BE CAREFUL WHAT YOU WISH FOR: GAYS, DUELING HIGH SCHOOL T-SHIRTS, AND THE PERILS OF SUPPRESSION

*Michael Kent Curtis**

"In this world there are only two tragedies. One is not getting what one wants, and the other is getting it."

Oscar Wilde, Lady Windermere's Fan Act III (1892)

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* Judge Donald Smith Professor of Constitutional and Public Law, Wake Forest University School of Law. B.A. University of the South, J.D. University of North Carolina, M.A. University of Chicago.

I. THE CONTROVERSY

In a number of public schools, high school students have embraced a "day of silence." To highlight the mistreatment of gay students in school, they spend the day in silence, not talking to other students.[1] The expressed idea of the "day of silence" is not to approve homosexuality, but to oppose mistreatment of gay students. Students who are supportive of gay students have taken other steps as well: they wear supportive t-shirts: "gay: fine by me" or "its o.k. to be gay," or a purple square with a yellow equal sign in it, or the legend, "Be Who You Are."[2] The message of the t-shirts often goes beyond tolerance (with its many virtues) to acceptance, which of course is what all of us crave. The acceptance message is that it is fine to be gay. Gay is o.k. I agree with that message.

But to others this message is deeply troubling. Some students accept and build their view of who they are on the basis of (perhaps selective)[3] Biblical literalism. Propagation of the idea that it is just fine to be gay threatens beliefs they see as central to who they are. A few of these students respond with counter-assertions emblazoned on t-shirts: It is not fine to be gay; to be gay is shameful, sinful, and contrary to revealed Biblical truth. One shirt proclaimed that

1. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 n.3 (9th Cir. 2006) (explaining day of silence; high school student excluded from class and allowed to do homework in the office, but not otherwise disciplined or written up for wearing t-shirt with anti-homosexual message), *vacated as moot mem.*, 127 S. Ct. 1484 (2007).

2. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 670 (7th Cir. 2008); *Poway*, 445 F.3d at 1171 n.3.

3. *Leviticus* 25:44–45 ("Both thy bondmen, and thy bondmaids, which thou shalt have, *shall be* of the heathen that are round about you; of them shall ye buy bondmen and bondmaids. Moreover of the children of the strangers that do sojourn among you, of them shall ye buy, and of their families that *are* with you . . . and they shall be your possession."); *Leviticus* 11:5–8 (providing dietary bans and bans on touching the skin of pigs—widely ignored by football players); *Leviticus* 20:10 (death penalty for adultery); *Exodus* 22:18 ("Thou shalt not suffer a witch to live."); *Deuteronomy* 25:11–12 (describing the punishment of cutting off the hand of a woman who intervenes in a fight between a man and her husband and, in an effort to assist her husband, grabs the genitals of his adversary); *Romans* 13:1–2 ("Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation."); *1 Peter* 2:13–18 ("Submit yourselves to every ordinance of man for the Lord's sake: whether it be to the king, as supreme; Or unto governors . . . Servants, *be* subject to *your* masters with all fear; not only to the good and gentle; but also to the froward.") (italics in original).

"Homosexuality Is Shameful," citing Romans 1:27.[4] Of course, many who reject homosexuality (sometimes defined as gay sex acts) for religious reasons still find the "homosexuality is shameful" slogans inappropriate, preferring other slogans or none at all.

The dueling school t-shirts expose basic tensions between competing constitutional ideals. One approach is a broadly inclusive belief in equality and dignity to be achieved, if necessary, through suppression of contrary political and religious messages. The other approach is a more broadly protective system of freedom of expression. It seeks to advance dignity and equality by methods other than the suppression of ideas on matters of public concern. Attempting to translate constitutional ideals into the public school setting raises difficult problems.

Of course, the tension between protection of speech and protection of dignity goes beyond the schools. Should we suppress speech that targets gay identity in the interest of furthering equality and acceptance of gays? The question raises basic constitutional questions. It also raises questions of practical wisdom.

In the school setting, competing interests are in tension. Schools should protect all students from physical harm and bullying and from verbal bullying and name calling. Of course, we expect them to teach about democracy, equality, and free speech. In applying these values, should schools protect gay students from the emotional harm of being confronted with anti-homosexual religious messages on t-shirts or in discussions of public policy? Should schools suppress all "intolerant" messages and if so how should they define them? The view of schools as protectors of students from emotional distress confronts another view: schools as teachers of the democratic value of dialogue while attempting to teach and enforce respect for dignity and equality by means other than suppressing speech.

This is not a simple problem, either as a matter of theory or law. The law is far from clear on how to deal with student speech at school that addresses a matter of public concern *and* that also has a "homosexuality is shameful" message.[5] In this Article I do not

4. *Poway*, 445 F.3d at 1171; *Romans* 1:27 ("And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.").

