

# ***TINKER* AND STUDENT FREE SPEECH RIGHTS: A FUNCTIONALIST ALTERNATIVE**

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## INTRODUCTION

Public schools are the sites of both education and distraction from education. While education can take many forms, so can distraction, including various forms of student speech. Distracting student speech is an important category that is nearly unrecognized by the law. Let us set aside student speech that causes or threatens disruption in the sense of an overt disturbance. Let us also set aside speech that unjustifiably violates the recognized legal rights of other persons. Finally, let us set aside speech thought to be lewd, vulgar, or plainly offensive and speech that could suggest official school endorsement. Each of these categories of student speech is addressed by a growing body of First Amendment case law. We are then left with various forms of independent student speech with either quite limited or potentially great value, but also with the potential, under some circumstances, to cause distraction.

Such distraction of and by students might be either superficial or deep and severe, emotionally disturbing or undisturbing, transient or chronic, limited in scope or school-wide. The distractions may or may not be closely linked with the intended message, if any, of the speech. Distraction itself may or may not be either intended or predicted. Some distractions could be thought of as consented to by those distracted, including cases of a speaker's own self-distracting speech. There seems to be some sense in which a distraction can be voluntarily encountered, yet still count as a distraction. But there are no guarantees that students and school authorities will always agree on when students are being distracted. We may not recognize that we are being distracted. Students and educators may, after all, disagree on students' goals and priorities.

Some distractions are relatively easy to avoid or minimize; others much less so. Some distractions are discreet; others obtrusive. Sometimes, speakers may reciprocally distract one another, as in various forms of merely idle conversation. Relatedly, some distractions amount to group-distractions. Distraction is, in a sense, a matter of degree. Many distractions seem more, or less, compatible with simultaneously performing other activities, as in real or alleged multi-tasking. Speech distraction may or may not involve technology. Some persons may be especially easily or severely distractable.

The seriousness of a speech distraction should take into account not only the degree—the intensity and duration, for example, of the distraction—but the difference in value between what is accomplished under distraction, and what might have been accomplished if one had avoided the distraction. In other words, distraction at important moments may matter more. We may think of a public school as always involving some minimal “baseline” level of distraction, and this distraction itself may have some sort of minimal positive social value.

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We cannot offer examples of all of the common forms of student speech that causes distraction. Purely for the sake of vividness in what follows, let us imagine an exceptionally distracted classroom in which the distractions are largely unobtrusive, ongoing, more or less voluntary, and which leave the distracted persons at least minimally capable of following along with and participating in official classroom activities and assignments.

More concretely, let us imagine technology-based distractions involving text-messages, Blackberries®, i-Pods®, video or camera cell phones, or laptop screen images involving some combination of class material, e-mail, chat room discussions, video and other entertainment, and commercial ads. The age of the students involved may be varied as thought relevant.

We may assume that each of the potentially distracted students is silent in their own distraction, and silent and physically unobtrusive insofar as they may be in distracting others. We may further assume that each student would, if called upon in class, be able to offer some sort of verbal response within the broad range of what could be thought normal in a classroom setting.

At some point, no doubt, distraction could be transformed into disruption, disturbance, or disorder. But this would then be amenable to school response under well-established law and outside the scope of our concern. It might also be possible to imagine an unwaivable right of all individual students to an education subject to only some minimum degree of voluntary or involuntary distraction. A student's consent to be distracted would be of no legal effect, and the distracted student could then conceivably sue for violation of her non-distraction rights. But it would be simpler and more straightforward to adopt what we herein call a functionalist approach, in which we consider student speech distractions in context and in light of the essential purposes and missions of public schools in the first place.

This is of course not to suggest that all distracting student speech should be constitutionally subject to restriction. That would clearly involve monumental overkill. For one thing, developing the ability to filter out environmental distractions, including the speech, symbolic or otherwise, of one's fellow students is itself an increasingly important dimension of one's overall education. For another, some independent student speech is both distracting and yet clearly worth protecting for its free speech or civic educational value. Student speech can be both distracting and constitutionally or pedagogically valuable.

Let us then briefly consider some of the surrounding student speech case law. Notably, there is an important gap in the area of distracting speech. However well or poorly such law may address disruption, disturbance, disorder, and recognized rights-violations, the law does not meaningfully address the various sorts of potentially distracting student speech briefly hinted at above. The crucial problem is that independent and unsponsored student speech can be clearly distracting to one degree or another and yet equally clearly fail to rise to the level of inviting disruption, disturbance, disorder, or violation of recognized rights. But the broad phenomenon of speech distraction can, in some respects, be meaningfully associated with a broad process of impairment of a school's essential educational and civic missions. Distracting student speech sometimes will and sometimes will not be worth constitutionally protecting. At least some

sort of judicial recognition of this is called for.

The most crucial case for our purposes is *Tinker v. Des Moines Independent Community School District*.<sup>1</sup> *Tinker* can be thought of as a triumph of the free speech rights of public school students. *Tinker* recognized students' rights to wear symbolic black armbands in public schools in protest of administration policy in pursuing the Vietnam War.<sup>2</sup> *Tinker's* holding focuses not on distraction, but on actual or potential disruption, disturbance, disorder, or violation of the rights of others. Necessarily, as a matter of sheer holding and dicta, *Tinker* can have little to say about merely distracting speech, especially when the student speech in question does not address any public issue potentially facing the school or any broader community.

The Supreme Court has revisited the question of public school student speech rights on two occasions, in *Bethel School District No. 403 v. Fraser*<sup>3</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>4</sup> Both *Fraser* and *Hazelwood* place significant, if not entirely clear, limits on student speech.<sup>5</sup> The circumstances in

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1. 393 U.S. 503 (1969). For commentary on *Tinker*, see, e.g., Akhil Reed Amar, *A Tale of Three Wars: Tinker in Constitutional Context*, 48 DRAKE L. REV. 507, 517-18 (2000) (discussing *Tinker* as evoking not only First Amendment concerns, but equality and inclusion themes of the Fourteenth Amendment as well); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 528 (2000) ("Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools."); Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 523 (1997) ("[L]aws governing free speech in schools should increasingly respect the free speech rights of students varied by age. To the extent that educators and laws fail to cede more freedom to students as they mature, they fail to prepare students for living the lives of democratic citizens."); Mark Yudoff, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 370 (1995) (noting the possibility of broad as well as narrow understandings of the educational mission and the importance of civility as a basic ground rule). While *Tinker* is often applied to very young students, some courts occasionally attempt to draw meaningful limits. See, e.g., *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 423 (3d Cir. 2003) (stating that a five-year-old kindergarten student at recess verbally "threatening" to shoot fellow student was not engaging in expressive speech).

2. *Tinker*, 393 U.S. at 504.

3. 478 U.S. 675 (1986).

4. 484 U.S. 260 (1988).

5. For some important issues left unclear under *Hazelwood*, see R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 178-90 (2007). For some unclear issues under *Fraser*, compare *Boroff v. Van Wert City Board of Education*, 220 F.3d 465, 469-70 (6th Cir. 2000), with *Frederick v. Morse*, 439 F.3d 1114, 1122-23 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007) and *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 328-29 (2d Cir. 2006) (discussing whether *Fraser* can extend to all independent student speech inconsistent with the school's basic educational mission, beyond the narrower vulgar and offensive-language speech in a school assembly context in *Fraser*), *cert. denied*, 127 S. Ct. 3054 (2007). See also *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003) (limiting *Fraser* to regulating the form or manner of lewd, vulgar, plainly offensive speech, but

*Fraser* were complex and distinctive. It is difficult to see the practical point of *Fraser* if the speech and reaction in *Fraser* already amounted to prohibitable disruption or disorder under *Tinker*. The *Tinker* Court did not protect any speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>6</sup> These limits are expressed repeatedly within *Tinker*.<sup>7</sup> But there is also a sense in which these limits are left largely unexplored and unclarified within *Tinker*, and even later within *Fraser* and *Hazelwood*. It is only recently that the lower courts have even consciously taken to clarifying, sometimes in controversial ways, limits to student speech rights that were at best implicitly recognized or left unconsidered in *Tinker*.<sup>8</sup>

This Article takes the ongoing judicial exploration of the proper scope of the limits on student speech rights imposed by *Tinker* and its progeny as an opportunity to more broadly reassess the logic of *Tinker* and ensuing cases on students’ right to free speech. An alternative, functionalist approach to student speech rights is raised herein. A functionalist approach begins with the widely recognized basic missions and purposes of public schools. A functionalist approach then emphasizes the presumably expert judgments of local school authorities as to how best to promote the basic civic and educational functions of the public schools, including, but hardly limited to, the importance of reducing distractions therefrom. A functionalist approach appropriately recognizes and protects student speech, even in many instances of distracting speech. However, a functionalist approach emphasizes that schools serve vital educational and civic purposes in addition to being fora for student expression.

This Article emphasizes schools’ institutional functions and purposes more than the *Tinker* Court. Perhaps the most widely cited language from *Tinker*, implicitly setting its tone, is the Court’s opening assertion that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>9</sup> We should not read too much into this rhetorical language. However, it is possible that the *Tinker* majority may hereby implicitly assume a baseline for free speech rights consisting of public non-school environments, including the speech protected in classic, uninhibited, and robust public debate cases such as *Terminiello v. City of Chicago*.<sup>10</sup> It is literally from such an assumed background that students

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perhaps not the speech’s “content”).

6. *Tinker*, 393 U.S. at 513. For whatever light it may shed on the matter, “disorderly” conduct has been defined as “[b]ehavior that tends to disturb the public peace, offend public morals, or undermine public safety.” BLACK’S LAW DICTIONARY 292 (7th ed. 1999) (defining “disorderly conduct”). Mere distraction would most typically fall outside these limits.

7. *Tinker*, 393 U.S. at 509, 513, 514.

8. See, e.g., *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir.), *reh’g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

9. *Tinker*, 393 U.S. at 506. A Westlaw search of the ALLCASES database undertaken February 6, 2007, with the query “shed their constitutional rights” /s “schoolhouse gate” yielded the substantial total of 301 distinct quoting cases. This search omitted close paraphrases.

10. 337 U.S. 1, 4 (1949) (stating that dispute, dissatisfaction, unrest, and anger are anticipated

emerge, with their free speech rights modified, but not shed, in the context of the public school.

This familiar *Tinker* approach, however natural, is not the only reasonable approach. It is open to functionalist critique. We can instead approach the question of student speech by first asking, in an equally legitimate way, about the most important purposes and missions of public schools. We can ask specifically about the variety of constitutionally permissible approaches a school might fairly choose to explore in seeking to better discharge the totality of its widely recognized basic pedagogical and civic responsibilities. These responsibilities will certainly include broad “training” and practice in the independent exercise of free speech. But this hardly exhausts the crucial missions of public schools. Student speech that tends to distract other students can, in appropriate cases, be a legitimate focus of reasonable regulation for the sake of better promoting the school’s varied basic missions and purposes.

