INTRODUCTION

In 1969, near the height of the Vietnam War protest movement, the Supreme Court issued its landmark opinion in the public school student speech case of Tinker v. Des Moines Independent Community School District. Tinker upheld wearing protest armbands in public school by students of various ages.

† Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law. The author extends his thanks to Samantha Everett.

2. Id. at 508.
3. Id. at 515, 516 (Black, J., dissenting) (listing the protesting Tinker family members as ranging in age from eight (second grade) to fifteen (eleventh grade)). The actual petitioners in Tinker ranged from age thirteen to sixteen. Id. at 504 (Fortas, J., majority
Schools could restrict such speech only where the speech reasonably foreseeably could have resulted in substantial indiscipline, disruption, disturbance, or disorder, or where the speech would have violated the more or less specified rights of other students or of unspecified non-students. The Court’s inspiration in protecting student speech, in ways adapted to the public school context, came in part from the classic rough-and-tumble political speech case of Terminiello v. Chicago.

The Tinker case has resonated with judges and academics. The Court’s assertion in Tinker 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” has been cited, in some variant, in at least 363 retrievable cases. The continuing citation rates of this language, expressing opinion).

4. Id. at 509-11. Here the Court seems to drift from the weaker idea of the mere foreseeability of the harm to the stronger idea that the prohibitable consequences of the speech “would” ensue, and that the speech restrictions must have been “necessary” to avoid those consequences. See also id. at 508 (referring to “actual or nascent” interference with the work of the school).

5. Id. at 508-13.

6. See id. at 508 (referring specifically to the rights of other students “to be secure and to be let alone”).

7. See id. at 508, 509, 513 (referring more generically to unspecified rights); see also Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.) (recognizing the lack of clarity of the Tinker rights-prong scope).

8. See Tinker, 393 U.S. at 508, 509 (referring to “the rights of other students”).

9. See id. at 513 (referring more generally to “the rights of others”). Tinker also referred to student conduct that “would substantially interfere with the work of the school,” id. at 509, but this formulation is unfortunately often de-emphasized or not looked to as a distinct constitutional test. But cf. Wisniewski v. Bd. of Educ., 494 F.3d 34, 38 (2d Cir. 2007) (briefly referring to this particular formulation). This very brief statement of Tinker sets aside cases in which the disruption or the rights violation was not merely reasonably foreseeable, but actually occurred. Tinker itself did not specifically address any relevant differences between content-based and content-neutral regulations of speech in this context. See generally R. George Wright, Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction, 60 U. MIAMI L. REV. 333 (2006) (noting the practice of adopting less stringent tests for content-neutral regulations).

10. See Tinker, 393 U.S. at 506 (noting “the special characteristics of the school environment”).

11. See id. at 508 (citing Terminiello v. Chicago, 337 U.S. 1 (1949)). Terminiello rejects a “heckler’s veto” over politically and personally offensive, emotional, and provocative public speech, see 337 U.S. at 4-5, with limitations largely anticipating those imposed in Brandenburg v. Ohio, 395 U.S. 444 (1969), a crucial subversive advocacy case decided the same year as Tinker. Whether Tinker, in contrast, allows for a “heckler’s veto” by opponents of the actual or proposed speech—whether justifiably, in the school context, or not—is worthy of reflection. See Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879-80 (7th Cir. 2011) (Posner, J.) (considering a T-shirt regarding sexual orientation); Barr v. Lafon, 553 F.3d 463, 464 (6th Cir. 2009) (Boggs, C.J., dissenting from denial of rehearing en banc).

12. Tinker, 393 U.S. at 506.

something of the spirit of *Tinker*, are a tribute to *Tinker*'s lasting appeal.

*Tinker* also remains popular, with or without some qualification, disclaimer, or particular interpretation, among contemporary free speech scholars. Dean Erwin Chemerinsky, for example, refers to *Tinker* as "the most important Supreme Court case in history protecting the constitutional rights of students."14 Dean Chemerinsky declares that he "strongly agree[s] . . . that students retain First Amendment rights even within the schoolhouse gates,"15 and he endorses Justice Brennan's view that "[t]he classroom is peculiarly the 'marketplace of ideas.'"16 More generally, Dean Chemerinsky concludes:

School officials—like all government officials—often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech.17

Professor Jamin Raskin argues with even greater enthusiasm that *Tinker* "made a core value of the Bill of Rights spring to life for young people facing authoritarian treatment at the hands of adult officials running their school systems."18 Professor Raskin elaborates:

By privileging the right of students to engage in passionate political communication over the school's interest in maintaining discipline or the community's interest in maintaining pro-war consensus, the *Tinker* decision was a decisive victory for . . . "democracy" values over "management" and "community" values within a key institutional setting.19

Nor does the rise of computer communication by means of portable technologies necessarily condemn *Tinker* to irrelevance. It has recently been argued, for example, that "*Tinker* remains functional, and if properly applied to students' online expression, it can vindicate students' free expression interests while still allowing schools to properly regulate day-to-day student discipline and the educational process."20 And when we add in the options of modifying

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15. *Id.* at 545.
17. *Id.* at 546.
19. *Id.* at 1194.
Tinker, as by abandoning either the first “disruption” prong\(^1\) or else the second “rights of others” prong,\(^2\) contemporary support for some version of Tinker is even broader.

At this point, however, it is fair, and indeed important, to ask about the likely consequences of radically abandoning Tinker. What might it mean, at this historical point, to abandon Tinker along with its qualifying and limiting cases? The discussion below pursues this question and eventually endorses just such a radical abandonment of Tinker. This is not an anti-student speech conclusion. It is instead a recognition of the importance of allowing public schools, if they so choose and within other constitutional and statutory bounds, to focus more on educational outcomes, equality, or other dimensions of the vital basic mission of contemporary public schools.

I. **Tinker and the Later Limiting Cases**

A. The Supreme Court Cases

The idea of “radically” abandoning Tinker requires clarification. What should be envisioned is not merely the overruling of Tinker itself. A radical abandonment of Tinker requires much more. Radically abandoning what we might call the Tinker regime also involves the overruling or abandonment of all of the case law that is intended either to support, or to limit or narrow, Tinker’s potential scope. With Tinker off the books, the justification for the subsequent case law either confirming or confining Tinker loses much of its point and appeal.