5. *Compare Poway,* 445 F.3d at 1192, *with* Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1072, 1074 (D. Minn. 2001) (allowing a high school student to wear a sweatshirt that says "Straight Pride" since it passed the *Tinker* test), *and* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971–74 (S.D. Ohio 2005) (allowing a middle school student to wear a shirt reading "homosexuality is a sin, Islam is a lie, abortion is murder, some issues are just

suggest a simple, logical, legal response to the conundrum. Instead, I suggest searching for creative alternatives. I do, however, believe that embracing simple suppression of messages such as "homosexuality is shameful" is practically and constitutionally troublesome. As we will see, some courts have decided that schools can suppress troublesome messages (or even all messages) students express on what they wear—"give peace a chance," "gay fine by me," "homosexually is shameful," etc.—provided they do it in the right way.

Broad suppression of student speech on controversial topics detracts from teaching students democratic values. Selective suppression broadly silencing the "homosexuality is sinful" side is also problematic. Suppressing of "homosexuality is shameful" t-shirts may lead federal judges to insist on banning t-shirts seeking acceptance. The subject is paradoxical because tolerance and acceptance of differences is also a crucial democratic value and because words can and often do cause harm.

II. THE FREE SPEECH SYSTEM

Today, we have a free speech system that strongly protects much speech in the public domain against government suppression. The free speech system protects speech in the newspaper or on TV (for those who can get access), on public streets and sidewalks (where you have a First Amendment right of access), inside your home, on your lawn (if the right has not been contracted away), on the Internet (as long as you are allowed access), etc.

On the other hand, there are domains where free speech rights are not constitutionally protected from private suppression. For example, we still have strong free speech rights on public sidewalks and streets. But design and land use changes that created private shopping malls and shopping centers have greatly shrunk the once robust public forum. In most states, you have no free speech rights in the "private" sidewalks, streets, interior walkways, etc. of "private" shopping centers. If a store in the mall allows you to create your own t-shirt and the words you choose are "give peace a chance," the corporation that owns the mall can have you arrested if

black and white" under *Tinker* since "no disruption occur[red] and no reasonable threat of any disruption exist[ed]," and because the t-shirt was not patently offensive under *Fraser*), *and Nuxoll*, 523 F.3d at 676 (applying *Tinker* and *Fraser* to allow a shirt that reads "Be Happy, Not Gay"). For citations to the *Tinker* and *Fraser* cases cited, see Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) and Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356 (C.A. Wash. 1985).

you wear the t-shirt in the mall.[6] Some state constitutions (as interpreted by state courts) and a few state statutes are more protective.[7] But they are the exception.

You have no national constitutional protection against being fired by your private employer for speaking out on issues of public concern. If your employer orders you to remove a John Kerry for President bumper sticker from your car or be fired, as a matter of federal law he is often within his rights, and you can lose your job if you resist.[8]

In various limited environments, speech rights against government suppression are often dramatically restricted. The military's "Don't ask, don't tell" policy is one example.[9] Obviously, in limited environments free speech rights can't work exactly as they would in the public domain. During war, no debate is constitutionally protected in the platoon ordered to charge a machine gun. But, on the home front, in the public domain, the wisdom of the war is and should be fully open to debate.[10] Schools are a limited free speech environment; the issue is how limited the environment should be.

Like all legal and constitutional institutions, the system of freedom of expression has evolved over time. In the years from the 1930s at least through the Warren Court years, the Court expanded the domain where free speech principles either applied fully or had substantial bite. For example, the Warren Court broadly defined the public places where one was allowed to speak—places where full

6. *See, e.g.*, SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1212 (N.Y. 1985) (finding no right to free speech in common areas of shopping malls under New York's state constitution).

7. *See, e.g.*, Wilson v. Superior Court, 532 P.2d 116, 120 (Cal. 1975) (finding that the California Constitution is more protective of free speech and press than the First Amendment).

8. *See* BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE 1–5, 54–57, 201–03 (2007) (explaining that few states explicitly protect employees' off-work political activity and that "many employers can, if they wish, regulate their employees' private political activity").

9. 10 U.S.C. § 654(b) (2006) (identifying the treatment of homosexuality in the armed forces).

10. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447, 449 (1969) (per curiam) (reversing the conviction of a KKK leader for a racist speech and holding that for the speech to be unprotected, the speaker had to advocate imminent lawless action, and the speech had to be likely to produce lawless action); Bond v. Floyd, 385 U.S. 116, 118, 132–33, 137 (1966) (holding that Julian Bond could endorse very harsh criticisms of the war in Vietnam and the draft without being barred from the Georgia legislature and could not be held to a stricter free speech standard than private citizens).

free speech principles largely applied.[11] When shopping malls began to replace the former free speech domain of downtown streets and sidewalks, the Court extended free speech to common areas of shopping malls.[12] Even where full free speech principles could not work (as in schools and public employment) the Court injected a substantial amount of free speech protection.[13] With the rise of a "conservative" reaction against the Warren Court's supposed sins and the electoral success of a new "conservative" political coalition with a southern base, expansion of the free speech domain began, to some extent, to go into reverse.[14] In the shrunken public domain, protection against government suppression has generally faired well.[15] In limited environments, however, the story has often been

11. *See, e.g.*, Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1086–89 (2002).

12. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 309 (1968) (allowing picketing on private sidewalks outside a shopping center), *overruled by* Hudgens v. N.L.R.B., 424 U.S. 507, 518 (1976).

13. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (upholding the free speech right of students to wear black armbands to protest the Vietnam War when the armbands did not materially and substantially interfere with the operation of the school); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 564–65 (1968) (holding that a school teacher had a free speech right to criticize a school-board decision in a letter to a local paper); Aumiller v. Univ. of Del., 434 F. Supp. 1273, 1312 (D. Del. 1977) (holding that a refusal to renew the contract of a gay lecturer in the university theater department and advisor to a gay student group violated the First Amendment when done because of his statements about homosexuality reported in newspaper articles about the gay group).

14. *See* United States v. Kokinda, 497 U.S. 720, 722–23, 726–30 (1990) (holding that the sidewalk in front of the post office was not a public forum); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43, 47–48, 53–54 (1986) (holding that an ordinance restricting the location of adult theaters in the city was constitutional because the ordinance was supposedly content neutral and the government was regulating the secondary effects of the concentration of adult bookstores as opposed to the effect on the mind of the reader or viewer). *Cf.* City of L.A. v. Alameda Books Inc., 535 U.S. 425, 430–31, 436 (2002) (upholding, as against summary judgment, an ordinance confining adult businesses to one medium per building because it was supported by earlier police crime data dealing with the concentration of adult stores that sold multiple media—film, books, magazines, etc.—in one building).

15. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002) (striking down city ordinance that required citizens to register with the mayor and obtain a permit before participating in door-to-door advocacy and solicitation); Ashcroft v. Free Speech Coal., 535 U.S. 234, 239, 258 (2002) (striking down a law that banned virtual, not actual, child pornography); Reno v. ACLU, 521 U.S. 844, 849, 877–79 (1997) (striking down as unconstitutionally overbroad a statute that made it a crime to allow minors to view patently offensive or sexually explicit material on the internet); City of Ladue v. Gilleo, 512 U.S. 43, 45, 59 (1994) (striking down an ordinance

one of retreat.

Today some suggest limiting current free speech principles to protect gays. Historically, strong free speech principles have protected the struggle for gay rights.

Supreme Court decisions from the late 1930s through the 1970s rejected the idea that speech with a potential "bad tendency" to cause harm could be suppressed for that reason alone.[16] The decisions protected speech across the ideological spectrum.[17] Generally advocacy, even advocacy that tended to produce lawless action, was protected unless it was directed to inciting or producing imminent lawless action and was clearly likely to produce such action.[18]

Claims that allowing a group to form would incite or produce lawless action had to be based on more than "undifferentiated fear or apprehension."[19]

In addition, according to Warren Court decisions, mere advocacy

prohibiting homeowners from displaying yard signs or signs in the windows of their homes); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15, 928–29 (1982) (holding that peaceful boycotts are protected by the First Amendment, and that certain generalized threats by an NAACP official advocating the boycott were permissible under the *Brandenburg* test).

16. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); Bridges v. California, 314 U.S. 252, 252–53, 273 (1941) (reversing, on free speech grounds, contempt-of-court convictions based on the tendency to obstruct justice of a labor leader's telegram and a newspaper editorial about pending cases).

17. *Claiborne Hardware Co*., 458 U.S. at 928 (relying on the *Brandenburg* rule to protect the NAACP from a huge damage award based on a boycott of local businesses and generalized threats against blacks who did not join it); *Bond*, 385 U.S. at 137 (holding that the Georgia legislature could not refuse to seat Julian Bond because of his strong criticism of the Vietnam War); N.Y. Times v. Sullivan, 376 U.S. 254, 256–58, 283, 285–86 (1964) (protecting civil rights leaders from a defamation action based on inaccurate statements in a newspaper ad in favor of civil rights and in support of Martin Luther King); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (relying on *Terminilleo* to protect a civil rights march at the South Carolina state legislature protesting racial discrimination); Terminiello v. Chicago, 337 U.S. 1, 4–6 (1949) (reversing a conviction for speech expressing racial and religious bigotry and holding that speech that stirs anger and invites public dispute does not lose constitutional protection for that reason); *Bridges*, 314 U.S. at 278 (1941) (reversing the contempt convictions of an anti-union newspaper for its editorial about a pending case and a labor leader for his statements about a pending case); Herndon v. Lowry, 301 U.S. 242, 261 (1937) (protecting a Communist for possession of pamphlets found to violate a Georgia statute punishing expression that had a tendency at some future time to promote violent revolt).