Thus, our focus is not on validating *Tinker* as a whole or on calling for its broad overruling. Nor do we need to interpret *Tinker*’s rights-violation or disorderliness-based exceptions either narrowly or broadly.<sup>11</sup> Our focus is instead on public schools as institutions with multiple and complex vital civic and educational missions. Individual public schools should be permitted reasonable experimental latitude in fairly regulating student speech that causes distraction in order to better discharge the school’s overall educational and community responsibilities.

The upshot of the argument is this: within appropriate limits, a public school that seeks to advance the overall mission of the school in a broadly egalitarian democracy should be allowed to fairly and even-handedly make such an attempt, even at the expense of some student speech rights apparently protected under *Tinker*. We reach this result whether we construe *Tinker*’s built-in<sup>12</sup> and extrinsic<sup>13</sup> limitations either narrowly or broadly. Whatever its value as free speech, student speech that tends to distract may also tend to impair a school’s pursuit of its basic educational and civic goals, and thus may become subject to reasonable and even-handed regulation without violating *Tinker*.

#### I. INTRODUCING THE PROBLEM OF DISTRACTION: *HARPER V. POWAY*

A recent controversial case explicitly focuses, admittedly, not on the idea of distracting speech, but on possible rights-violations by student speakers. *Harper ex rel. Harper v. Poway Unified School District* is useful for illustrating some limits of *Tinker*’s focus on disorder and disruption as well as rights-violation as justification for regulating student speech.<sup>14</sup> *Harper* involved a public high

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results of public political debate).

11. See *Tinker*, 393 U.S. at 509, 513, 514.

12. See *id.*

13. See *supra* notes 3-5 and accompanying text.

14. 445 F.3d 1166 (9th Cir.), *reh’g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). In connection with the en banc level review, see the opinions of

school sophomore, Harper, who wore t-shirts to school with hand-lettered messages on the front and back. The front of one such shirt bore the message: “‘BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED.’”<sup>15</sup> The front of another read: “‘I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED.’”<sup>16</sup> Apparently on both of the school days in question, the handwritten message on the back was: “‘HOMOSEXUALITY IS SHAMEFUL “Romans 1:37.”’”<sup>17</sup> On the second such day, “Harper’s second period teacher . . . noticed Harper’s shirt and observed ‘several students off-task talking about’ the shirt.”<sup>18</sup>

In addressing Harper’s interlocutory appeal from the trial court’s denial of his motion for a preliminary injunction regarding any possible suspension, the Ninth Circuit focused its analysis on the *Tinker* case when determining any likelihood of success on the merits.<sup>19</sup> The Ninth Circuit interestingly did not focus on the first *Tinker* prong: the possibility that the school might reasonably have predicted substantial disruption, disorder, or similarly disturbing interference with educational activity and mission.<sup>20</sup> Instead, the court focused on the second *Tinker* prong, or on the possibility under *Tinker* of regulating student speech that violates the relevant rights of other students.<sup>21</sup>

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Judge Reinhardt, *Harper*, 455 F.3d at 1052 (Reinhardt, J., concurring), and Judge O’Scannlain, *id.* at 1054-55 (O’Scannlain, J., dissenting).

15. *Harper*, 445 F.3d at 1170-71.

16. *Id.* at 1171.

17. *Id.*

18. *Id.* While the explicit reference to students being, at least briefly, “off-task” might have served as a cue to consider the role of distraction and distracting speech in public schools, the court unfortunately, but unsurprisingly, did not pursue this possibility.

19. *See id.* at 1175 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). *Harper* raised a number of separate constitutional claims, *see id.* at 1173, but this Article’s focus is solely on the free speech claims.

20. *See id.* at 1174. Doubtless, if distracting speech, especially if unwelcome, is carried beyond some extreme point, the distracting speech could become not only extremely distracting, but physically disruptive or provocative of the altercations and physical confrontations contemplated by the disruption or disorder prong in *Tinker*. For discussion of disorderliness under *Tinker*, see, e.g., *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 252-58 (3d Cir. 2002). Analogously, speech that is extremely distracting over a period of time might also be thought to thereby violate some recognized relevant sorts of rights of one or more distracted students. We prefer herein to focus directly on a school’s essential mission, without the separate analytical step in which a school’s failure to advance its mission also violates the sufficient individual rights, however defined, of identifiable students. Anyone who sees value in taking this further analytical step is certainly welcome to argue on behalf of doing so. A focus on rights-violation is sensible in many cases in which distraction is not the central issue and in which an individual rights-violation analysis can be easily conducted.

21. *See Harper*, 445 F.3d at 1175 (citing *Tinker*, 393 U.S. at 508). The *Harper* court set aside not only the disruption or disorder prong under *Tinker*, but the possibility as well of restricting the speech as plainly offensive under *Fraser*. *See id.* at 1176, 1177 n.14.

*Harper* focused in particular on the language in *Tinker* that permits regulating student speech that violates “the rights of other students to be secure and to be let alone.”<sup>22</sup> The *Harper* court stated more specifically that “[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”<sup>23</sup> Injury, assault, and security are not confined to the realm of the physical and tangible. The *Harper* court emphasized that “[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.”<sup>24</sup> The court explained:

Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.<sup>25</sup>

The court expressly set aside questions of the status in this context of gender categories<sup>26</sup> and confined its holding to targeted students who are “particularly vulnerable”<sup>27</sup> or of “minority status”<sup>28</sup> with respect to “core characteristic”<sup>29</sup> attributes, including “race, religion, and sexual orientation.”<sup>30</sup> Sensibly, the court observed that “[t]here is . . . a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status.”<sup>31</sup>

Courts could limit or extend the logic of *Harper* in various ways. The focus,

22. *Id.* at 1177 (quoting *Tinker*, 393 U.S. at 508).

23. *Id.* at 1178.

24. *Id.*

25. *Id.* Note here not only the court’s focus on the minority or historically oppressed status of the target of the speech, but also the emphasis on an individual right to an unimpaired education, while still setting aside the *Tinker* prong that encompasses genuinely disruptive and physically disorderly interference with the school’s educational mission. See *supra* notes 6, 7, 9 and accompanying text; see also *Harper*, 445 F.3d at 1180 (“[T]he School had a valid and lawful basis for restricting Harper’s wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.”).

26. See *Harper*, 445 F.3d at 1183 n.28.

27. *Id.* at 1182.

28. *Id.* at 1183.

29. *Id.* at 1182.

30. *Id.* at 1183.

31. *Id.* at 1183 n.28; see also *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052, 1052-54 (9th Cir. 2006) (Reinhardt, J., concurring), *vacated as moot*, 127 S. Ct. 1484 (2007). Of course, these two general historical classifications may not be entirely exhaustive. For a sense of Judge Reinhardt’s approach to other elements of *Tinker*, see *LaVine ex rel. LaVine v. Blaine School District*, 279 F.3d 719, 726 (9th Cir. 2002).

however, would still be on rights, of one sort or another, of one weight or another, as held by individual students or by more or less identifiable groups of students. Any number of questions would, as the court recognizes, inevitably arise. Further refinement of the *Harper* theory would certainly be required, likely at the price of additional complexity, and perhaps additional controversy.

Merely to illustrate a few of the *Harper* complications, consider the question, noted by the *Harper* court, of gender classifications.<sup>32</sup> Gender certainly seems to commonly qualify as a “core characteristic”<sup>33</sup> in defining identity and vulnerability. But what if gender did not for some reason count as a “core characteristic”? Would any burdening on the basis of gender for that reason somehow count as a less serious problem in the school speech context? Or could we say that the right in question could never be violated by speech that does not evoke or address a “core characteristic”?

At some point, a court applying *Harper*, perhaps in the context of gender or elsewhere, would have to decide on the relative importance of historical relationships, over some specified time frame, and present vulnerabilities. Female students are doubtless disproportionately subject to verbal targeting in public schools. Should this targeting suffice to evoke rights protection and speech regulation under *Harper*, or should evidence of some further adverse effect on women’s educational achievement, causally attributable to such verbal targeting, also be required? In contrast, we might ask whether “religion” should always count as a “core characteristic.” Often, religious and other forms of identity can be characterizable in various complex ways, some perhaps associated with past or present minority status, and others not.

A court could also, in a variety of cases, look in a “formalistic” way to the express language of the verbal targeting. But some language may have an impact on its target beyond its literal meaning. And will courts handle “ironic” or insincere language well? Should the courts then attempt to look more to evidence of actual impact on educational achievement, as costly and difficult as that might be to rigorously sort out? Can we assess the impact on target-group members without also taking into consideration how the speaker reasonably conceives of him or herself, the intended message or purpose of the speech, and how he or she is in turn conceived of and identified by the speech targets?

If historically dominant groups are, by the sensible logic of *Harper*, subject to its unique prohibitions but not its unique protections, the *Harper* rule, however otherwise justifiable, may be in tension with current Supreme Court’s sentiment for applying similar equal protection tests for historically dominant and subordinated groups alike.<sup>34</sup> Even after *Harper*, members of dominant groups who are targeted by speech are not without some redress, typically through credible threats of altercations and disorder under the alternative *Tinker*

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32. See *Harper*, 445 F.3d at 1183 n.28.

33. See *id.* at 1182.

34. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

“disruption” prong,<sup>35</sup> despite the general disfavoring in free speech law of a “heckler’s veto.”<sup>36</sup>

Under *Harper*, we can expect good faith debates to evolve, not only over group identification and status, but over what sorts of messages will count as an attack or verbal assault sufficient to evoke the *Harper* rights analysis.<sup>37</sup> Will inadvertent injury suffice where a speaker’s claimed motive was merely one of unselfconscious group pride or some allegedly innocent or healthy form of group assertion? How far will subtleties of recent school history, context, or local cultural understanding transform a literally innocent message? What if the target-group’s interpretation, let alone its reaction, is itself mixed and to one degree or another either ambivalent or indifferent? Could such mixed reaction mean that we have misidentified the target group?

Suppose we start with student speech that is judged to be unprotected under *Harper*. For purposes of this Article, we again certainly need have no objection to *Harper*. But judicially finding an instance of speech unprotected under *Harper* could trigger a process of responsive move and countermove at a level of subtlety that may test the courts. Why could not dominant groups then seek to determine how close to the legally established limit they can come? Language could then become more subtle, more ironic, more non-referential, vaguer, more implicit, or more “coded,” and perhaps this would be a good thing. But the “sting” and intended hurtfulness of language need not be a function of only literal reference and meaning. Ambiguity and sarcasm can send a message of severe and continuing contempt with a greater chance of judicial protection. A change in speaker identity can arguably change the valence of the language from camaraderie to insult.

Such hypothetical cases are, under the *Harper* analysis, inevitably difficult, however they might eventually be adjudicated. Again, our point is not to suggest how such cases should come out. Our own functionalist approach, emphasizing questions of distraction, will sometimes raise some similar, if not overlapping, complications, though not as directly in a group-right adversarial setting. We focus, in contrast, less on the complex rights-violation analysis required by *Harper* and more on administrators’ reasonable perceptions of distraction through student speech or of students’ being substantially “off-task” in ways that fail to promote schools’ crucial educational mission.<sup>38</sup> The focus in such cases

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35. See *Harper*, 445 F.3d at 1175 (referring to the *Tinker* disruption or disorder prong).