Ever since the Tinker decision, the Supreme Court’s highest priority in the public school student speech cases has been to impose qualifications and limitations on the scope of Tinker. Thus if Tinker itself were somehow negated, these qualifying and limiting cases would lose much of their original rationale, and might not be justifiable on their own merits. Let us briefly recall the most important of the cases that reaffirm, while variously limiting, Tinker.

In Bethel School District No. 403 v. Fraser,\(^3\) the Court relied on the classic form-versus-content distinction,\(^4\) and carved out an exception for language


\(^{22}\) See, e.g., Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1191 (2009) (“[F]or Tinker to be reinvigorated, if not resuscitated, . . . the rights-of-others prong of Tinker . . . must be abandoned.”).

\(^{23}\) 478 U.S. 675 (1986).

\(^{24}\) For the Court’s ambivalence in the free speech context with regard to form and content, compare Cohen v. California, 403 U.S. 15, 26 (1971) (“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”), with FCC v. Pacifica Foundation, 438 U.S. 726, 743
deemed vulgar, indecent, highly or plainly offensive, or sexually lewd. The Fraser Court cited Tinker, but partly for the sake of limiting Tinker's scope. Thus Fraser allows public schools to insist "that certain modes of expression are inappropriate and subject to sanctions," based on the idea that "[t]he inculcation of [the contrary] values is truly the 'work of the schools.'" The Fraser Court's logic actually seems to carry further than its language: if inculcating certain values, including that of avoiding plainly offensive language, is "truly the 'work of the schools,'" failing to prohibit the underlying language at issue in Fraser might be difficult to justify. Is this aspect of the basic mission of the public schools commonly of limited importance?

More broadly, the Fraser Court declares that "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." Whether or not the Court recognized it, this language carries a certain broader logical momentum. If the public schools must, as part of their vital work, uphold "the shared values of a civilized social order," should this ordinarily be confined, in the student speech realm, merely to the form and phrasing of the speech, apart from any more substantive message? Even as Fraser cites Tinker, the logic of Fraser, in emphasizing the value of a broader civilized order, may tend to subordinate Tinker.

The Court again edged away from, and further limited, Tinker in Hazelwood School District v. Kuhlmeier. In Hazelwood, a high school curricular student newspaper case, the Court's narrow focus was on speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Rather than apply Tinker in such a case, the Court authorized a school's censorship, as to both form and content, in "school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

n.18 (1978) ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.").

25. See Fraser, 478 U.S. at 683-85.
26. See, e.g., id. at 683.
27. See id. at 685.
28. Id. at 683.
29. Id. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
30. Id.
31. Id.
32. Id.
34. Id. at 271.
35. See id. at 273.
36. Id.
While the *Hazelwood* Court acknowledged *Tinker*, it also distinguished the speech at issue as "'wholly inconsistent with the fundamental values of public school education.'" The Court sensibly declared, importantly for our purposes, that "'[a] school need not tolerate student speech that is inconsistent with . . . [the school's] 'basic educational mission.'" The question must then arise as to whether speech that reasonably appears to bear the approval of the school is the only kind of student speech that could be inconsistent with a school's basic educational mission. On any reasonable understanding of the mission of the public schools, that would seem implausible. And again, if any particular kind of student speech is considered—by school officials rather than by courts—to be inconsistent with the school's basic and plainly vital educational mission, should the school even have discretion to permit student speech incompatible with that basic institutional mission? How would a school justify permitting what it considered the deliberate subversion of its own basic and vital mission?

Most recently, the Court decided the curious case of *Morse v. Frederick*. *Morse* again verbally reaffirmed *Tinker*. But by reasonable inference *Morse* may undermine *Tinker* more than its narrow holding might suggest. The plurality in *Morse* steered a middle ground between finding the "Bong Hits 4 Jesus" banner to be meaningless, as the student speaker himself claimed, and finding any political message in the banner." Instead, the plurality found reasonable the school principal's judgment that "the banner would be interpreted by those viewing it as [non-politically] promoting illegal drug use."
The *Morse* plurality then determined that "deterring drug use by

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37. *Id.* at 266.
38. *Id.* at 267 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986)) (internal quotation marks omitted).
39. *Id.* at 266 (quoting Fraser, 478 U.S. at 685).
40. *See id.* at 267 (“'[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.'” (quoting Fraser, 478 U.S. at 683)); *see also* Gschwind v. Heiden, 692 F.3d 844, 847 (7th Cir. 2012) (Posner, J.) (“We are mindful—have indeed emphasized—that academic administrators are entitled, in the name of academic freedom and efficient educational administration, to a considerable degree of judicial forbearance in matters of discipline.” (citing Brandt v. Bd. of Educ., 480 F.3d 460, 467 (7th Cir. 2007))).
42. *See id.* at 403-04 (Roberts, C.J.) (plurality opinion).
43. *Id.* at 401-02.
44. *See id.* at 403 (“'[N]ot even Frederick argues that the banner conveys any sort of political or religious message. . . . [T]his is plainly not a case about political debate over the criminalization of drug use or possession.'”).
45. *Id.* at 401; *see also id.* at 403 (referring to speech "reasonably viewed as promoting illegal drug use" when expressed at a school-sponsored event). The concurring opinion of Justices Alito and Kennedy also refers to what a reasonable observer "would," as opposed to might, or could, infer. *Id.* at 422 (Alito, J., concurring).
schoolchildren is an important—indeed, perhaps compelling interest";\textsuperscript{46} that "[t]he problem remains serious today";\textsuperscript{47} that federal funds are contingent upon a school's unequivocal condemnation of illegal drug use;\textsuperscript{48} that peer pressure is an important factor in student use of illegal drugs;\textsuperscript{49} and, most significantly for our purposes, that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use."\textsuperscript{50} On the basis of these considerations—and not on the basis of either language offensiveness\textsuperscript{51} or "an abstract desire to avoid controversy"\textsuperscript{52}—the plurality rejected the student free speech argument. Thus "[t]he 'special characteristics of the school environment' ... and the governmental interest in stopping student drug abuse ... allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."\textsuperscript{53}

Justice Alito’s concurring opinion was apparently conditioned not only on the specific illegal drug use advocacy context but also on excluding “any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”\textsuperscript{54} In contrast, Justice Thomas’s concurring opinion interestingly took direct aim at \textit{Tinker} in its entirety, declaring that \textit{Tinker} “is without basis in the Constitution.”\textsuperscript{55}