18. *Brandenburg*, 395 U.S. at 447.

19. Healy v. James, 408 U.S. 169, 188–91 (1972) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)) (holding that a university could not deny official recognition to a chapter of the Students for a Democratic Society based on other chapters' disruptive behavior).

of ideas—even evil or "immoral ideas"—was protected from government suppression.[20] The principle was applied to advocacy that violated accepted views of sexual morality. For example, New York state had a movie censorship regime that prohibited exhibition of pictures that would "tend to corrupt morals."[21] Tending to corrupt morals was defined as including, among other things, films that "portray acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly present such acts as desirable, acceptable or proper patterns of behavior."[22] Under this law the state had banned the showing of a movie version of "Lady Chatterley's Lover" because it presented "adultery as a desirable, acceptable and proper pattern of behavior."[23] The Court accepted the characterization of the film, but flatly rejected the justification for suppressing it:

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.
>
> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.
>
> Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." . . . "Among free men, the deterrents ordinarily to be applied to prevent crime are

20. Roth v. United States, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.").

21. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 685 (1959).

22. *Id.*

23. *Id.*

> education and punishment for violations of the law, not abridgment of the rights of free speech . . . ."[24]

In the 1950s, the Court also held that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[25] Similarly, denying a university student group "official recognition, without justification" unconstitutionally burdened its First Amendment rights.[26] A state university that opened its facilities and gave assistance to a wide variety of student groups had created a free speech forum. Creating the forum and free speech principles limited the school's power to exclude other student groups whose messages were less acceptable to university administrators.[27]

Strongly protecting freedom of expression departed from the course courts had often followed earlier in American history. Earlier courts approved suppressing advocacy of peaceful political change on the theory that the ideas—abolition of slavery or opposition to a war, for example—had a bad tendency to promote violence or law violation.[28] When the Court provided much broader protection for speech, of course, some evil speech got protected. But decisions protecting the rights of bigots[29] provided support for protecting the free speech rights of advocates of integration, of acceptance of homosexuality, or of critics of wars.

Acceptance of broad free speech principles was a bargain: protecting the free speech rights of those with whom we profoundly disagree was part of protecting our own rights and the rights of those whose speech we found at least partly worthwhile. The bargain seems to broaden popular support for free speech even when people disapprove of the speech. By broadly protecting free speech rights, the Court made it easier for people to support the right to speak without supporting the unpopular cause. Of course, people differ on just how broad free speech protection should be.

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24. *Kingsley*, 360 U.S. at 688–89 (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

25. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

26. Healy v. James, 408 U.S. 169, 181 (1972) (rejecting a university's denial of recognition to a chapter of the Students for a Democratic Society).

27. Widmar v. Vincent, 454 U.S. 263, 267–69 (1981) (holding that a university had created a public forum by providing a generally open forum for student groups and therefore could not ban religious groups from meeting in the same building).

28. HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (Burdick Bros. 1857); State v. Worth, 52 N.C. 488, 492–94 (1860) (upholding Worth's conviction for circulating Helper's anti-slavery book); Schenck v. United States, 249 U.S. 47, 52–53 (1919) (upholding Schenck's conviction for circulating leaflets asking people to use peaceful political means to repeal the conscription act).

29. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 446 n.1 (1969).

Not all speech is protected, and not all speech should be. Threats are not protected.[30] Fighting words are not protected, though the category is a narrow one.[31] Defamation of private citizens receives little protection[32] and, of course, assault and violence are not speech and are not protected[33].

In a school setting, where one objective is to teach civility, name calling or verbal bullying focused on an individual should be prohibited. There is not and should not be a free speech right to call a student a nigger, a faggot, a honky, etc. In the public domain, speech on matters of public concern that inflicts emotional distress on a public figure or public official is typically protected,[34] and much speech that does harm or causes anger and hurt feelings is protected, and necessarily so.[35]

III. FREE SPEECH AND GAYS

In a democratic society, those who seek to change existing views and institutions rely on free speech. Dissenters and outsiders need free speech. Broad suppression of discussion of a topic—or for that matter broad suppression of a medium of expression—benefits the status quo. Before the Civil War, for example, a ban on speech about slavery would have protected the status quo and prevented anti-slavery speech. For most of our history, a ban on all speech dealing with homosexuality would have advantaged the status quo enforced by laws that supported the suppression of homosexuality. The same principle applies in environments such as colleges, universities, and high schools. Historically, suppressing all discussion of homosexuality would advantage prevailing views.