36. See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (disfavoring the threat or likelihood of disruption by the speaker’s opponents as sufficient grounds to censor the speaker).

37. See *supra* text accompanying notes 23-25.

38. See *supra* text accompanying notes 23-25. The *Harper* court, following language in *Hazelwood*, urged that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission.” 445 F.3d at 1185 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). *Hazelwood* involved not the speech of clearly independent students, but of students who could reasonably be perceived as speaking with the school’s approval. *Hazelwood*, 484 U.S. at 270-71. *Harper* reads this as permitting schools to validate basic civic values such as tolerance and equality, as distinct from bigotry or hatred, rather than as a distinct concern for

will be less directly on adversarial, often zero-sum, group-rights adjudication.

Speech that is less overtly challenging than that in *Harper*, and thus a more difficult case under *Harper*, may in some cases actually be just as distracting, if not more distracting, than some instances of a plainer verbal attack. Distraction can take various forms, including students' anxious and active uncertainty in class as to the meaning of ambiguous language. The meaning of the underlying speech may be unclear or controversial. But the resulting degree of distraction, partly in the form of a detectable student conversational "buzz," may actually be relatively easy for school officials to ascertain and to document, at least through accumulated verbal reports.

The *Harper* rights-focus has the undoubted virtue of attempting to best protect those who deserve the most protection. But *Harper*'s scope, in itself and even in the context of the broader speech regulation permitted by *Tinker*, is actually relatively narrow. *Harper*, even in conjunction with the remainder of *Tinker*, does not attempt to address the largely distinct and much broader problem of speech that causes distraction from the school's educational mission.<sup>39</sup> Far from violating rights in the *Harper* sense, for example, the most distracting speech may be most welcomed by those distracted.

The dissenting opinion in *Harper*, authored by Judge Kozinski,<sup>40</sup> takes issue with Judge Reinhardt's opinion for the court on a number of issues of free speech.<sup>41</sup> But Judge Kozinski seems, for purposes of his free speech analysis, even less interested than the majority in questions of distraction and educational mission. Judge Kozinski thus merely observes, uncontroversially, that "it is not unusual in a high school classroom for students to be 'off-task.'"<sup>42</sup> Thus, the scene of "students bored or distracted in class is a cliché."<sup>43</sup>

From our perspective, though, that classroom distraction is indeed a cliché may justify more, rather than less, official attention to such distraction, even when valuable student speech is the source of the distraction. The argument is

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distraction from education. See *Harper*, 445 F.3d at 1185.

39. See *Harper*, 445 F.3d 1185-86.

40. *Id.* at 1192 (Kozinski, J., dissenting).

41. See, e.g., *id.* at 1198 ("The 'rights of others' language in *Tinker* 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 . . . . Otherwise, a state legislature could effectively overrule *Tinker* by granting students an affirmative right not to be offended."). On the merits, it is unclear why the relevant rights under *Tinker* must be traditional, above and beyond being sufficiently important. It would seem that the *Harper* majority is at least seeking to narrow the scope of the relevant rights so that more than mere offense is required. See, e.g., *id.* at 1180 n.21, 1182 (majority opinion) (noting that mere offense insufficient; possibility of "significant injury" required). For further debate, see the contrasting opinions of Judges Reinhardt, *Harper ex rel. Harper v. Poway Unified School District*, 455 F.3d 1052, 1052 (9th Cir. 2006) (Reinhardt, J., concurring), *vacated as moot*, 127 S. Ct. 1484 (2007), and O'Scannlain, *id.* at 1054 (O'Scannlain, J., dissenting), in a denial of a petition for rehearing.

42. *Harper*, 455 F.3d at 1193 (Kozinski, J., dissenting).

43. *Id.* at 1193-94.

not that briefly distracting speech in any particular case causes lasting or substantial harm. Nor is the argument that distracting speech within schools is the primary cause of any undesirable educational or cultural outcome. The broader culture, apart from school, promotes distractability and also distracts students. In-school speech among students is thus hardly the only source of student distraction. Specific and rigorous causal proof of any claim, positive or negative, in this area is probably impossible. Instead, a key point is that distracting student speech within schools is generally speech that, whatever its value otherwise, fails to promote or impairs fulfillment of one or more basic educational mission and purpose.

In-school speech among students that can reasonably be said to distract, and thus in some respect fail to promote or to impair the purposes for which public schools exist, may in some cases not qualify for distinctive protection under the free speech clause. Some distracting speech may be otherwise sufficiently valuable and promotive of basic educational or civic goals as to deserve free speech protection. There will be some close cases. But this course allows us to bypass much of the controversy and the rights-focused interpretive issues raised by the *Harper* case. More generally, a contrary focus on utter disruption or disturbance, even combined with *Harper's* focus on particular rights-violations, leaves merely distracting speech completely unexamined.

In *Harper*-type cases, debate may focus, for example, on whether some instance of student speech was “merely” offensive to some students and thus protected, or whether a violation of a sufficient right held by particular targeted students can be shown as well. The distinction between various kinds of offensive speech and various kinds of speech harmful to other persons would often be crucial to a *Harper*-type analysis, but this distinction is, among the experts, notoriously difficult to consensually draw and to justify.<sup>44</sup>

Distracting speech may be merely entertaining or a matter of indifference to

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44. For discussion, see Richard A. Posner, *On Liberty: A Revaluation*, in ON LIBERTY 197, 202 (David Bromwich & George Kateb eds., 2003); Michael S. Moore, *Freedom*, 29 HARV. J.L. & PUB. POL'Y 9, 17-18 (2005). The leading twentieth century discussion of offense and harm was arguably JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 59 (1985). Feinberg's discussion was in turn variously critiqued. See, e.g., R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 16-19 (2001) (noting the possibility of severe setbacks to someone's basic interests that do not violate any relevant rights, as in the case of fair competitions for valued resources); Robert Amdur, *Harm, Offense, and the Limits of Liberty*, 98 HARV. L. REV. 1946, 1947 (1985) (book review) (“For Feinberg, . . . to harm another person we must set back, thwart, or defeat his interests in a way that violates his rights.”); Gerald Dworkin, 98 PHIL. REV. 239, 239-42 (1989) (book review); Bernard Gert, *Critical Notices*, 48 PHIL. & PHENOMENOLOGICAL RES. 147, 151-52 (1987) (book review) (“Profound offenses are not merely disliked states, they are an impersonal affront to one's ‘deepest moral sensibilities.’” (quoting FEINBERG, *supra*, at 59)); Judith Jarvis Thomson, *Feinberg on Harm, Offense, and the Criminal Law: A Review Essay*, 15 PHIL. & PUB. AFF. 381, 386-87 (1986) (book review) (discussing Feinberg's complex factors to be assessed in cases where offenses are claimed to be rights-violative); Robert E. Rodes, Jr., *Limits of Law*, 48 REV. POL. 481, 481-83 (1986) (book review).

the persons distracted. If it is unwelcome, the distraction may take the form of imposed thoughts and images, regularly replayed mentally, unpleasantly, and involuntarily. In some, but hardly all cases, distracting speech might occur without any further clear harm in grades, class standing, attendance, or college prospects. Distracting speech by students may or may not have any sort of social point or raise any matter of possible public concern. In this sense, the categorical constitutional value of the distracting speech may vary widely. Speech might reasonably be judged distracting from basic educational aims even if the speech's effects are not by themselves so severe or pervasive as to demonstrably deny access to equal educational opportunity over a period of time.<sup>45</sup>

Certainly there is no reason to suppose that speech a school judges to be significantly distracting must necessarily also be objected to on the basis of its viewpoint. This is true whether the speech seeks to address a matter of public interest or, presumably less valuably, does not. School officials could well agree with, be indifferent to, or admittedly not entirely understand the message of distracting student speech. We see this in the school uniform and dress code cases.<sup>46</sup> Even where the school officials do in some sense disagree with the viewpoint of the speech, they may be predominantly, and sufficiently, motivated to regulate that speech based on its level of distraction.

Interesting questions would certainly arise under a distraction-based school speech standard. Suppose, for example, a particular student speech had a number of students largely pre-occupied for several days on whether they should boycott school, refuse to do any class assignments, plagiarize papers, or some such course of action. It would be possible to ask first whether this allegedly distracting speech might undercut academic learning, but also uniquely promote other important public school missions, including irreplaceably contributing to the students' civic competence. If so, some reasonable balancing of basic school purposes in unavoidable conflict should be permissible. Some judicial deference

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45. See, e.g., *Moore v. Marion Cmty. Sch. Bd. of Educ.*, No. 1:04-CV-483, 2006 WL 2051687, at \*6-7 (N.D. Ind. July 19, 2006) (holding that peer harassment on the basis of gender in public school context evokes a similar standard guided by Title VII workplace discrimination law); see also *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967, 975 (S.D. Ohio 2005) (granting injunction to allow a high school student to wear, and finding no violation of target group rights in, a t-shirt featuring a Bible verse on the front and the words "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" on the back). For brief reference, see Brett Thompson, Comment, *Student Speech Rights in the Modern Era*, 57 MERCER L. REV. 857, 875 (2006) (discussing briefly the *Nixon* court's findings of no violation of the right "to be let alone" under *Tinker*).

46. See, e.g., *Blau ex rel. Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005) (reviewing public school dress code intended to "focus[] attention upon learning and away from distractions" in order to promote school goals without seeking to "regulate any particular viewpoint"); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (applying only intermediate scrutiny, rather than *Tinker*, to a school uniform requirement that was thought to be both aimed at enhancing the educational process and neutral with regard to student speech viewpoint).

to fairly exercised local democratic decisionmaking and local expertise, in light of our commitment to free speech values, would seem sensible.

The school's official viewpoint that its own basic mission should be optimally, non-repressively furthered is itself in some sense a viewpoint. We might call it a meta-viewpoint or a viewpoint about all viewpoints expressed within the school. It is a viewpoint the public must hope any school will hold. A school should not be legally handicapped for fairly taking its democratically assigned and democratically supervised vital mission seriously on school grounds and during school hours.<sup>47</sup>

## II. THE PUBLIC SCHOOLS: ESSENTIAL PURPOSES AND PERMISSIBLE APPROACHES

American public schools are widely thought to serve a number of basic pedagogical and civic purposes. Plainly, these various purposes cannot be reduced to, or invariably subordinated to, the one purpose of maximizing current free speech among students or even maximizing the free speech of their future selves as a free speech training ground.

In a non-school context, however, Judge Richard Posner has argued forcefully for the free speech rights of juveniles as future voting citizens.<sup>48</sup> Citing *Tinker*, Judge Posner has urged that

[t]he murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise . . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.<sup>49</sup>

Public schools would certainly be derelict in their responsibilities if they commonly graduated persons blank of mind and incapable of discharging their civic obligations. Students must indeed not be raised in anything remotely like an intellectual bubble. Whatever the status of any student's free speech rights, certainly no student's speech rights should be reduced to the point at which Judge Posner's account above becomes even remotely descriptive.

