminology of viewpoint-discrimination adds little to the *Tinker* analysis. Courts will do better to keep their focus on explicating the ideas of substantial disruption and, perhaps, invasions of the rights of others. If those ideas are properly developed – including application of the fit test suggested here – they provide the needed protection against purposeful viewpoint discrimination, which is all the protection *Tinker* should provide. There is no need to classify school speech rules as either subject-matter restrictions or viewpoint restrictions, for either sort of speech restriction should trigger serious constitutional analysis under *Tinker*. There is no need to characterize the effects

³⁰⁵ Judge Reinhardt's analysis tied this point to *Tinker's* rights of others prong, but he might have been better off to frame the argument as an application of the substantial disruption test.

of a rule on the school speech market as viewpoint-based or not, for the permissibility of viewpoint-differential effects depends on whether those effects are intended or incidental. And the answer to that question, I contend, is determined by application of *Tinker*, which serves as an indirect means of policing speech restrictions undertaken for impermissible ideological purposes. We can, if we wish, say that (some of the) speech restrictions that fail *Tinker* constitute viewpoint discrimination, but that conclusion will simply be a label for the outcome of a constitutional analysis in which the concept of viewpoint discrimination was largely superfluous.

It does not help to say that restricting Confederate flag shirts but not X shirts must be wrong because it constitutes viewpoint discrimination, which we all know is a bad thing. Whether the hypothesized pattern of speech restrictions is justified should depend on the application of the substantial disruption narrow tailoring analysis proposed in Part VI, not on the viewpoint discrimination label. It does not help to say that the Poway High School could not prohibit Tyler Harper from wearing his anti-gay T-shirt because this would constitute viewpoint discrimination. The school's actions in *Harper* should have been ruled unconstitutional because there was insufficient evidence of substantial disruption of school discipline or classwork and because nondirected, political speech should not be held to violate the rights of others.³⁰⁶ Talk about viewpoint discrimination doesn't determine the constitutional conclusion, for the viewpoint-discriminatory effects of the school's actions in *Harper* might have been justified on a different factual record.

I can put the point more bluntly. In the introduction, I observed that courts are beginning to import a flat ban on facially viewpoint-discriminatory speech restrictions into their *Tinker* jurisprudence.³⁰⁷ They should stop. Rather than borrowing ideas from the public forum doctrine, courts should focus on greater development of the ideas about substantial disruption (and, maybe, interference with the rights of others) that are internal to *Tinker*.

³⁰⁶ See Waldman, *supra* note 33, at 497-502.

³⁰⁷ See *supra* notes 30-33 and accompanying text.