Generally applied principles of liberty are particularly important for despised minorities. William Eskridge has noted that "the criminal, first amendment, and equality rights the Warren Court created . . . were directly applicable to gay people. . . . Contrary to its critics, rights discourse . . . tangibly worked to the

30. Virginia v. Black, 538 U.S. 343, 363 (2003) (holding that burning a cross on a person's lawn with the intent to intimidate could be punished because burning a cross as a threat is a "virulent form of intimidation").

31. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

32. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974).

33. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

34. R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–53, 56 (1988) (allowing no recovery of damages for intentional infliction of emotional distress stemming from an ad "parody" that presented Mr. Falwell's "first time" as being in an outhouse with his mother).

35. *R.A.V.*, 505 U.S. at 414 (White, J., concurring).

benefit of the most despised minority in America. . . ."[36]

A strong, broad, and ideologically neutral free speech system made it easier for gays collectively and individually to come out of the closet and to become politically active. Free speech and civil liberties protections created space for political activism.[37] The generality and neutrality of free speech law (and criminal law, and equality law) was crucial for gays. As William Eskridge has noted, "neutral law provided just about the only way gays could appeal to an [often] antigay judiciary. . . ."[38]

A general and neutral free speech law did not have exceptions for unpopular expression or expression thought to advocate "dangerous" and "immoral" doctrines or to lead to "immoral" practices. As one judge explained in 1977:

> The Court fully recognizes that homosexuality is an extremely emotional and controversial topic and that [the opinions of a university lecturer whose contract was not renewed because he discussed the topic in the press] quite likely represent a minority view. . . . [But] the fundamental purpose of the First Amendment is to protect from State abridgement the free expression of controversial and unpopular ideas."[39]

Broadly enforced free speech guarantees limited the ability of the powerful to impose their views of acceptable expression on those with less power.

As gay people began coming out of the closet by announcing their sexuality, their expression profoundly challenged the status quo. Meeting gay people and learning that friends, family members, or acquaintances were gay challenged stereotypes and assumptions. Coming out was intensely personal. But it was also powerful political speech.[40]

Coming out produced a backlash. Still, compared to the accepted and often grotesque suppression of gay people of the 1950s

36. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 100 (2002). *See generally id*. at 111–132 (regarding the sometimes-mixed story of First Amendment law and gays).

37. *See generally id.* at 379.

38. *Id.* at 100. The "often" is mine, not that of Professor Eskridge.

39. Aumiller v. Univ. of Del., 434 F. Supp. 1273, 1301 (D. Del. 1977).

40. Fricke v. Lynch, 491 F. Supp. 381, 385 (D.R.I. 1980) (indicating that Fricke's attendance at a high-school senior dance with another male student as his escort "would be a political statement"); *Aumiller*, 434 F. Supp. at 1301; *accord*, Gay Students Org. v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974). The desire of the university's gay student group to hold a dance conveyed a political message protected by free speech guarantees. The message was "that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society."

and before,[41] the cause of tolerance and acceptance of gay people made great progress under a broadly protective civil liberties, equality, and free speech regime.

One area where gays and their allies sought First Amendment protection was in public colleges and universities where gay students and their allies organized groups and sought the recognition accorded to other student organizations.

A. Gay Groups in Public Colleges

From the 1970s through the 1990s, gay and sympathetic straight students sought to form pro-gay groups on state college and university campuses and to obtain for them the same university recognition and advantages extended to other student groups. Recognition typically allowed the gay group the right to use campus meeting rooms, rights to communicate through school channels, some funding, etc.[42] The objectives of the gay groups varied but included providing a dialogue between gay and straight students, dispelling misunderstanding of gays, alleviating the burden of shame felt by gays, and seeking law reform.[43] Some politicians, state legislators, and a number of schools resisted recognizing the gay groups.[44] Often students supported recognition, but

41. ESKRIDGE, *supra* note 36, at 42 (noting the use of lobotomies and castrations for homosexuals); *id.* at 98 (noting the risk of arrest and conviction for dancing with a person of the same sex, cross dressing, propositioning another adult homosexual, possessing a homophilic publication, and writing about homosexuality without disapproval).

42. *See* Gay Student Servs. v. Tex. A & M Univ., 737 F.2d 1317, 1319 n.3 (5th Cir. 1984); Gay Alliance of Students v. Matthews, 544 F.2d 162, 163 (4th Cir. 1976).