Justice Thomas’s approach, however, depends entirely upon his historicist-originalist methodology, which seeks some sort of consensual, original understanding of the constitutional text at issue.\textsuperscript{56} In his own terms, “[i]n my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”\textsuperscript{57} Anyone who is unconvinced by Justice Thomas’s originalist methodology,

\begin{itemize}
\item \textsuperscript{46} Id. at 407 (Roberts, C.J.) (plurality opinion) (internal quotation marks omitted).
\item \textsuperscript{47} Id.
\item \textsuperscript{48} See id. at 408.
\item \textsuperscript{49} See id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} See id. at 409.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 408 (quoting \textit{Tinker} v. \textit{Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 506 (1969)); \textit{cf.} \textit{DeFabio} v. \textit{E. Hampton Union Free Sch. Dist.}, 623 F.3d 71, 77 (2d Cir. 2010) (per curiam) (quoting \textit{Morse}, 551 U.S. at 397). Note the plurality’s relative lack of interest on this occasion in empirical proof that the student speech restriction at issue would promote substantially the cited government interest.
\item \textsuperscript{54} \textit{Morse}, 551 U.S. at 422 (Alito, J., concurring).
\item \textsuperscript{55} Id. at 410 (Thomas, J., concurring).
\item \textsuperscript{56} See id. at 410-11. Given the increasing prominence of public schools over time, the originalist would need a theory of how much light, if any, can be shed by later practices or by later judicial decisions, on public school student speech rights at the time that the First Amendment was ratified. When is the evidence of any consensual original intent too scanty, too murky, or too general to underwrite any distinctive constitutional result? And why is the focus on the time of adopting the First Amendment, rather than on the time of applying the First Amendment against the states through the Fourteenth Amendment?
\item \textsuperscript{57} Id.
\end{itemize}
either in general or in this context, must of course follow another path.

Overall, Morse seeks to preserve the core of the Tinker holding by distinguishing between student speech that promotes illegal drug use and student speech “that can plausibly be interpreted as commenting on” favorably, the decriminalization of an illegal drug, perhaps on grounds of futility or harmlessness. But this attempted distinction is, realistically, plainly hopeless. These two categories must, in practice, substantially and inevitably overlap, with arbitrary judicial results.

It would also be easy to argue that illegal drug use is not unique as a social problem faced by students, and that other subjects could be added to the ‘drug use’ exception to Tinker. The more basic concern, however, is not whether any further subject-matter exceptions could arise, but whether there is any fully defensible stopping point, under Morse, short of recognizing any important and relevant governmental interest as potentially sufficient to limit student speech. The Morse plurality refers to the interest at stake as at least important, if not compelling, and as focused on a “serious” problem. This language does not suggest a narrow scope for Morse-type exceptions to Tinker. And Morse does not provide a rationale for distinguishing among important interests, or in particular for subordinating some, but not other, important interests to the interest in unrestricted student speech.

58. For contrary suggestions, see R. George Wright, Originalism and the Problem of Fundamental Fairness, 91 MARQ. L. REV. 687, 718 (2008). Even if there were case law from the time of First Amendment ratification, Fourteenth Amendment ratification, or from the explicit incorporation therein of free speech rights in general, any case language suggesting the nonexistence of public school student free speech rights, carried beyond a narrower rule sufficient to decide the particular case, would of course be dicta. Oddly, though, one could also argue that the absence of any flat declarations that students lack free speech rights suggests either that the culture had not given such a question much thought, or that the culture considered the absence of student speech rights so obvious as to go without saying.

59. Most of Justice Thomas’s own historical references emphasize patterns of educational hierarchy, authority, discipline, and obedience, including at the college level. See Morse, 551 U.S. at 411-13, 412 n.2. But even such a rigid system would be compatible with limited speech rights held by students. Such speech rights would be part of the “ground rules” respected by all. And of course, history alone as the basis for denying any free speech rights to post-high school students would be even more doubtful. See, e.g., R. George Wright, The Emergence of First Amendment Academic Freedom, 85 NEB. L. REV. 793 (2007).

60. See supra note 53 and accompanying text.
61. See supra note 54 and accompanying text.
62. See supra note 46 and accompanying text.
63. See supra note 47 and accompanying text.
64. It is not as though the Morse holding avoids clear paternalism. The doctrine of overbreadth might help in some such cases. See, e.g., Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 260 (4th Cir. 2003) (applying the overbreadth doctrine at the preliminary injunction stage, in the case of a public middle school dress code prohibiting the display of weapons or messages about weapons, despite the importance of a school interest in discouraging weapons themselves in schools, or in preventing weapons-related violence, in or out of school, by the students). For a narrow view of the scope of Morse, see, for example,
B. A Sampling of Recent Lower Court Cases Tending to Further Limit *Tinker*

1. Professional Conduct Standards as a Limit on *Tinker* at the College Level

Our focus herein is not on college or professional degree students. Briefly, though, some courts have recently bypassed opportunities to apply the logic of *Tinker* or any similarly speech-protective test regarding public university student speech where such speech violates a school-adopted standard of professional conduct. Thus in *Tatro v. University of Minnesota*, the court upheld the university’s regulation of a student’s Facebook posting as in violation of professional program rules reflecting applicable professional standards of discretion and confidentiality. The court declined to apply the *Tinker* “disruption” prong, as failing to capture the essence of the alleged harm at stake.

Of course, failing to apply a case such as *Tinker* on grounds of factual or policy irrelevance hardly amounts to “limiting” that case. But *Tatro* nevertheless limits the scope of *Tinker* at the college level, by implying that public school rules requiring conformance with applicable professional standards can override the speech’s protected status under *Tinker*; the *Tatro* court held that professional-level student speech may be regulated where the applicable rules are “narrowly tailored and directly related to established professional conduct standards.” The narrow tailoring requirement, importantly, can easily be interpreted with varying degrees of rigor. In this sense, *Tatro* is an example of an emerging line of cases providing a further exception to *Tinker*, presumably at the public college and graduate school levels.

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*Defoe v. Spiva*, 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting from denial of rehearing en banc).


66. 816 N.W.2d 509 (Minn. 2012).

67. *See id.* at 520-21.

68. *See id.* at 519-20.

69. *Id.* at 521.