Beyond meeting this standard, however, public schools are also expected to,

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47. See, e.g., *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 287 (5th Cir. 2001). For administrative overreaching, see the public sidewalk speech case of *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

48. Judge Posner has addressed this, in particular, with respect to juvenile access to violent video games in a public arcade setting without the supervision of a parent or guardian. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001).

49. *Id.* (emphasis added).

in various ways, promote “the shared values of a civilized social order.”<sup>50</sup> Somewhat more specifically, the courts have recognized the public schools’ “role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”<sup>51</sup>

Some mixture of cultural socialization, imparting technical and liberal arts knowledge, and promoting civic values and civic competencies is a democratic cultural aim long antedating public schools in their familiar form. Let us recall the aspiration, if not the reality, of Athenian civic life as far back as the time of Pericles:

[O]ur ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless, we Athenians are able to judge at all events if we cannot originate, and, instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.<sup>52</sup>

In roughly the same time and place, Platonic civic participatory education focused most crucially on “the early stages” of life:

[W]hen habits, tastes, and aspirations are formed; when heroes and objects of emulation and reverence are set before the imagination’s eye; when a communal sense of shared destiny is shaped; when gratitude to the past and responsibility for future generations is instilled; when capacities for collective deliberation and action, for leadership and loyalty, are discovered, tested, and celebrated.<sup>53</sup>

This description focuses directly on deliberation and speech skills, if not on unimpaired speech among students. There is, however, already a sense that education has a number of purposes and dimensions, any of which might come into conflict with what we might today think of as student speech rights.

The development of modern views of democratic education and its civic dimensions has been halting and unsteady. Rousseau, for example, developed civic educational theory,<sup>54</sup> but distrusted what we would think of as diversity,

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50. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

51. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

52. THUCYDIDES, *Pericles’ Funeral Oration*, in *THE PELOPONNESIAN WAR BOOK* 2.34-46, available at <http://www.fordham.edu/Halsall/ancient/pericles-funeralspeech.html> (last visited Oct. 31, 2007).

53. THOMAS L. PANGLE, *THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN ERA* 164 (1992). For a much more focused and extended treatment of the theory of Athenian and Platonic education, see WERNER JAEGER, *PAIDEIA: THE IDEALS OF GREEK CULTURE* (Gilbert Highet trans., Oxford Univ. Press 1945) (1939).

54. See, e.g., Terrence E. Cook, *Rousseau: Education and Politics*, 37 *J. POL.* 108, 123

pluralism, particularism, and their celebration.<sup>55</sup> Influenced by Rousseau, Immanuel Kant emphasized the duty of self-improvement and mental cultivation<sup>56</sup> for the sake of eventual freedom and independence.<sup>57</sup> These themes are generally friendly to the broad ideas of freedom of thought and discussion, whether in school or not, but they do not seem to call for the general sacrifice of civic and educational values before the asserted speech rights of students.

The early constitutional experience with general and civic education in the United States was, according to Alexis de Tocqueville, of mixed character. Tocqueville wrote:

In New England every citizen receives the elementary notions of human knowledge; he is taught, moreover, the doctrines and the evidences of his religion, the history of his country, and the leading features of its Constitution.

...

What I have said of New England must not, however, be applied to the whole Union without distinction; as we advance towards the West or the South, the instruction of the people diminishes.<sup>58</sup>

As the nation later developed, our leading modern educational theorist, John Dewey, recognized a broad educational mandate unattainable by straightforwardly libertarian means. Dewey argued that "it is the business of the school environment to eliminate, so far as possible, the unworthy features of the existing environment from influence upon mental habitudes."<sup>59</sup> Doubtless this Deweyan mandate extends beyond distraction and into curriculum as well.

The sense of the multifacetedness of education aimed at civic competence has understandably remained. Professor and University of Pennsylvania President Amy Gutmann, for example, observes that children begin to "develop capacities for criticism, rational argument, and decisionmaking by being taught how to think logically, to argue coherently and fairly, and to consider the relevant alternatives before coming to conclusions."<sup>60</sup> In some measure, this is a matter of affirmative teaching and positive inculcation, rather than merely the disinhibition of student speech. Professor Howard Gardner similarly writes that understanding any subject matter requires authoritative confrontation with

(1975) (citing, *inter alia*, JEAN-JACQUES ROUSSEAU, *ÉMILE: OR ON EDUCATION* (Barbara Foxley trans., 1974) (1762)).

55. *See id.* More broadly, and outside the context of education, see JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968) (1762).

56. *See* IMMANUEL KANT, *EDUCATION* 11 (Annette Churton trans., Univ. of Mich. Press 1960) (1803).

57. *Id.* at 28.

58. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 315-16 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., Alfred A. Knopf 1963) (1835).

59. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 24 (MacMillan Co. 1957) (1916).

60. AMY GUTMANN, *DEMOCRATIC EDUCATION* 50 (1987).

“natural” and strongly held popular misconceptions in thought and speech.<sup>61</sup> Civic competence should not be viewed as a natural process that spontaneously occurs when constraints are removed. Authoritative structuring of the educational environment may be required as well.

### III. POLITICAL AND GENERAL KNOWLEDGE AND POLITICAL PARTICIPATION IN RECENT DECADES: AN INVITATION TO RESPONSIBLE EXPERIMENTATION WITH THE *TINKER* RULE

At this point, we should briefly consider a few measures of civic interest, civic competence, and general educational achievement over the past several decades. On such bases, school districts and public school administrations could fairly conclude that the post-*Tinker* era has, for one reason or another, not amounted to a Golden Age of political and broader sorts of education or of key forms of political participation by public school and other graduates.

This is certainly not to say that the *Tinker* decision is to blame or that all reasonable school administrators in general must draw similar conclusions. Reasonable persons can read the accumulating historical evidence and draw different conclusions. Our argument is merely that a sense of improvability along the lines of civic and general educational competence is certainly not always outside the bounds of reasonableness.

Nor is this to suggest that the *Tinker* decision or its implementation has provably contributed to any less than ideal educational or civic outcomes. No such demonstrable causal relationship is claimed herein. As merely one among many complications, let us recall that the right to vote in federal elections was extended to eighteen year olds for the first time in 1970,<sup>62</sup> just as the *Tinker* decision was first being implemented.

Thus, the question is not whether *Tinker* has by itself had provable adverse civic or educational consequences. The question is instead whether a particular school administrator could reasonably believe that some appropriate modification of the *Tinker* rule could in some way promote non-distraction and a better overall realization of the school’s essential civic and educational missions. Modifying *Tinker* is by itself unlikely to have dramatic effects on education and civic life.

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61. See HOWARD GARDNER, *CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE’S MINDS* 139 (2004). By way of conflict, at least in emphasis, see Carlos Alberto Torres, *Paulo Freire as Secretary of Education in the Municipality of São Paulo*, 38 COMP. EDUC. REV. 181, 201 (1994) (“Curriculum reform starts with administrators and teachers learning how to listen to their students.”). For brief statements of the role of genuine freedom of speech in adult civic engagement and responsible decisionmaking, see, e.g., ROBERT A. DAHL, *ON POLITICAL EQUALITY* 8-9 (2006) (discussing the speech requisites of “ideal democracy”); JURGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 88-89 (Christian Lenhardt & Shierry Weber Nichol森 trans., 1991) (1983).

62. See U.S. CONST. amend. XXVI. Among other considerations might be the 1965 Voting Rights Act, 42 U.S.C. § 1973 (2000), along with other attempts, in various forms at different levels, to either enhance, or at least inadvertently, to reduce voter turnout.

Other sorts of cultural, pedagogical, and funding changes, for example, might be required as well. However, modifying *Tinker* might also have symbolic or expressive purposes, and some such symbolic statements may be worth making. Paradoxically, well-chosen “symbolic” changes may over time actually catalyze more substantive changes.

Anyone concerned with public schools and free speech should be permitted to consider, for example, rates of voter turnout and political participation. The current consensus seems to find a general, but not invariant, modest decline in national voter turnout rates, perhaps beginning around 1960, but more clearly from 1972.<sup>63</sup> The percentage turnout of the voting-age population in presidential elections from 1960 and 1968 was in the low 60% range, with the rate then declining to 55.21% in 1972 and remaining in the middle to low 50% range thereafter through the 1996 presidential election.<sup>64</sup> The general trends are seen among high school graduates and among college graduates, though at higher voting levels among the latter.<sup>65</sup>

One could debate the civic healthiness of diminished voter turnout over the past several decades.<sup>66</sup> Our point is simply that at least some school districts could reasonably doubt the civic healthiness of such trends and could reasonably wish to promote an educational experience inspiring greater political participation, even at the cost of modifying the *Tinker* rule as one element in such a response.

We again need not suggest that *Tinker* has, by itself, led to any harmful civic consequences. Cause and cure need not be mirror images of one another. Let us consider an analogy. We might “cure” smokiness in a room by turning on a fan or opening a window, without claiming that the “off” fan or the closed window “caused” the smokiness. Firefighters may “cure” a fire their absence did not

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63. See, e.g., Peter F. Nardulli et al., *Voter Turnout in U.S. Presidential Elections: An Historical View and Some Speculation*, 29 PS: POL. SCI. & POL. 480, 480 (1996). Cf. *Ortiz v. City of Phila.*, 28 F.3d 306, 318 (3d Cir. 1994) (Scirica, J., concurring) (“For some time now, Congress and the state legislatures, concerned by low voting rates, have commendably sought to increase voter participation.”); *Condon v. Reno*, 913 F. Supp. 946, 967 (D.S.C. 1995) (“Congress identified a nationwide problem of low electoral participation.”).

64. See Federal Election Commission, *National Voter Turnout in Federal Elections: 1960-1996*, <http://www.fec.gov/pages/htmlto5.htm> (last visited Oct. 31, 2007). For additional data, see United States Census Bureau, *Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964-2000*, <http://www.census.gov/population/socdemo/voting/tabA-1.xls> (last visited Nov. 20, 2007).

65. See United States Census Bureau, *Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964-2000*, <http://www.census.gov/population/socdemo/voting/tabA-1.xls> (last visited Oct. 31, 2007). For further discussion, see, e.g., Steven Tenn, *An Alternative Measure of Relative Education to Explain Voter Turnout*, 67 J. POL. 271, 271 (2005) (noting that highly educated people are more likely to vote, but that voter turnout has not significantly increased even though average educational attainment has risen).

66. It is hardly unusual for despotic states to boast of high voter turnout rates, typically endorsing the entrenched regime.