43. *See* Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1546 (11th Cir. 1997); *Tex. A & M,* 737 F. 2d at 1320*; Matthews*, 544 F.2d at 163–64; Gay Activists Alliance v. Bd. of Regents, 638 P.2d 1116, 1121–22 (Okla. 1981).

44. *See Pryor*, 110 F.3d at 1549–50 (a state law banning funding for gay interests at the college level is viewpoint discrimination); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 368 (8th Cir. 1988) (finding University of Arkansas student senate's denial of funding to a gay and lesbian student group constituted viewpoint discrimination in distribution of funds); *Tex. A & M,* 737 F.2d at 1330–32 (finding insufficient justification to deny group recognition after creating a limited public forum); Gay Lib v. Univ. of Mo., 558 F.2d 848, 858 (8th Cir. 1977) (the university's refusal to recognize the gay student group was a violation of the group members' First Amendment rights); *Matthews*, 544 F.2d at 165 (overturning Virginia Commonwealth University's denial of gay student group recognition and the privileges associated with recognition); Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 660–63 (1st Cir. 1974) (ruling an attempt to prevent a gay student association from holding social events on campus abridged freedom of association; the activity was speech related and the conduct barred was not an overt sexual act); Student Coal. for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267, 1272–74 (M.D. Tenn. 1979) (noting the university's failure to recognize group based on the fear of propagating homosexuality was an abridgement of the right to associate for no compelling state reason); Gay Rights Coal. of Georgetown Univ.

administrators vetoed recognition.[45]

When their bans were challenged, the schools presented an array of reasons to deny recognition, often supported by expert testimony.[46] The schools generally noted that "homosexual conduct" (which they equated with oral or anal sex) was illegal under state law.[47] (Of course, the sex acts were often illegal for heterosexuals as well.) Allowing gay groups to meet would bring "homosexuals" together, increasing the chances that they would engage in sexual conduct in violation of the law.[48] So banning the gay and gay friendly groups was a form of crime prevention.

Some schools suggested that homosexuals were sick and that groups would threaten public health by leading potential or latent homosexual students toward active homosexuality.[49] According to "experts" for the schools, pro-gay groups were attempting to present homosexuality as a "normal" sexual activity when in fact it was "abnormal" and sick.[50] The schools had a duty to protect impressionable students from psychological harm threatened by recognizing and allowing the gay groups.[51]

One curious claim was that the pro-gay groups were unqualified to contribute to public education on the issue of homosexuality. Texas A & M noted that its student group listed educating the

Law Ctr. v. Georgetown Univ., 536 A.2d 1, 5 (D.C. 1987) (holding that, under District of Columbia law, a private university could not deny student groups equal rights of full recognition based on sexual orientation but could deny the title of university "endorsement."); *Gay Activists Alliance*, 638 P.2d at 1121–22 (Okla. 1981) (finding that the decision by the Board of Regents not to recognize a student group opposing legal discrimination against homosexuals was viewpoint discrimination and a First Amendment violation); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995) (finding that denial of funds to a student group for printing a Christian periodical was impermissible viewpoint discrimination since allocation of funds creates a limited public forum); Widmar v. Vincent, 454 U.S. 263, 273–74 (1981) (holding that to deny a campus religious group access to university buildings under university policy against religious preaching or teaching on university grounds was impermissible viewpoint discrimination where the university had created a public forum).

45. *Georgetown Univ.*, 536 A.2d at 10–11; *Austin Peay State Univ.*, 477 F. Supp. at 1269. *But see Gohn*, 850 F.2d at 362–63 (identifying a student senate denying funding for group activities).

46. *See, e.g.*, *Tex. A & M*, 737 F.2d at 1312; *Austin Peay State Univ.*, 477 F. Supp at 1270.

47. *Austin Peay State Univ.*, 477 F. Supp. at 1271; *Matthews*, 544 F.2d at 166; *Gay Lib*, 558 F.2d at 852; *Tex. A & M*, 737 F.2d at 1321.

48. *Austin Peay State Univ.*, 477 F. Supp. at 1271; *Matthews*, 544 F.2d at 166.

49. *Gay Lib*, 558 F.2d at 851 n.7, 852; *Matthews*, 544 F.2d at 166; *Tex. A & M*, 737 F.2d at 1322 n.7.

50. *Gay Lib*, 558 F.2d at 851 n7., 852.