70. In *Tatro*, Facebook posts were classified as within the scope of a rule that prohibited any and all “blogging,” whether discreet and professional or not, about the relevant anatomy lab or about the dissection of cadavers. *See id.* at 512, 516.

71. *See, e.g.*, *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011) (denying the student free speech claim); *Ward v. Polite*, 667 F.3d 727, 737 (6th Cir. 2012) (holding a speaker entitled to a jury trial on the issue of pretextualism in regulating the speech at issue).
2. Broadening the Scope of the “Rights of Others” Prong of the Tinker Test

Interestingly, the speech rights protected in Tinker by the Constitution are, on one reading of Tinker, subject to subordination to other rights that may not be of constitutional stature.72 Some additional arguably relevant rights may arise from the common law, but then take on a constitutional equal protection or privacy dimension. The eventually moot case of Harper v. Poway Unified School District illustrates the potential for broad interpretation, if not expansion, of the “rights of others” limitation on Tinker’s protection of student speech.73

In Harper, the Ninth Circuit addressed, at the preliminary injunction stage, a restriction on a public high school student’s wearing a t-shirt with a religiously motivated general condemnation of a minority sexual orientation.74 Relying on the reference in Tinker to the “right to ‘be secure and to be let alone,’”75 Judge Reinhardt’s opinion limited itself to the public high school context, and to “instances of derogatory and injurious remarks directed at students’ minority status such as a race, religion, and sexual orientation.”76

Whether the breadth of Harper’s logic can be entirely confined to public school students of minority status is inevitably subject to some debate. Plainly, for the relevant purposes, not all racial, religious, and sexual or gender identities are historically equal, symmetrical, or relevantly similarly situated.77 Language targeting a particular classification within any of the above categories may well not have any realistically equivalent language targeting other classifications and categories, as a matter of cultural history and of group power differentials.78 On the other hand, we would also need to explore whether any non-minorities could ever be subjected to “psychological attacks that cause [them] to question their self-worth and their rightful place in society.”79 Judge Reinhardt himself argues:

Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As Tinker clearly states, such students have the right to “be secure and to be let alone.”80

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72. See supra notes 6-9 and accompanying text.
73. See 445 F.3d 1166, 1178 (9th Cir. 2006), reh’g en banc denied, 455 F.3d 1052 (9th Cir. 2006), vacated as moot, 127 S. Ct. 1484 (2007) (mem.).
74. See the reproduced image in Exhibit A, Harper, 445 F.3d at 1192.
76. Id. at 1183. See also Harper, 455 F.3d at 1053 (Reinhardt, J., concurring in the denial of rehearing en banc) (referring explicitly to minority group status).
78. See id. at 6-7.
80. Id. (quoting Tinker, 393 U.S. at 508); see also id. at 1053 (Reinhardt, J., concurring
On any reasonable theory, the most typical such cases will involve targeted students who are school-level, local-level, and national-level minorities, based on historical power relationships, along the sorts of racial, religious, or sexual and gender classifications to which Judge Reinhardt refers. But whether these categories exhaust the range of recognized core identifying characteristics is unclear—one could arguably add cases from half a dozen legally protected or unprotected categories to the list.\(^{81}\) What is emotionally central to students’ identities may vary broadly. And whether purely numerical minority status, locally or more broadly, should entirely exhaust the logic of the court’s opinion in *Harper* is an unresolved further issue. Verbal attacks on various grounds may predictably be devastating and distracting. But in any event, *Harper* may suggest a significant broadening, to one degree or another, of the *Tinker* rights-prong exception to student speech protection.

3. Judge Posner on Minimum Age and Message Requirements Under the *Tinker* Standard

The *Tinker* case involved students of various ages,\(^{82}\) and an unmistakably political, if symbolically conveyed, message.\(^{83}\) Judge Richard Posner of the Seventh Circuit Court of Appeals has been prominent among judges probing minimum-age and message-content requirements of, or limitations on, *Tinker*.

Judge Posner has in some contexts been enthusiastic in defense of teenagers’ free speech rights, in light of their future “civic” rights and responsibilities.\(^{84}\) But he has insisted as well on exploring the boundaries of the logic of *Tinker*. While he recognizes, for example, the possibilities for expressive school clothing,\(^{85}\) he also argues that not all self-expression, in a broad sense, amounts to speech within the scope of *Tinker*.\(^{86}\) Thus “[s]elf-expression is not to be equated to the expression of ideas or opinions and thus

\(^{81}\) Categories such as ethnicity, language, accent, regionality, alienage, disability, as well as economic status, would lead the list.

\(^{82}\) See supra note 3 and accompanying text.

\(^{83}\) While a symbolic black armband does not necessarily involve a recognizable political dimension, the broad and the narrow context supplied such a dimension in *Tinker*. How to address student speech that is arguably commercial in nature is not addressed in *Tinker*.

\(^{84}\) See Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 576-77, 579 (7th Cir. 2001) (providing injunctive relief against a public arcade restriction of minors’ access to violent video games).

\(^{85}\) See Brandt v. Bd. of Educ., 480 F.3d 460, 465 (7th Cir. 2007) (“Of course there can be speech printed on clothing, political symbols such as a swastika or a campaign button affixed to clothing, and masks and costumes that convey a political or other message.”).

\(^{86}\) See id. at 465-66 (citing, among other cases, Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389 (6th Cir. 2005) (finding not all clothing preferences protected speech)).
to participation in the intellectual marketplace."\textsuperscript{87}

As to the matter of a relevant minimum age, Judge Posner expresses some doubt as to "whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders."\textsuperscript{88} At the bottom end of the age spectrum, we should normally expect a lesser capacity for idea expressiveness in the relevant sense.\textsuperscript{89} But Judge Posner concludes that even in cases of speech that meet the thresholds applicable in \textit{Tinker} cases, courts should be reluctant to overrule the judgments of responsible on-site public school authorities. Crucially for our purposes, Judge Posner has argued that "a school need not tolerate student speech that is inconsistent with its basic educational mission."\textsuperscript{90}

4. "Distraction" from Learning as a Sensible Interpretation of (or a Further Limitation on) the \textit{Tinker} Standard

A final, largely recently developed limitation on \textit{Tinker} is the sensible desire to broadly interpret, if not expand, the \textit{Tinker} "disruption" prong. While the \textit{Tinker} standard in general has been and remains somewhat unclear,\textsuperscript{91} the "disruption" prong does tend to conjure up mental images of something like an angry hallway confrontation, if not a physical altercation, or threat thereof.\textsuperscript{92} Despite \textit{Tinker}'s several formulations, the most common judicial focus, in first-