“cause.” Local modification of *Tinker*, among other responses, might, as in extinguishing a fire by removing oxygen that did not itself cause the fire, allow for better fulfillment of a school’s overall civic and educational mission for reasons suggested herein.<sup>67</sup>

Consistently unimpressive levels of electoral participation by high school and college graduates are only a portion of the picture. Participation is one thing, and knowledge is another. The *Tinker* regime in the schools has, arguably, hardly coincided with a Golden Age of political knowledge and understanding among those fully exposed to the broad post-*Tinker* public school free speech experience. One author has in fact recently referred to “the overwhelming evidence that the American electorate fails to meet even minimal criteria for adequate voter knowledge,”<sup>68</sup> and has observed that “[f]ew people dispute the well-established conclusion that most individual voters are abysmally ignorant of even very basic political information.”<sup>69</sup>

It is difficult to argue with universal persuasiveness that *Tinker* and *Tinker*-inspired speech have ameliorated this situation. Despite increases in formal schooling and school spending, “the level of political knowledge in the American electorate has increased only very slightly, if at all, since the beginning of mass survey research in the late 1930s.”<sup>70</sup> There is evidence that among first-year college students since the mid 1960s, “every significant indicator of political engagement has fallen by at least half.”<sup>71</sup> This generalized low civic engagement

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67. See *supra* Part II.

68. Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, POL'Y ANALYSIS, Sept. 22, 2004, at 1, 2, available at <http://www.cato.org/pubs/pas/pa525.pdf> (visited Nov. 20, 2007).

69. *Id.* at 3. Note, e.g., that “[m]ost of the time, only bare majorities [in this case of the public, not of voters] know which party has control of the Senate.” *Id.* at 4. Further, “voters are ignorant not just about specific policy issues but also about the basic structure of government and how it operates.” *Id.*

70. *Id.*

71. *Id.* By way of further illustrative specifics, the 2000 National Election Survey resulted in 11% of respondents identifying the position of Chief Justice of the Supreme Court as the position then held by William Rehnquist. See *id.* at 7. Equally awkwardly, a nationwide 1998 telephone survey of persons between the ages of thirteen and seventeen resulted in 2.2% of the respondents being able to specify William Rehnquist as Chief Justice. See *New Survey Shows Wide Gap Between Teens' Knowledge of Constitution and Knowledge of Pop Culture: More Teens Can Name Three Stooges than Can Name Three Branches of Government*, NAT'L CONST. CENTER, Sept. 2, 1998, <http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCTeens'Poll.shtml>. The robustness of these results is supported by a 2006 Zogby International telephone poll in which 77% of respondents were able to name two of the Seven Dwarfs, whereas only 24% of respondents were able to name two Justices of the Supreme Court. See *New National Poll Finds: More Americans Know Snow White's Dwarfs than Supreme Court Judges, Homer Simpson than Homer's Odyssey, and Harry Potter than Tony Blair*, [http://aolmedia.tekgroup.com/article\\_print.cfm?article\\_id=1029](http://aolmedia.tekgroup.com/article_print.cfm?article_id=1029) (last visited Nov. 20, 2007). For some indication that these sorts of problems extend even to seniors at the nation's leading universities, see AMERICAN COUNCIL OF

may or may not be linked in some way with starkly limited civic knowledge. It is certainly reasonable for particular educators to be concerned along the lines indicated by the well-respected political scientist William Galston:

Whether we are concerned with the rules of the political game, political players, domestic policy, foreign policy, or political geography, student performance is quite low. This raises a puzzle. The level of formal schooling in the United States is much higher than it was fifty years ago, but the civic knowledge of today's students is at best no higher than that of their parents and grandparents. We have made a major investment in formal education, without any discernible payoff in increased civic knowledge.<sup>72</sup>

Neither the availability of courses in U.S. government<sup>73</sup> nor widespread involvement in volunteer or charitable activity seem to effectively address the lack of basic civic knowledge or the lack of broader civic and political engagement.<sup>74</sup>

This is again not to ascribe any significant blame precisely to the *Tinker* rule. Instead, one might question the broad process of political enculturation immediately preceding the *Tinker* case.<sup>75</sup> Nevertheless, it is reasonable for some

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TRUSTEES AND ALUMNI, LOSING AMERICA'S MEMORY: HISTORICAL ILLITERACY IN THE 21ST CENTURY 3 (2000), <http://www.econ.berkeley.edu/users/webfac/czelusta/acta.pdf> (finding 81% of elite university seniors unable to identify basic constitutional principles).

72. William A. Galston, *Civic Education and Political Participation*, PS: POL. SCI. & POL., Apr. 2004, at 263, 264, available at <http://www.apsanet.org/imgtest/CivicEdPoliticalParticipation.pdf> (including voting in presidential and congressional elections, the reported importance of keeping up with politics, frequency of discussing politics, and acquiring political knowledge, whether from traditional news sources or from the Internet). One could, however, question setting the initial historical baseline in a time period when many first-year college students faced, apart from student deferments, the possibilities of a military draft into the same controversial war protested in *Tinker*.

73. *See id.*

74. *See* CONSTITUTIONAL RIGHTS FOUNDATION, EDUCATING FOR DEMOCRACY: CALIFORNIA CAMPAIGN FOR THE CIVIC MISSION OF SCHOOLS—THE CALIFORNIA SURVEY OF CIVIC EDUCATION 4 (2005), available at [http://www.cms-ca.org/civic\\_survey\\_final.pdf](http://www.cms-ca.org/civic_survey_final.pdf).

75. Whatever the relationship between lack of civic knowledge and lack of civic engagement, it remains true that there are special risks associated with active civic engagement on the basis of either minimal knowledge or questionable normative beliefs. For example, a 2005 Knight Foundation study of 112,000 U.S. high school students found that “36% believe newspapers should get ‘government approval’ of stories before publishing; 51% say that they should be able to publish freely; [and] 13% have no opinion.” Greg Toppo, *U.S. Students Say Press Freedoms Go Too Far*, USA TODAY, Jan. 30, 2005, [http://www.usatoday.com/news/education/2005-01-30-students-press\\_x.htm](http://www.usatoday.com/news/education/2005-01-30-students-press_x.htm). The study results are available at [http://firstamendment.jideas.org/downloads/future\\_final.pdf](http://firstamendment.jideas.org/downloads/future_final.pdf) (last visited July 31, 2006). *See in particular* question forty-five at page seventy-nine. More impressionistically, see Diana Jean Schemo, *What a Professor Learned as an Undercover Freshman*, N.Y. TIMES, Aug. 23, 2006, at B8, available at <http://www.nytimes.com/2006/08/23/>

public school administrators to take seriously the view that “[a]t the core of our dysfunctional political culture is the degraded quality of civic discourse—how we talk about public problems.”<sup>76</sup> Such administrators also need not take any stand on whether American politics has become more polarized over time or whether such polarization would or would not be a good thing.<sup>77</sup> There are, however, grounds to believe that political judgment and decisionmaking are often less informed by reason than many educators might prefer.<sup>78</sup>

More broadly, it would also be reasonable for some public school educators to be dissatisfied not only with their students’ knowledge of narrowly civic or political material,<sup>79</sup> but also of various academic subjects that might bear upon

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education/23FACE.html (discussing professor “undercover” as a college student finding limited student interest in academics or in diversity, with “a pervasive, if tacit, emphasis on conformity and an undercurrent of cynicism”).

76. Edward C. Weeks, *The Practice of Deliberative Democracy: Results from Four Large-Scale Trials*, 60 PUB. ADMIN. REV. 360, 360 (2000); see also GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 49 (Little, Brown & Co. 1965) (1963) (recognizing the categories of political “allegiants,” political “parochials,” and political “alienates”).

77. Weeks, *supra* note 76.

78. See, e.g., E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* (1991); Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and “Conflict Extension” in the American Electorate*, 46 AM. J. POL. SCI. 786, 786 (2002) (increasing elite or party-level polarization as leading to diverse reactions among the general voting public); Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and Party Structuring of Policy Attitudes: A Comparison of Three NES Panel Studies*, 24 POL. BEHAV. 199, 227 (2002); Cass R. Sunstein, *Essay, Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 118-19 (2000).

79. Political learning and discourse occurs in patently defective ways. A recent functional magnetic resonance imaging (fMRI) study of brain activity of political partisans is of special interest in this respect. See *Emory Study Lights Up the Political Brain*, SCI. DAILY, Jan. 31, 2006, <http://www.sciencedaily.com/releases/2006/01/060131092225.htm> (“None of the circuits involved in conscious reasoning were particularly engaged” . . . . “Essentially, it appears as if partisans twirl the cognitive kaleidoscope until they get the conclusions they want, and then they get massively reinforced for it, with the elimination of negative emotional states and activation of positive ones.”); Michael Shermer, *The Political Brain: A Recent Brain-Imaging Study Shows that Our Political Predilections Are a Product of Unconscious Confirmation Bias*, SCI. AM., July 2006, <http://www.sciam.com/article.cfm?id=the-political-brain>. Crucially, though, this behavior need not be regarded as inevitable or unalterable. Charles Darwin, for example, apparently kept a special notebook for recording observations tending to falsify his own beliefs, recognizing his tendency otherwise to “forget” such observations. See David M. Buss, *Sexual Strategies Theory: Historical Origins and Current Status—The Use of Theory in Research and Scholarship on Sexuality*, J. SEX RES., Feb. 1998, available at [http://www.findarticles.com/p/articles/mi\\_m2372/is\\_n1\\_v35/ai\\_20746721](http://www.findarticles.com/p/articles/mi_m2372/is_n1_v35/ai_20746721).

This is not to suggest that such cognitive biases are always without utility or redeeming value. For the mixed character of such biases, see generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); JUDGMENT UNDER UNCERTAINTY:

reasonable public policymaking.<sup>80</sup> This broader deficiency could include nearly every academic skill and subject matter teachable in public schools. United States' students tend to "score low among developed nations in international comparisons of science, math, and reading"<sup>81</sup> and "relatively worse . . . the longer they stay in our schools."<sup>82</sup>

In particular, despite classroom emphasis, verbal SAT scores and reading ability scores have proved generally resistant to overall enhancement for several decades.<sup>83</sup> In its most extreme form, the indictment is brought that working

HEURISTICS AND BIASES (Daniel Kahneman et al. eds., Cambridge Univ. Press 1986) (1982). For some intriguing theorizing, see Michael Huemer, *Why People Are Irrational About Politics*, <http://home.sprynet.com/~ow11/irrationality.htm> (last visited Nov. 20, 2007).

80. An unfortunate, if predictable, result of current testing policy is that "there is no accountability for whether or not students learn anything about American history or our democratic institutions. There is significant evidence that the students receive even less instruction than previously in subjects not tested [pursuant to the No Child Left Behind Act]." JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 7 (2006), [www.civilrightsproject.UCLA.edu/research/esea/nclb\\_naep\\_lee.pdf](http://www.civilrightsproject.UCLA.edu/research/esea/nclb_naep_lee.pdf). For discussion of student knowledge of American history, see, e.g., Elizabeth Irwin, Conference Summary: Why Is U.S. History Still a Mystery to Our Children?, <http://www.aei.org/events/filter.all,eventID.131/summary.asp> (last visited Nov. 20, 2007) (citing the study by the American Council of Trustees and Alumni entitled "Losing America's Memory" (2000)) (noting the rise of a "visual culture," in conjunction with "students who have shrinking vocabularies, shorter attention spans, and less efficient reading skills" (remarks of Peter Gibbon, Harvard Graduate School of Education)).