51. *Austin Peay State Univ.*, 477 F. Supp. at 1270 n.3; *Matthews*, 544 F.2d at 165–66.

public on gay issues as one of its goals.[52] The school responded that education of such matters should come from the school, not students.[53] Of course, the university's claim of an exclusive right on campus to engage in public education on the subject of homosexuality was a direct affront to free speech principles.[54]

From a modern perspective, these reasons are singularly unpersuasive. Of course, it is true that allowing gay students to meet in a university approved setting could increase the chances of sexual activity. But that would also be true for allowing straight students to meet. Straight students, like gay students, meeting in university approved social settings might well become sexually attracted and later have sex. The sex could include sex acts that were punished by state law. Still the idea of banning school social events because the students might meet, become attracted, and have (for example) oral sex, seemed not to be on the radar screen. The university's "crime against nature" worry was focused on the crime by gay students, not the crime by straight students.

The American Psychiatric Association has since rejected the claim that homosexuality is a disease and that gay people are sick and in need of psychiatric care because of their sexual orientation.[55] In addition, the Supreme Court has ruled that consenting gay (or straight) adults ordinarily may not be punished for consensual sex in private.[56] When the issue of recognizing gay groups emerged, however, these developments were in the future. Back then oral and anal sex were crimes and homosexuality was widely viewed as a (perhaps contagious) disease.

Still, circuit courts, citing and applying strong free speech precedents, uniformly rejected the efforts to deny public college and university recognition to the gay groups.[57] In doing so, they followed strongly speech-protective precedent from the late 1930s[58] through the 1970s.[59] Because oral and anal sex were unlawful in states denying recognition, the schools argued that university recognition and gay students meetings on campus would "increase the

52. *Tex. A & M*, 737 F.2d at 1320.

53. *Id.* at 1320 n.4, 1321.

54. *Id.* at 1321.

55. American Psychiatric Association, *Homosexuality and Civil Rights*, http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsand Related/PositionStatements/197310.aspx (last visited Apr. 20, 2009).

56. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

57. *See, e.g.*, Gay Students Org. of the Univ. of N. H. v. Bonner, 509 F.2d 652, 658 (1st Cir. 1974).

58. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242, 261 (1937) (rejecting the bad tendency approach applied to Communist pamphlets advocating a separate state for blacks).

59. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that to justify punishing speech likely to cause crime, the speech had to be directed to inciting or producing imminent lawless action and plainly likely to produce such action).

opportunity for illegal homosexual contact."[60] But the circuit courts held that such claims were insufficient to justify the infringement on First Amendment rights.[61] For example, the University of New Hampshire banned a gay group after it sponsored a dance that attracted negative publicity.[62] The University expressed concern about illegal sex acts, but the First Circuit rejected "undifferentiated fear" as a basis for suppression[63] and noted the lack of allegations or evidence of illegal acts.[64] Speculation that "individuals might at some time engage in illegal activity is insufficient to justify regulation by the state."[65]

The decision in the *Texas A & M* case is typical. There the Fifth Circuit rejected the claim that education (if any) of students on gay issues was solely for the University—not for students—because the University and its agents were better qualified. Instead, the Fifth Circuit noted that students had a First Amendment right

> to organize the homosexual minority [in an effort] to 'educate' the public as to its plight, and obtain for it better treatment from individuals and from the government. . . . [This is] but another example of the associational activity unequivocally singled out for protection in the very 'core' of association cases decided by the Supreme Court.[66]

Texas A & M's claim that it had not established a forum in which the gays were entitled to share was equally unavailing. Since it opened its campus to a wide range of similar student groups, it could not close the forum to the gay group because the University objected to its message—at least without showing that its interest could not be served by a less restrictive alternative.[67]

Texas A & M University sought to ban the gay group from its forum because of its viewpoint on homosexuality, but the circuit court strongly rejected viewpoint discrimination. The University had allowed a religious group "to present the view that homosexuality conflicted with the teachings of the Bible. . . . It therefore appears that TAMU did not object to the presentation of negative ideas about homosexuality by its recognized student groups."[68]

Since it was based on viewpoint, the A & M ban would have to

60. *Tex. A & M*, 737 F.2d at 1329 (quoting *Matthews*, 544 F.2d at 166).
61. *E.g.*, *Matthews*, 544 F.2d at 166; *Bonner*, 509 F.2d at 662.
62. *Bonner*, 509 F.2d at 654.
63. *Id.* at 662.
64. *Id.*
65. *Id.*
66. *Tex. A & M*, 737 F.2d at 1330 (quoting *Bonner*, 509 F.2d at 660).
67. *Id.* at 1331 (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)).
68. *Id.* at 1331 n. 21.

survive strict scrutiny.[69] But the reasons Texas A & M had advanced for the ban (preventing illegal acts, etc.), failed "under the straightforward First Amendment analysis."[70] As a result, they did not survive strict scrutiny.[71] The message was clear: The University could not allow one viewpoint opposing homosexuality and ban the pro-gay viewpoint. It also could not escape from *Brandenburg* principles because homosexuality was involved.