\textsuperscript{87} \textit{Id.} at 465.
\textsuperscript{88} \textit{Id.} at 466.
\textsuperscript{89} See, e.g., S.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3d Cir. 2003) (declining to apply \textit{Tinker} in the absence of "expressive speech," in the relevant sense, by the kindergarten student subjected to discipline).
\textsuperscript{90} Brandt, 480 F.3d at 467 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)) (internal quotation marks omitted); see also Walker-Serrano v. Leonard, 325 F.3d 412, 416 (3d Cir. 2003) (concluding that any proper accommodation of student speech claims and the interest in fostering "an environment conducive to learning ... must necessarily take into account the age and maturity of the student"). Actually, it is unclear why any student, through speech or by other means, should be constitutionally entitled to force an unwilling public school to depart from its basic and plainly crucial mission in general, or from preserving "an environment conducive to learning" in particular. See Judge Posner's observation that "[t]he contribution that kids can make to the marketplace in ideas and opinions is modest and a school's countervailing interest in protecting its students from offensive speech by their classmates is undeniable." Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 671 (7th Cir. 2008).
\textsuperscript{91} See, e.g., supra notes 4-9 and accompanying text. In particular, it has been noticed that \textit{Tinker} refers, with apparent significance, to substantial interference with the work of the school. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 511 (1969), quoted in Wisniewski v. Bd. of Educ., 494 F.3d 34, 38 (2d Cir. 2007).
\textsuperscript{92} See, for example, much of the discussion in the remarkably numerous appellate court decisions on Confederate flags or other Confederate insignia in the public schools, many of which are referred to in \textit{Hardwick} v. \textit{Heyward}, 711 F.3d 426 (4th Cir. 2013). See Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 738-40 (8th Cir. 2009) (citing Barr v. Lafon, 538 F.3d 554, 565 (6th Cir. 2008)); Scott v. Sch. Bd., 324 F.3d 1246, 1248 (11th Cir. 2003).
prong *Tinker* cases, tends to be on something consistent with that threatened altercation imagery. Thus disruption may be supplemented, or explained, by references to threats of disturbance, disorder, or the violation of school discipline.93

There is no reason, however, to allow this narrow physicalist interpretation to exhaust the scope of this important exception to *Tinker’s* protection of student speech. Consider the vital overall student learning process at school. One might well imagine that promoting this learning process, along with reducing school-based impairments thereof, would be a fundamental and pervasive consideration. And it would be easy to conclude that significant impairments of the learning process can take forms not captured by the threat of altercation or other physicalist models.

Quite sensibly, teachers and administrators often recognize school-based impairments of the educational process and of the school’s fundamental mission, outside the physicalist interpretation of *Tinker’s* first prong. Consider a student who is chronically disturbed, or preoccupied, by the hostile speech, on whatever basis, of one or more other students, to the point where the learning process suffers. There need be no threat or expectation of violence, disorder, or physical disruption in such cases. But to one degree or another, the vital basic aims and functions of the school are still being impaired.

Or consider a typical case in which a student who claims to be “speaking,” visits a website on a laptop during class, in a way that is readily visible and distracting to those sitting behind. In such a case, the distracted students may well raise no objection to their own distraction. But whether they “consent” to the distraction or not, the basic task of the school is to some extent again being frustrated.

School administrators often show awareness of the adverse educational effects of “distractive” speech, whether such distractions are thought to fall within the first *Tinker* prong or not.94 Distraction, whether noticed by school authorities or not, can impair the fulfillment of a school’s fundamental mission as much as the threat of a possible altercation at recess, apart from the sheer

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93. *See supra* note 5 and accompanying text.

94. Thus one litigated public school dress code, considered to be viewpoint neutral, prohibited clothes that would “distract others, interfere with the instructional programs, or otherwise cause disruption.” *Hardwick*, 711 F.3d at 444 (internal quotation marks omitted). The same policy also prohibited “sexual innuendos.” *Id.* (internal quotation marks omitted). To equate mere silent, unobserved distraction with disruption or disorder is actually sensible as a pragmatic judgment, but it extends the ordinary use of the language, if not the underlying broad policy logic, by a substantial amount. See Cuff v. Valley Cent. Sch. Dist., 677 F.3d 109, 114 (2d Cir. 2012) (finding tolerance of a violent imagery drawing as perhaps leading to “an increase in behavior distracting students and teachers from the educational mission”), *quoted in Saad-El-Din* v. Steiner, 953 N.Y.S.2d 326, 330 (App. Div. 2012); S.J.W. v. Lee’s Summit R-7 Sch. Dist., 696 F.3d 771, 774 (8th Cir. 2012) (discussing “distraction” in the stronger sense of causing teachers to be unable to manage their classes, as opposed to forms of distraction that might not be immediately noticed).
distraction that may flow from the widespread knowledge and discussion of just such threats. A case can thus be made that even if Tinker is retained and regardless of how it is otherwise limited, Tinker should accommodate the regulation of “mere” distractions that involve no possibility of disorder but that impair the several basic missions of the school.

II. COULD MAINSTREAM EDUCATIONAL THEORY, IN THE CASES AND FROM THE ACADEMICS, SUPPORT THE BROAD ABOLITION OF TINKER?

A. Some Representative Case Law

The case law of student speech reflects, at least indirectly, elements of educational theory. In another vital constitutional context, the Supreme Court’s opinion in Brown v. Board of Education classically observed that education, and presumably pre-college public school education in particular, “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.”

These several functions seem central to the vital importance, in various contexts, of public education. Perhaps this may all change in the future, if most such education is privatized, virtualized, digitalized, time shifted, and rendered unrecognizable by the interactions of markets, regulators, accreditors, and developing technologies. But for now, public school education retains, irreplaceably, its vital functions.

In the free speech case law following Tinker, there is occasional recognition of the plainly basic values, functions, aims, and purposes of public school education as an essential institution. Fraser, for example, observes uncontroversially that “public education must prepare pupils for citizenship in the Republic...It must inculcate the habits and manners of

95. For skepticism as to whether the Tinker line of cases authorizes public schools to restrict student speech in conflict with the basic mission of the school, see Defoe v. Spiva, 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting from denial of rehearing en banc) (“Morse does not give the slightest hint that schools are authorized to suppress any speech that either they or an appellate court deems contrary to the school’s ‘mission’ or ‘core values.’”).