81. E.D. HIRSCH, JR., THE KNOWLEDGE DEFICIT: CLOSING THE SHOCKING EDUCATION GAP FOR AMERICAN CHILDREN 1 (2006). This would include at least such mathematics as is needed to make minimal critical sense of arguments over economic policy, statistical arguments, tax rates, the environment, health, and so forth. See OECD, EDUCATION AT A GLANCE 2005: OECD BRIEFING NOTE FOR UNITED STATES 5 (2005), available at [www.oecd.org/dataoecd/41/13/35341210.pdf](http://www.oecd.org/dataoecd/41/13/35341210.pdf) ("[T]he performance in mathematics of 15-year old students in the United States was well below the OECD mean, ranking the United States in a tie for 21st place."); Jay Mathews, *For Math Students, Self-Esteem Might Not Equal High Scores—U.S. Lags Behind Countries that Don't Emphasize Self-Regard*, WASH. POST, Oct. 18, 2006, at A02.

82. HIRSCH, *supra* note 81, at 1; see also Diana Jean Schemo, *At 2-Year Colleges, Students Eager but Unready*, N.Y. TIMES, Sept. 2, 2006, at A1, available at <http://www.nytimes.com/2006/09/02/education/02college.html> ("Though higher education is now a near-universal aspiration, researchers suggest that close to half the students who enter college need remedial courses.").

83. See HIRSCH, *supra* note 81, at 2. Time-series data from 1992 to 2005 is reported in NATIONAL ASSESSMENT GOVERNING BOARD, U.S. DEPARTMENT OF EDUCATION, THE NATION'S REPORT CARD: 12TH-GRADE READING AND MATHEMATICS 2005, at 1 (2007), <http://nces.ed.gov/nationsreportcard/pdf/main2005/2007468.pdf> (reporting that except among the top tenth of 12th grade readers, a general decline from 1992 to 2005, but with no significant decline from 2002 to 2005); Diana Jean Schemo, *Grades Rise, But Reading Skills Do Not*, N.Y. TIMES, Feb. 23, 2007, at A13; see also Jay Mathews, *SAT Records Biggest Score Dip in 31 Years*, WASH. POST, Aug. 30,

vocabularies have shrunk by more than half, with this vocabulary shrinkage not being confined to the young.<sup>84</sup> This is particularly true in the area of articulable distinctions among matters such as alternative public policies.<sup>85</sup> Again, our point is not to assert the truth of this set of claims, but to suggest the reasonableness of hypothetical responses by at least some school administrators.

Although there has been some progress, there is also cause for concern about trends and performance levels in the broad area of adult literacy. It is reasonable to be concerned that, beyond the data referred to above, “[t]he average American college graduate’s literacy in English declined significantly over the past decade.”<sup>86</sup> This point focuses directly on college graduates, but the capacity in question, literacy, as defined in one way or another, is also addressable in junior or senior high schools. Literacy has apparently been on a long-term decline not only among college graduates, but also “among all education levels.”<sup>87</sup>

On this basis, school districts might reasonably conclude that optimally fulfilling the varied basic purposes of their public schools could call for a change

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2006, at A1; Press Release, College Board, College Board Announces Scores For New SAT® with Writing Section (Aug. 29, 2006), <http://www.collegeboard.com/press/releases/150054.html>. In turn, heavier emphasis on preparing for such tests has failed to improve the situation and has generated resistance. See, e.g., Peter Whoriskey, *Political Backlash Builds Over High-Stakes Testing—Public Support Wanes for Tests Seen as Punitive*, WASH. POST, Oct. 23, 2006, at A3.

84. See David W. Orr, *Verbicide*, 13 CONSERVATION BIOLOGY 696, 696 (1999).

85. See *id.*

86. Sam Dillon, *Literacy Falls for Graduates from College, Testing Finds*, N.Y. TIMES, Dec. 16, 2005, at A34, available at <http://www.nytimes.com/2005/12/16/education/16literacy.html> (referring to results of the 2003 version of the Department of Education’s National Assessment of Adult Literacy). For relevant statistics and some useful breakdowns, see MARK KUTNER ET AL., A FIRST LOOK AT THE LITERACY OF AMERICA’S ADULTS IN THE 21ST CENTURY (2005), available at <http://nces.ed.gov/NAAL/PDF/2006470.PDF>; PATRICK ROONEY ET AL., THE CONDITION OF EDUCATION 2006, available at <http://nces.ed.gov/pubs2006/2006071.pdf>; see also NOEL-LEVITZ, 2007 NATIONAL RESEARCH STUDY: SECOND ANNUAL NATIONAL FRESHMAN ATTITUDES REPORT 1 (2007), available at <http://www.noellewitz.com/freshman> (showing limited interest in reading for enjoyment and limited strength of study habits); Posting of Thomas C. Reeves to History News Network, <http://hnn.us/blogs/entries/32493.html> (Dec. 3, 2006, 8:33AM).

87. NATIONAL ENDOWMENT FOR THE ARTS, READING AT RISK: A SURVEY OF LITERARY READING IN AMERICA 6 (2004), available at <http://www.arts.gov/pub/RaRExec.pdf> (reporting that portion of U.S. adults reading literature as dropping by nearly ten percentage points from 1982 to 2002). None of this is to suggest that these or any similar trends are confined to the United States. It has, for example, been suggested that the better newspapers in the United Kingdom presume a vocabulary of at least 20,000 words, whereas the average sixteen-year-old girl has a vocabulary of 11,500 words and the average sixteen-year-old boy a vocabulary of 8,500 words. See the remarks of Mr. Colin Pickthall (West Lancashire), 279 PARL. DEB., H.C. (6th Ser.) (1996) 156. For casual discussion of possible distraction and a significant trend among British students toward dislike of reading with resulting effects on writing, see Boris Johnson, *Computer Games: The Writing Is on the Wall—Computer Games Rot the Brain*, [http://www.boris-Johnson.com/archives/2006/12/computer\\_games.php](http://www.boris-Johnson.com/archives/2006/12/computer_games.php) (last visited Dec. 28, 2006).

in the school's pedagogical focus, including some authorized modification of the *Tinker* rule. In particular, distractions, including distracting student speech, may be thought to tend to undermine basic school purposes. Such distractions might well have such adverse effects even if they fall short of disruption, disorder, or relevant rights-violation under *Tinker*. Again, this is hardly a matter of rigorous provability, now or in the foreseeable future. But localized responsible experimentation, in the pursuit of uncontroversial, fundamental educational goals, may be appropriate even in the absence of guaranteed success.

The general idea of distraction as an impediment to efficient learning is familiar. Our admittedly imperfect social science<sup>88</sup> suggests that “[a] child reared on television might have a tough time when later asked to slow down and concentrate on a less visually stimulating medium, such as a second-grade teacher or a text book.”<sup>89</sup> One study found, for example, that “[f]or every hour of television viewed per day before age 3, children were 10 percent more likely to have trouble paying attention by age 7.”<sup>90</sup> Such studies extend established work linking television viewing to diminished attention spans among school age children,<sup>91</sup> even controlling for factors such as “depressed parents, prenatal substance abuse and socioeconomic status.”<sup>92</sup>

Television as classically transmitted is, at least for the moment, not a major, direct, and immediate distraction within the school setting itself, as distinct from cell phones, laptops, video and camera phones, or various sorts of messaging and music or visual content provision. Various forms of distracting student speech and behavior, protected or unprotected by *Tinker*, have prompted concern on the part of many parents of public school children.<sup>93</sup> Some distracting student

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88. There may well be a sense in which “distraction” by definition involves interference with learning, but we are interested here in matters such as what could count as a distraction and from what sorts of learning a student might in one way or another be distracted.

89. Julie Davidow, *Television May Drive Kids to Distraction: Study Says Rapid Scene Changes Could Harm Concentration*, SEATTLE POST-INTELLIGENCER, Apr. 5, 2004, at A2, available at [http://seattlepi.nwsource.com/health/167646\\_television05.html](http://seattlepi.nwsource.com/health/167646_television05.html); see also Lori Aratani, *Teens Can Multitask, But What Are Costs?: Ability to Analyze May Be Affected, Experts Worry*, WASH. POST, Feb. 26, 2007, at A1; Dimitri Christakis, *Television Watching and Shortened Attention Spans*, PEDIATRICS FOR PARENTS, July 2004, available at [http://www.findarticles.com/p/articles/mi\\_m0816/is\\_7\\_21/ai\\_n13246900](http://www.findarticles.com/p/articles/mi_m0816/is_7_21/ai_n13246900); Christine Rosen, *Fast Forward to Passivity: There Are Risks Hidden Inside TiVo's Illusion of Control*, L.A. TIMES, Dec. 7, 2004, available at [http://www.eppc.org/publications/pubID.2227/pub\\_detail.asp](http://www.eppc.org/publications/pubID.2227/pub_detail.asp).

90. Davidow, *supra* note 89.

91. *Id.*

92. *Id.* Such considerations remind us that for some students the worst “distractions” may not be speech distractions in our sense, but may include family poverty, family instability, neighborhood poverty and violence, and school finances. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

93. See Blau *ex rel.* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 385-86 (6th Cir. 2005) (reviewing dress code policy explained by school partly in terms of avoiding distractions); National Public Radio, *Americans Willing to Pay for Improving Schools*, <http://www.npr.org/about/>

speech, it should be noticed, involves content more or less initiated by the “speaking” student. Other distracting student speech, however, is initiated by other persons and then transmitted through a student’s conscious decision, typically with endorsement or appreciation, or else critically, to one or more other students in a “chain” of speech communication.

There have of course always been potential distractions in schools, including notes, tradeable cards and other tradeable objects, jewelry,<sup>94</sup> caps and hats<sup>95</sup> or other message-bearing clothing,<sup>96</sup> and of late wristbands associated with various causes. As distracting as these traditional forms might be in some cases, it is implausible that such distractions must always, or even typically, be potentially restricted under *Tinker*. That is, many such distractions do not rise to the level of actual or predictable disruption or disturbance nor to the level of violation of some sufficient right on the part of some third party. A daydreaming student is perhaps self-distracted, but hardly disruptive, disorderly, or rights-violative.

These traditional sorts of classroom distractions thus typically do not threaten disruptions, disorder, disturbances, or rights-violations that might justify restricting student speech under *Tinker*. Nor does distracting speech typically fall within the (uncertain) scope of *Fraser* or *Hazelwood*. The logic of disruption and rights-violation forces us to a similar conclusion regarding most forms of contemporary electronic distractions as well. Devices such as cell-phones (with or without camera or video capability),<sup>97</sup> Blackberries® and similar messaging devices, music and video-playing i-Pods® and their rivals, handheld personal

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press/990920.edpoll.html (last visited Nov. 22, 2007). For judicial validation of a concern for “distraction” in this context, see *Walz ex rel. Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271, 276-77 (3d Cir. 2003) (“A school must be able to restrict student expression that contradicts or distracts from a curricular activity.”). The court here, however, may have had in mind overt disruption and disorder of a sort clearly prohibitable under *Tinker*’s established “disruption” exception. See *id.*

94. See *Jeglin ex rel. Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1462 (C.D. Cal. 1993).

95. *Id.* at 1463 (“Hats and caps shall not be worn.”); *Blau*, 401 F.3d at 385.

96. *D.B. ex rel. Brogdon v. Lafon*, 452 F. Supp. 2d 813, 814 (E.D. Tenn. 2006) (involving “clothing depicting the confederate battle flag”); see also *Governor Wentworth Reg’l Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410, 411 (D. N.H. 2006) (involving symbolic “anti-Nazi” patch on school clothing). Graffiti of traditional sorts in public schools could also in some cases be distracting, but in some contexts might be removed or even sanctioned on content-neutral grounds without a need to meet the *Tinker* test. Other forms of graffiti, as in the case of racist graffiti and counter-graffiti, may give rise to issues under *Tinker*. See *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 248, 252-53 (3d Cir. 2002).

97. See *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 640 (E.D. Pa. 2006) (referring to “school’s policy prohibiting use or display of cell phones during school hours”); *Your Bra is Ringing: Students Defy Ban*, N.Y. DAILY NEWS, Nov. 16, 2006, [http://www.nydailynews.com/news/2006/11/16/2006-11-16\\_your\\_bra\\_is\\_ringing\\_students\\_defy\\_ban.html](http://www.nydailynews.com/news/2006/11/16/2006-11-16_your_bra_is_ringing_students_defy_ban.html); see also *infra* note 109.

game devices, and laptops<sup>98</sup> with their multiple functions can all be used in various ways without affecting non-consenting persons in ways not amounting to disruption, disorder, or rights-violation under *Tinker*. The next generations of such devices could be more engagingly attractive, more social, yet less obtrusive to non-consenters. There may eventually be some risk that the students' increasingly chronic distractedness might come to affect our view of what it is fair and realistic to expect students to learn and accomplish.

These and other emerging technologies are certainly not the first technologies with the potential to distract. Blank notebook paper could always be doodled upon, and paper notes passed. Literal window technology allowed for extended staring outside. Still, many new and emerging technologies hold a potential for distraction, as well as for legitimate use, far exceeding that of traditional technologies. Some such technologies may be unusually "involving" if not in some sense even mildly "addictive." The potential for increased personal distraction in school, individually or socially, seems at the very least easily arguable.

Most of this emerging technological distraction may be directly confined to students voluntarily utilizing the technology. Some forms of the new distractions—visible images on laptop screens or on a cell phone, audible music, cameras, or ringing as opposed to silent or vibrate-mode cell phones<sup>99</sup>—may distract other students, consenting or non-consenting, as well. But such distractions, even if involuntary, may not fall within the scope of disturbance or disruption or rights-violation under *Tinker*. Distraction may seem increasingly "normal." Much, if not all, student speech-based distraction will not, on mainstream judicial interpretation, fall within the scope of the exceptions to protected speech in *Tinker* or subsequent Supreme Court student speech cases. The gulf between distracting speech and physical altercations or rights-violations is shown clearly by the fact that distracting speech need not be disapproved of, and may indeed be enthusiastically and unequivocally welcomed by those who are most distracted.

Even the worst forms of speech distraction will thus not typically amount to impending disruption, disturbance, or rights-violation sufficient under *Tinker* and

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98. For the controversial use of unconstrained laptop, Internet, or messaging capacity use even in law school classes, see Posting of Orly Lobel to Prawfsblawg, [http://prawfsblawg.blogs.com/prawfsblawg/2006/07/banning\\_laptops.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/07/banning_laptops.html) (July 27, 2006, 2:34PM). More broadly, see Christina Silva, *Some Colleges Crack Down on Laptop Use in Classroom: Teachers Say It Distracts from Class Participation*, BOSTON GLOBE, June 10, 2006, at B1, available at [http://www.boston.com/news/education/higher/articles/2006/06/10/some\\_colleges\\_crack\\_down\\_on\\_laptop\\_use\\_in\\_classroom](http://www.boston.com/news/education/higher/articles/2006/06/10/some_colleges_crack_down_on_laptop_use_in_classroom); Jeffrey R. Young, *The Fight For Classroom Attention: Professor vs. Laptop—Some Instructors Ban Computers or Shut Off Internet Access, Bringing Complaints from Students*, CHRON. HIGHER EDUC., June 2, 2006, at A27.

99. The point has, however, been made that a cell phone going off in class even in vibrate mode can be distracting, i.e., that there is a difference in distractive potential even between silent and vibrate mode.

its progeny to justify restricting speech<sup>100</sup> with a student as a speaker or listener.<sup>101</sup> It is nevertheless reasonable to imagine that such distractions may voluntarily or involuntarily impair the educational experience of at least some students. Indeed, distractions not subject to limitation under *Tinker* may adversely affect the educational mission as severely, if not more severely, than some brief actual or looming physical or verbal confrontations, altercations, or playground brawls deemed to qualify as disruptions, disturbances, or cognizable rights-violations under *Tinker*.<sup>102</sup>

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100. Certainly the interactive use of a computer, a telephone, or even a violent video game is typically held to involve speech for First Amendment purposes. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 198 (2003) (public library Internet filtering and blocking case); *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989) (involving "indecent" commercial phone message); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001) (involving public violent video game ordinance). Even the playing of a relatively static communicative medium, such as a phonograph record, in an essentially private way, such as through headphones or earphones, can involve speech for constitutional purposes. See, e.g., *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 188-90 (Ct. App. 1988). For even unsolicited commercial e-mail as speech subject to ordinary constitutional commercial speech tests, see, e.g., *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 374-75 (5th Cir. 2005).

101. The student's status as speaker or writer on the one hand, or as listener or viewer on the other, should not be typically crucial to the student's ability to assert a free speech claim. As well, one can distract other persons in various capacities. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both.") (footnote omitted).

A further dimension of the problem is that some lower courts have held that the distinction between speech on public interest and concern, compared to speech that is not on public interest and concern, is not applicable in the *Tinker* context. See *Pinard v. Clatskanie Sch. Dist.* 6J, 446 F.3d 964, 974 (9th Cir.), *amended by* 467 F.3d 755 (9th Cir. 2006). *Contra* *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (highlighting, among other considerations, the difference in free speech protection accorded speech on matters of public as opposed to merely personal interest in the context of public employee speech). This raises the possibility of student speech that is not regulable under *Tinker*, but that is both distracting and also not on any publicly consequential subject. Distractingness combined with the subject-matter triviality of the student speech could heighten the case for the reasonable regulation of the speech in such cases.

102. See, e.g., *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 255 (3d Cir. 2002) (acknowledging recent "serious disruptive incidents" in the school system, but questioning their relevance to the particular speech sought to be regulated); *Saxe ex rel. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (referring to a "well-founded expectation of disruption" standard not met in *Saxe* itself); *West v. Derby Unified Sch. Dist. No. 206*, 206 F.3d 1358, 1367 (10th Cir. 2000) (validating the prevention and not mere punishment of disruption and disturbance of a cognizable sort); see also *Scott ex rel. Blich v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1248 (11th Cir. 2003) ("[S]chool officials are on their most solid footing when they reasonably fear that certain speech is likely to 'appreciably disrupt the appropriate discipline in the school.'" (citing *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1271 (11th Cir. 2000))

In sum, “mere” distractions may well not qualify as actual or likely impending disruptions, disturbances, or rights-violations under *Tinker*. But they may in some respects be as bad or worse in their effects on learning, on student attention spans, on concentration, and on the value of the educational experience. “Mere” distraction, in an increasing variety of forms, may undermine basic educational purposes and missions.

It would be possible for a court to redefine the scope of disruption or rights-violation under *Tinker* to encompass such educational mission-impairing distractions. This dramatic redefinition would verbally preserve *Tinker*, at least superficially, as the guiding precedent. But even then, there is something to be said for a more candid and explicit modification of *Tinker*. This latter alternative seems more forthright than oddly redefining and expanding *Tinker*’s existing exceptions.

In any event, we can easily imagine a school administrator who is motivated by a desire to promote the crucial educational mission of the public schools, perhaps as classically articulated in *Brown v. Board of Education*.<sup>103</sup> Such an administrator might be specifically concerned by the catalogue of disturbing educational and civic outcomes briefly noted above.<sup>104</sup> Thus an administrator today might reassess the constitutional status of speech distraction by recalling the crucial language from *Brown*:

Today education is perhaps the most important function of state and local governments . . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.<sup>105</sup>

Despite the limits of *Tinker* as currently interpreted, a reasonable administrator might well be moved to endorse, merely for example, a school dress code or even a school uniform policy: “We expect students to maintain the type of appearance that is not distracting to students, teachers, or the educational process of the school.”<sup>106</sup> Whether the distraction takes the form of words or symbols on clothing, as in the case of Confederate battle flag insignia,<sup>107</sup> or any

(setting aside restriction of student speech based on its vulgarity or offensiveness).

103. 347 U.S. 483 (1954).

104. See *supra* notes 64-90 and accompanying text.

105. *Brown*, 347 U.S. at 493; see also, e.g., *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 469 (1988) (Marshall, J., dissenting) (“[E]ducation is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . .” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972))).

106. *Blau ex rel. Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 386 (6th Cir. 2005); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469-70 (6th Cir. 2000) (citing a school official affidavit that particular “message” t-shirts were “a distraction” and “contrary to our educational mission”).

107. See *supra* note 102; see also *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246

other form of speech on matters politically significant or trivial<sup>108</sup> need not be decisive. Even the current case law to some degree attempts to recognize “schools’ need to control behavior and foster an environment conducive to learning.”<sup>109</sup>

A reasonable school administrator might also wish to reconsider the distinction between protected “distracting” speech and unprotected “disorderly, disruptive, or rights-violative” student speech in the context of distraction cases such as *Chandler v. McMinnville School District*.<sup>110</sup> In *Chandler*, two high school students wore and distributed various buttons and stickers during school in response to the school’s hiring of replacements for legally striking teachers, among whom were the fathers of the two students.<sup>111</sup> Among the slogans displayed on the buttons were “Do scabs bleed?”<sup>112</sup> and “I’m not listening scab.”<sup>113</sup>

The Ninth Circuit held that the buttons in question were not inherently disruptive,<sup>114</sup> which may well have been entirely correct in the sense intended by *Tinker*. Nor would this particular student speech be of the sort most likely to evoke a neutral, dispassionate, pedagogically reflective response from a school administration. After all, the speech involved in this case focused not on some diffuse national policy issue, but directly on the actions and decisions of the local school administration itself.

F.3d 536, 538 (6th Cir. 2001); *Denno ex rel. Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1270-71 (11th Cir. 2000); *D.B. ex rel. Brogdon v. Lafon*, 452 F. Supp. 2d 813, 814 (E.D. Tenn. 2006); *Bragg v. Swanson*, 371 F. Supp. 2d 814, 816 (W.D. W. Va. 2005).

108. Again, *Tinker* free speech protection does not yet appear to require some minimum threshold of public interest in the subject matter of the speech. See *Pinard v. Clatskanie Sch. Dist.* 6J, 446 F.3d 964, 967-68 (9th Cir.), *amended by* 467 F.3d 755 (9th Cir. 2006). For an entertaining case in which the student speech, off campus and during a non-curricular activity, was neither on a merely personal matter, nor by admission meaningful if addressing a matter of public interest, see *Frederick v. Morse*, 439 F.3d 1114 (9th Cir.) (displaying “Bong Hits 4 Jesus” banner), *rev’d*, 127 S. Ct. 2618 (2006).