96. Note the unsatisfying claim that speech can be so implausible, or so literally incredibly offensive to its target, in its claims, that no reasonable student would take the claims seriously, so the literally incredibly offensive speech may be protected on that basis. See J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 921 (3d Cir. 2011) (en banc). It is not clear why literally implausible but deeply offensive remarks, without causing physical disorder, might not distract the target of the speech, if not other students, from advancing the basic mission of the school to the reasonable best of their abilities. See id. at 925, 928, 930, & n.7.


98. Id. at 493, quoted in Abbott ex rel. Abbott v. Burke, 971 A.2d 989, 991 (N.J. 2009)).
civility... indispensable to the practice of self-government in the community and the nation.\textsuperscript{99} As Judge Posner has observed, "[m]utual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning."\textsuperscript{100}

Here, there is actually an important distinction between ideas such as civility or mutual forbearance on the one hand, and the somewhat more manipulable idea of tolerance\textsuperscript{101} on the other. If one student speaks hostilely to another student or to a teacher, it may then demonstrate a flaw of character but not of logic, if that speaker demands official tolerance of her hostile speech regardless of the possible absence of much political point to her hostile speech, or of the protected status of any category of personhood to which she may have referred, or of any lingering emotional effect on the target of her speech. There need not be any obvious illogic in demanding tolerance for one's own speech, but not for that of one's designated opponents. One could simply believe that they are not relevantly similarly situated.

The ideas of civility and mutual forbearance, in contrast to tolerance as a speaker demand, operate somewhat differently. A speaker may target a listener-victim, and then ask for, and perhaps expect, official tolerance of her speech-act. But a speaker who breaches the limits of civility or who refuses forbearance, engages in something like what is called a logical or at least a practical or performative contradiction\textsuperscript{102} if she then insists on impunity in the name of civility or mutual forbearance. One can hardly ask, logically or in good faith, for overall atmospheric civility or for mutual forbearance and mutual respect, if one has just disdained those very values in one's underlying speech act. This remains logically true even if the speaker arrogantly claims some sort of relevant superiority.

This does not show that mutual forbearance or general civility are without any general cost or defect. They may indeed be used manipulatively by dominant groups to reduce the conspicuousness or the intensity of justified dissent. But it is also fair to ask how speech that predictably distracts its victim and impairs the victim's educational performance over time can claim to be respecting the value of mutual forbearance and broad universal civility of a kind necessary for the optimal performance of a public school's crucial functions.

And it is the possibility of distraction, more than of physical disruption,
that often links sensible restrictions on student speech—beyond those permitted by *Tinker* and subsequent cases—to the greater fulfillment of the school’s irreplaceable and basic functions. Some degree of genuine practical wisdom, perhaps irreducible to any rule, is necessary in making such particularized judgments. But there is, we argue, room for responsible experimentation in this area.

Judge Posner has interestingly argued, based on *Fraser* and *Morse*, that “if there is reason to think that a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech.” One might respond that even if such outcomes could be attributed to student speech, there may well be insufficient grounds under *Tinker* to call the speech disruptive or to call the decline in test scores an effect of any possible disruptiveness of the speech. We might then, under *Tinker*, constitutionally protect such speech. Or else in contrast, on our recommended view, schools might be better off without *Tinker* and the *Tinker* disruption standard, focusing instead on better fulfilling one or more of the consensually vital functions and basic purposes of public schools, even at some cost to student speech rights.

It is also possible to argue that something like the *Tinker* rule, or as later modified, is itself genuinely essential in order to eventually produce civically competent and sufficiently knowledgeable citizen voters. But this seems, on the accumulating evidence, doubtful. Even if we set aside problems of what is called “rational ignorance” and of the wide variety of motives for taking a political stance, it is implausible to imagine that anything like the *Tinker* rule, modified or unmodified, is necessary for minimal civil competence or for an increase in the number of altruistic, community-minded, thoughtful, high-information voters. As Judge Posner observes in one current context, it is difficult to believe that “uninhibited high-school student hallway debate over sexuality—whether carried out in the form of dueling T-shirts, dueling banners, dueling pamphlets, annotated Bibles, or soapbox oratory—[is] an essential preparation for the exercise of the franchise.” One might well wonder whether this observation could be generalized to any and all post-school public

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103. See generally ARISTOTLE, NICOMACHEAN ETHICS bk. VI (Terence Irwin trans., 2d ed. 1999) (c. 384 B.C.E.); JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (2004).
104. Nuxoll, 523 F.3d at 674.
105. See supra notes 97-102 and accompanying text.
106. Actually, though, voting and discussing politics may often involve “rational ignorance” from the individual voter’s standpoint, and the greater social and psychological rewards from discussing politics or voting in a socially approved way, rather than from conscientiously attempting to vote for the candidate who will furthest advance overall well-being, including into the future. For a start, see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238-59 (1957).
107. See id.
108. Nuxoll, 523 F.3d at 671.
policy debate contexts. But we need not make so strong a claim in abolishing *Tinker*.109

B. Some Observations from Classical Educational Theorists

A number of the classic writers on education appear to balance what they take to be the various relevant interests and rights claims in ways substantially different than the *Tinker* requirements.110 According to John Locke, in the modern era there is a role not only for liveliness of spirit on the part of students, but for student self-denial,111 obedience,112 awe,113 and even reverence114 as well. Even the great champion of the liberalizing Enlightenment, Immanuel Kant, does not favor granting students a broad initiative in the education process, where the focus would be on the student’s acting from mere inclination or preference, rather than from conformance with duty.115

At greater length, though, consider the view of the influential American pragmatist John Dewey116:

[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 habits .... Selection aims not only at simplifying but at weeding out what is undesirable. Every society gets encumbered with what is trivial, with dead wood from the past, and with what is positively perverse. The school has the duty of omitting such things from the environment which it supplies .... As a society becomes more enlightened, it realizes that it is responsible not to transmit and conserve the whole of its existing achievements, but only such as make for a better future society. The school is its chief agency for the accomplishment of this end.117

This Deweyan perspective hardly validates students’ distracting or uninhibitedly, personally critiquing their fellow students. Enlightenment could

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109. *See infra* Part III.