109. *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003) (“[T]he First Amendment has never been interpreted to interfere with the authority of schools to maintain an environment conducive to learning.”). Teachers and students have occasionally been videotaped in class without consent, with the videos then sometimes turning up on fora such as YouTube. See Paul Shukovsky & Nina Akhmeteli, *Free Speech vs. Class Disruption: Court to Decide if Teen Can Be Suspended over Video of Teacher*, SEATTLEPI.COM, May 22, 2007, available at [http://seattlepi.nwsourc.com/local/316618\\_youtube22.html](http://seattlepi.nwsourc.com/local/316618_youtube22.html). In some permutations of such cases, neither disruption nor relevant rights-violation may fully capture the effects of the distraction.

110. 978 F.2d 524 (9th Cir. 1992).

111. *See id.* at 526.

112. *Id.*

113. *Id.* at 530-31.

114. *See id.* We may also set aside any concern that the buttons could be restricted as somehow lewd, vulgar, or plainly offensive as to manner of speech under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). *See Chandler*, 978 F.2d at 528-29.

The *Chandler* case, however, raises the possibility that *Tinker*'s focus on disruption, disorderliness, and rights-violation, even as supplemented by *Fraser*'s concern for lewd, vulgar, or plainly offensive speech,<sup>115</sup> in school assemblies or independently uttered, ignores some forms of speech that may undermine achievement of a school's most basic goals. A reasonable school administration, in a more neutral position than that occupied in *Chandler*, could wonder whether the distributed buttons promoted distraction among students or less than optimal student attentiveness to the curricular lessons.

Doubtless, the buttons in *Chandler* vividly brought home a civics lesson unfolding before the students themselves. In this respect, the buttons could be of unusually large free speech value. It is assumed that the question of whether "scabs bleed"<sup>116</sup> was intended and understood in merely a rhetorical sense. There is also a sense in which the rhetorical slogan "I'm not listening scab"<sup>117</sup> could be reasonably imagined to worsen and not merely evidence a problem of curricular distraction. Some sort of contextualized balancing of educational and civic interests might seem appropriate.

This is not to suggest that most individual buttons, or similar speech expressions, by themselves create significant distraction from basic educational tasks and achievement. It is also not to decide from afar whether the undoubted free speech value of the buttons in question somehow outweighed the distraction associated with the buttons. Buttons with messages may express valuable speech, but may also express a pre-existing distractedness, as well as promote further distraction. A reasonably detached administrator might conclude that some forms of symbolic or literal student speech, whether in the form of clothing, jewelry, electronics, accessories, or some other medium, taken in the aggregate<sup>118</sup> and in context,<sup>119</sup> can contribute to a problem of classroom distraction.

Restrictions on speech certainly cannot always be justified by pointing to associated harms, even where the harms can be characterized in some politically neutral way,<sup>120</sup> and even where the harms may be substantial.<sup>121</sup> Some

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115. See *Fraser*, 478 U.S. at 683.

116. *Chandler*, 978 F.2d at 526.

117. *Id.*

118. By analogy, when trial court errors, each of which is harmless in isolation, are aggregated in context, the overall cumulative effect may in some cases be legally harmful. See, e.g., *United States v. Schuler*, 458 F.3d 1148, 1156 (10th Cir. 2006) (citing *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc)); *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005) ("[T]he cumulative prejudicial effect of many errors may be greater than the sum of the prejudice caused by each individual error." (citing *United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993))).

119. See *supra* note 118. The law certainly need not treat, say, individual instances of pollution in isolation and out of any context; some environmental harms are dependent on aggregation, cumulation, interaction, or synergistic effects. See, e.g., *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 186-87 (2d Cir. 2003); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 264 (3d Cir. 1992).

120. See R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The*

accounting of the various speech interests and other cognizable interests at stake should be taken.<sup>122</sup> The very real costs of free speech are of course in many contexts worth bearing.

Courts should, however, be reluctant to systematically undervalue the broad educational achievement interests potentially at stake<sup>123</sup> in student speech cases, at least where the school administration has no obvious personal, partisan, or narrowly political stake in the regulation.<sup>124</sup> Courts generally are not better positioned, even through judicial independence, than experienced on-site school administrators to identify, assess, and address educational distraction through student speech.

Common sense might tell outsiders, for example, that there are distinctions to be drawn between pro-drug or pro-alcohol speech on school clothing and anti-drug or anti-alcohol speech on school clothing, perhaps with differences in their realistic potential for distraction. Pro-drug and anti-drug speech, we might think, are readily distinguishable. Speech on school clothing endorsing a school's anti-drug policy rather than rejecting it could, issues of viewpoint preference aside,<sup>125</sup> perhaps be thought as correspondingly less distracting. There may be a tendency for outsiders in particular to imagine that such speech in "support" of a school's policies should be generally less distracting<sup>126</sup> and therefore not generally objectionable.<sup>127</sup>

A reasonable administrator might find, for example, all clothing-slogan references to alcohol or drugs or violence more or less equally distracting,<sup>128</sup> regardless of any purported endorsement or criticism. Suppose a student wears a shirt bearing an apparently anti-drug message. Will it be clear to outsiders

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*Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 342-43 (2006).

121. It would be implausible to defend cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) or the Illinois Nazi march case of *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) on the grounds of the insignificance of the harm attributable to the speech. For discussion, see Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157 (2005) (reviewing GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004)).

122. For a discussion of contrasts among balancing methodologies, see, e.g., David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 693-94 (1994) (endorsing the balancing of all affected constitutional rights against the similarly aggregated governmental or public interests at the level of the transaction in question).

123. See *supra* notes 103-05 and accompanying text.

124. But compare the obvious interests at stake in *Chandler v. McMinnville School District*, 978 F.2d 524, 526, 531 (9th Cir. 1992).

125. See generally Wright, *supra* note 120.

126. See *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 260 (4th Cir. 2003).

127. See *id.*

128. See, e.g., *Guiles ex rel. Lucas v. Marineau*, 349 F. Supp. 2d 871, 875 (D. Vt. 2004), *aff'd in part, vacated in part*, 461 F.3d 320 (2d Cir. 2006).

whether the student is speaking ironically?<sup>129</sup> Will this generally be more accurately determined by a federal court than by experienced, on-site school administrators who may know the student? Why could not merely ironic “support” of an anti-drug policy be distracting, whatever its overall value as speech? Assuming, by analogy, some overall value in anti-drug advertising campaigns may also seem commonsensical, the positive effects of anti-drug messages may actually be more elusive than some imagine.<sup>130</sup>

No doubt the courts must have the final say with regard to the constitutional dimensions of classroom speech, even when the speech regulation does not seem politically motivated.<sup>131</sup> But public schools can comprise social environments of remarkable subtlety.<sup>132</sup> The better part of wisdom would be to

avoid too quickly second-guessing, from the quiet confines of a judge’s chambers, the complex and difficult decisions made on a daily basis by teachers and school administrators. School authorities are generally in a far better position to understand their students . . . . They are entitled to a healthy measure of deference when exercising judgment, drawing inferences, and reaching conclusions about what is actually going on in their schools and classrooms.<sup>133</sup>

### CONCLUSION

Reasonably regulating some distracting student speech may tend, at least in combination with other reforms, to promote basic educational and civic goals of the public schools. At the very least, this possibility is worth judicially experimenting within accordance with the judgments of local school administrations. Of course, the judgments of local school officials who distrust the idea of educational functionalism in this context or a jurisprudence of distracting speech should be respected as well.

Much judicial work remains to be done in clarifying the scope of *Tinker* and succeeding cases regulating unprotected speech categories. The latter categories include speech that is violative of relevant rights or speech that realistically

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129. *See id.* at 876.

130. *See, e.g.,* Ryan Grim, *A White House Drug Deal Gone Bad: Sitting on the Negative Results of a Study of Anti-Marijuana Ads*, SLATE, Sept. 7, 2006, <http://www.slate.com/id/2148999/> (“So far, at least, it appears to be pretty much impossible to warn kids away from drugs with an ad campaign, no matter how cautious or nuanced an approach you take. Talking about drugs seems to give enough kids the idea of trying them that drug education efforts regularly backfire.”).

131. *See, e.g.,* *Pinard v. Clatskanie Sch. Dist.* 6J, 446 F.3d 964, 972 (9th Cir.), *amended by* 467 F.3d 755 (9th Cir. 2006); *LaVine ex rel. LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001).

132. Consider, for example, the circumstances and the broader context in *LaVine*. *See LaVine*, 257 F.3d at 988.

133. *Governor Wentworth Reg’l Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410, 425 (D.N.H. 2006).

portends disruption, altercation, physical or other confrontational conflict, impending or likely overt physical disturbance, and disorder.<sup>134</sup> These formulations, however, generate a number of unresolved questions. There are also more ambiguous and perhaps broader occasional references in some of the case law to maintain “appropriate discipline,”<sup>135</sup> to avoid “substantial interference with schoolwork,”<sup>136</sup> or even the “operation of the school.”<sup>137</sup> Such language has the potential to be expanded upon. Formulations, if validated and expanded upon in the right ways by the Supreme Court, have some potential to address the problems of speech distraction.

In general, however, the language, examples, imagery, and scenarios in *Tinker* and successor cases do not seem to encompass many cases of “pure” distraction in the absence of something like rights-violation or probable physical disorder. Even if various pure distraction cases could all fit within the scope of *Tinker*’s unprotected categories, the crucial judicial problem would still remain. It makes little difference whether we can fit all of our distraction cases within the scope of, say, “appropriate discipline”<sup>138</sup> or the other looser *Tinker* language if the courts still resist treating significant distraction from curricular and civic learning as permissible grounds for reasonably restricting student speech. Some judicial re-assessment or re-weighing of the various interests at stake, even when the distracting speech is on a matter of public interest, will still be advisable.

Thus, courts should, whatever the rubric, be willing to consider validating the reasonable regulation of significant distraction when that regulation is not counterbalanced by free speech values. Courts should be receptive particularly in light of our often arguably disappointing educational and civic experiences and achievements since roughly the time of *Tinker*’s adoption. Courts should be constitutionally permitted to be responsive to fair-minded decisions of school administrations seeking to promote basic educational and democratic civic values. Free speech itself, after all, clearly functions best on the basis of crucial knowledge, competencies, and values promoted by public schools generally.

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134. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

135. *Id.*

136. See, e.g., *Harper ex rel. Harper v. Poway United Sch. Dist.*, 445 F.3d 1166, 1193 (9th Cir.) (Kozinski, J., dissenting) (quoting *Tinker*, 393 U.S. at 511), *reh’g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

137. See, e.g., *Ponce v. Socorro Indep. Sch. Dist.*, 432 F. Supp. 2d 682, 695 (W.D. Tex. 2006).

138. *Tinker*, 393 U.S. at 513.