110. Even among mature students, the classic Platonic and Aristotelian pedagogical models do not appear to emphasize the role of student initiative in helping to determine the focus of daily attention. *See generally* 3 WERNER JAEGGER, PAIDEIA: THE IDEALS OF GREEK CULTURE (Gilbert Hight trans., Oxford Univ. Press ed. 1981); C.D.C. REEVE, ACTION, CONTEMPLATION, AND HAPPINESS: AN ESSAY ON ARISTOTLE 253 (2012) (“A community could not really be a city, Aristotle thinks, if it did not educate its citizens in virtue, since it is by means of education that people are unified and made into a city.”).

111. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (1693), *reprinted in The Educational Writings of John Locke* 21, 35 (John William Adamson ed., 1912).

112. *See id.*

113. *See id.* at 34.

114. *See id.* at 35.


well involve, instead, some combination of increasing the public's knowledge base; enhanced scientific and technological awareness; various forms of egalitarianism; and a developing sense of solidarity, civility, mutual commitment, and communitarianism. Even if we were to assume, controversially, that anything like adolescent school speech libertarianism maximizes overall freedom over time, it is less plausible that distracting or fundamentally critical interpersonal student speech maximizes the most appealing forms of either egalitarianism or communitarianism.

Dewey does not think of adulthood—distinct from child—control over the school agenda as necessarily repressive or as rights violative. Dewey argues instead that "nothing but the crude can be developed out of the crude—and this is what surely happens when we throw the child back upon his achieved self as a finality, and invite him to spin new truths of nature or conduct out of that." More broadly, education involves "an immature, undeveloped being; and certain social aims, meanings, values incarnate in the matured experience of the adult." While Dewey recognizes that it would be wrong on the one hand to regard the student as simply defective, he also resists regarding "the child's present powers and interests as something finally significant in themselves." Mature adult social control, exercised on behalf of the society by a given school authority, is thus not regarded by Dewey as repressive. Instead, as Dewey understands the process, the meaningful growth, development, and liberation of the student are fulfilled through appropriate social control. Thus "[g]uidance is not an external imposition. It is freeing the life-process for its own most adequate fulfilment [sic]."

Of late, the idea of mutual public respect among an increasingly diverse
student body has, for educational theorists, loomed increasingly large. Thus Amy Gutmann, for example, argues that "the minimal conditions of reasonable public judgment include mutual respect among citizens of differing religions, races, genders, and ethnicities."\textsuperscript{126} It is not clear how this and related judgments should be expected to change under even the most technologically advanced systems of educating the public.

Doubtless the ideas of solidarity, civility, and mutual respect in speech, even at a generalized level, are not entirely neutral in their political effects. Partisans can easily imagine that mutual civility operates, in practice, to temper their own righteous indignation. In this, some less powerful groups will be correct. There is certainly a time for plain political speech that lets the chips fall where they may, if not generally in public schools.

Partisans should remember, though, that while they view their own speech as insightful, sound, and forthright even if uncivil in the eyes of some, other persons—whether they respond or not—may instead detect self-righteousness; self-indulgence; something like performance art; or merely empty, formulaic, ultimately arbitrary, uninformed, calculatedly unpersuasive, and unserious if indignant posturing. Thus lack of civility, especially among those currently acquiring a public school education, may well be considered by at least some school administrations as no superficial matter.\textsuperscript{127} One or more public schools could, especially with regard to their maturing students, reasonably concur with the philosopher Cheshire Calhoun:

I find something odd, and oddly troubling, about the great confidence one must have in one's own judgment (and lack of confidence in others') to be willing to be uncivil to others in the name of a higher moral calling. . . . [T]o adopt a principle of eschewing civility in favor of one's own best judgment seems a kind of hubris.\textsuperscript{128}

Whatever we think of the value, and the costs, of civility in various other speech contexts, there is a case to be made for civility in public school speech when that value is reasonably endorsed by one or more responsible public school jurisdictions with respect to the speech of, say, fifteen year olds, whose


\textsuperscript{127}. Since speakers are not likely to perceive their own speech, as distinct from that of their designated opponents, as uncivil, such judgments should generally be left to informed school administrations. More generally, see John Kekes, \textit{Civility and Society}, 1 \textit{HIST. PHIL. Q.} 429, 429-30 (1984) ("Civility is an essential ingredient of a good life, for it makes it possible to have more or less harmonious relationships with fellow members of one's society."). See also Robert Coles, \textit{Civility and Psychology}, 109 \textit{DAEDALUS} 133, 139 (1980) ("For [John Milton], politeness was no superficial attribute of human behavior, something to be stripped away in the interest of a supposed verbal bluntness that turns out to be, so often, an exercise in truculence, rudeness, self-display, if not a mix of self-promotion and self-indulgence.") (proceeding to ask, "When a culture begins to turn its back on civility, ought it be called 'civilized'?"").

then-current understanding of history, language, diverse cultures, economics, science, rhetoric, statistics, psychology, empathy, humility, and forensics is often decidedly imperfect.

III. WHAT, PERHAPS AT THE EXPENSE OF ADMINISTERING THE TINKER SPEECH STANDARD, MIGHT SOME PUBLIC SCHOOLS CHOOSE TO EMPHASIZE?

A reasonable and genuinely democratically responsible public school administration could decide that fulfilling the school’s basic aims and missions might require less emphasis on some currently Tinker-protected student speech, or on administratively addressing such matters—let alone litigating them—and more emphasis on any of a number of other areas of general educational and administrative concern.

The thinking on the part of such a school need not be that there is some direct conflict between Tinker-protected student speech (and its broadly defined administration) and one or more fundamental purposes the school should, first and foremost, serve. The idea might instead be that the broad Tinker regime, including its various effects on speakers and listeners, often involves some degree of student, teacher, or administrator distraction from best promoting overall the vital purposes of public schools.

Such school authorities could certainly grant that Tinker-protected speech, and even its litigation, may itself often serve one or more basic purposes of public schooling. But a school or district could also reasonably imagine that the broad overall Tinker-speech regime will, in their own context, involve significant direct or indirect costs in other important pedagogical values. Perhaps not all public school administrations need concern themselves with such value tradeoffs. But our crucial point is that, at a minimum, some reasonably could, and they should be allowed to do so, at the federal free speech constitutional level.

Suppose, then, that the Court allowed those public schools or districts who wished to broadly abandon Tinker, its various limits and clarifications, and its broad administration and judicial litigation. Such judicial permission would, of course, not free the public schools from compliance with, among other requirements, relevant state constitutional and statutory laws; the federal equal protection of the laws; the Establishment and Free Exercise of Religion Clauses; procedural due process at least at the level of rationality; and other relevant sources of law.129

To at least some degree, and however indirectly, the broad abolition of Tinker—as a uniform administrative requirement, if not as a model for voluntary local adoption—would allow public schools so inclined to enhance

129. For the sake of simplicity, though, we shall assume that typical student free press cases would generally fall within the scope of the now presumably abandoned Tinker and related tests. See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 281 (1988).
their focus on one or more basic functions of such schools.130 Or, more negatively, such schools would be permitted to more undistractedly address what they reasonably consider the most significant obstacles to greater fulfillment of such basic public educational functions.

Again, the point is not that broadly protecting student speech—letting students say what they wish under Tinker—invariably tends to directly impair the fulfillment of a school’s vital functions. The point is instead that nothing, including a broad Tinker regime, is without its various costs,131 especially, but not limited, to persons of emotional, personal, or group-based vulnerability.132 As a social institution, the broad Tinker regime might reasonably be thought, by one or more public schools or school districts, to itself “distract” attention away from a more effective focus on one or more of the consensually vital functions of public schools.

The idea is thus to largely trust public schools or school districts, in their widely varying circumstances, in reasonably prioritizing their goals, subject to appropriate constraints and to democratic electoral accountability.133 Thus there is little value in trying to exhaustively catalog here all of the educational aims a school might consider vital, but not yet optimally achieved. Merely for the sake of illustration, though, consider the following options, in light of the fact that many schools will inevitably be below—perhaps quite substantially below—the relevant national medians.

Thus a particular school, school district, or even a state might legitimately choose to focus more on equality in various forms, on graduation rates, or on curricular enhancement.134 A school district might be motivated by unflattering

130. See supra notes 97-105 and accompanying text.
132. See supra notes 72-81, 91-96, and accompanying text.
133. See supra text accompanying note 129. Of course, the Tinker cases often involve some modest attempt, by federal judges, to get a feel for the local school circumstances, both tangible and intangible.
geographic, and even international, comparisons. More particularly, schools might legitimately seek to remedy perceived deficiencies in broad civic education. Perhaps even more basically, schools might wish to upgrade stagnant or plainly unsatisfactory achievement levels in vital curricular subjects, including vocabulary, reading comprehension, mathematics, or
science, at any or all grade levels. Or a school or district might promote "soft" job skills, or the skills necessary for effective performance or teamwork in business or other settings. The use, or misuse, by students, in school, of social media communication devices of various sorts is in particular of increasing concern. Cyberbullying, as well, however defined, might also be of special concern. And even more directly, the phenomenon of (non-fatal) physical bullying, victimization, theft, and violence of various sorts could, for some schools, be reasonably considered high priorities, and as fundamental and long unresolved problems. It would thus be entirely reasonable for at least


some public school jurisdictions to judge the broad *Tinker* student speech regime to not be worth its various tangible and intangible and direct or indirect costs.

**CONCLUSION: A POST-TINKER FUTURE**

Suppose the Supreme Court were to broadly abandon *Tinker* and related rules—the entire *Tinker* regime—as a matter of federal constitutional free speech law. With what legal regime might the Court then replace *Tinker* and its associated case law?

One possibility would be to adopt some complex, multi-factor replacement rule, supposedly required, in all its detail, by the federal Constitution. Or the Court might then provide even less guidance for administration and litigation than at present by insisting on some sort of multi-stage, burden-shifting test, or on a vague, manipulable, general multi-factor balancing test.

For the reasons highlighted above, however, abandoning the *Tinker* field, in favor of other independent and justifiable constitutional and statutory limits at the federal and state levels,\(^{145}\) seems more advisable. This is again not an anti-student speech option. Any state or school district that regrets the continuing erosion of *Tinker* itself might, subject to any relevant constraints,\(^ {146}\) retain school speech policies reflecting *Tinker* itself, and perhaps even reject one or more limitations on *Tinker*. States, districts, or public schools, on the other hand, that are more sensitive to matters of equality or to the various indirect and unintended basic costs of the *Tinker* regime should equally feel free to reasonably and permissibly depart from that regime.

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2009-10 school year, 85 percent of public schools recorded that one or more of these incidents of violence, theft, or other crimes had taken place, amounting to an estimated 1.9 million crimes."); *Indicators of School Crime and Safety: 2011*, NAT’L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/programs/crimeindicators/crimeindicators2011/key.asp (last visited March 27, 2013) ("In 2010, among students ages 12-18, there were about 828,000 nonfatal victimizations at school, which include[d] 470,000 victims of theft and 359,000 victims of violence (simple assault and serious violence)."). Of course, the *Tinker* cases do not endorse physical violence, or prioritize speech over avoiding physical violence. But a school could well be concerned about violence, or underachievement, that has no direct connection to the broad *Tinker* regime, other than that *Tinker* helps to set the "atmosphere" of a school, and may also distract attention away from envisioning and implementing better approaches to violence or other vital matters.

The recent case *B.H. v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013) (en banc) upheld the middle school student speech in question, while acknowledging that "\cite{[b]esides the teaching function, school administrators must deal with students distracted by cell phones in class and poverty at home, parental under- and over-involvement, bullying and sexting, preparing students for standardized testing, and ever-diminishing funding. When they are not focused on those issues, school administrators must inculcate students with ‘the shared values of a civilized social order.’" *Id.* at 324 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

145. *See supra* note 129 and accompanying text.

146. *See supra* note 129 and accompanying text.
As a matter of procedural due process, though, all jurisdictions should articulate and publicize—subject to ongoing democratic electoral scrutiny—their basic substantive student speech policies, along with the basic internal administrative processes by which such policies are to be implemented.

But, in sum, at this point in our history, it is implausible that Tinker, along with its refinements, qualifications, and limitations, amounts to the only constitutionally permissible approach to student speech, as the public schools seek to better and more cost-effectively discharge their vital and multi-faceted basic mission. Certainly the broad Tinker regime itself, enforced now for more than forty years, has absorbed administrative attention without, in the cases of many schools, detectably contributing to fulfilling the various crucial aims of public education.