Circuit courts generally rejected suppression of illegal acts as a justification for denying recognition. They required proof of an imminent danger, not speculation. If the justification was fear of illegal acts, the less restrictive alternative was to punish the acts, not to prevent the speech.[72]

Circuit Courts in the First, Fourth, Fifth, Eighth, and Eleventh Circuits decided for the students.[73] There were dissents only in the *Gay Lib* case from the Eight Circuit. In that case dissenting Judge Regan credited the testimony of psychiatrists who testified that homosexual behavior is compulsive, homosexuality is an illness, and clearly abnormal, and recognition of Gay Lib would tend to expand homosexual behavior on campus and likely result in acts of oral and anal sex proscribed by Missouri law.[74] A petition for rehearing en banc was denied by an equally divided vote. According to two of the judges seeking rehearing, "This is yet another example of unwarranted judicial intrusion into the internal operations of an educational institution."[75] They "would defer to the policy decisions of school administrators" who were "more attuned to the interests of the students."[76]

The United States Supreme Court denied review, but two of President Nixon's four appointees, Justices Rehnquist and Blackmun, dissented. They relied on the "expert" testimony described above as to the effects of allowing students to meet together "in an officially recognized university organization."[77] For these justices, at that time, the issue was "akin to whether those suffering from measles have a constitutional right, in violation of

69. *Id.* at 1332–33.

70. *Id.* at 1333.

71. *Id.*

72. *See, e.g.*, Gay Lib v. Univ. of Mo., 558 F.2d 848, 853 n.9 (8th Cir. 1977) (citing Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976)); *see also* Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1547 (11th Cir. 1997) (holding that even speech advocating violation of the sodomy laws is protected unless it meets the *Brandenburg* test).

73. *See Pryor*, 110 F.3d 1543; *Tex. A & M*, 737 F.2d 1317; *Gay Lib*, 558 F.2d 848; *Matthews*, 544 F.2d 162; Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974).

74. *Gay Lib*, 558 F.2d at 858 (Regan, J., dissenting).

75. *Id.* at 861 (Gibson, C.J., dissenting).

76. *Id.*

77. Ratchford v. Gay Lib, 434 U.S. 1080, 1083 (1978) (Rehnquist, J., dissenting).

quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined."[78] Justices Rehnquist and Blackmun cited *Schenck v. United States*,[79] the case upholding a prison sentence for a man who advocated political action to repeal the draft, as well as *Brandenburg*,[80] with apparent approval.[81] *Schenck* was a bad tendency case that seemed to have been consigned to the garbage heap of history by later decisions.[82] If its bad-tendency approach was good law, *Schenck* would support banning pro-gay groups on campus. By that approach, gay groups could be banned because of their bad tendency to spread the gay "infection," to cause illegal acts, etc. *Brandenburg* rejected bad tendency and required proof that speech was directed to inciting or producing imminent lawless action and plainly likely to produce such action before it could be punished.[83]

A few basic, broad, and generally applicable speech principles were crucial to the success of the gay groups seeking university recognition. First, to justify its illegal conduct rationale the university had to show the group's message was directed to *inciting* or producing *imminent* lawless action and clearly likely to produce such action.[84] Under these decisions, a "common sense" assumption that bringing gay students together in social and other settings would lead to increases in gay sex were simply not sufficient to overcome First Amendment interests. The schools had to *demonstrate* that their fears had substantial factual foundation. Second, if universities were concerned about illegal sexual acts, they needed to focus on the acts not speech. Finally, universities could not allow anti-homosexual speech and deny pro-gay speech. Both viewpoints, presumably, were entitled to hearing. At any rate one viewpoint could not be allowed and the other suppressed.

B. Free Speech and Gays in Other Settings

The Warren Court's cases that expanded protection for sexually oriented materials also provided protection for gay expression. For example, a magazine that dealt with gay issues but also contained stories and poems on gay and lesbian themes was found obscene by a lower court.[85] The Supreme Court reversed summarily, citing *Roth*

78. *Id.* at 1084.
79. Schenck v. United States, 249 U.S. 47 (1919).
80. Brandenburg v. Ohio, 395 U.S. 444 (1969).
81. *Ratchford*, 434 U.S. at 1085.
82. *Schenck*, 249 U.S. at 52; MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 385–402 (2000).
83. *Brandenburg*, 395 U.S. at 447.
84. *See e.g.,* Gay Lib v. Univ. of Mo., 558 F.2d 848, 854–55.
85. One, Inc. v. Olesen, 241 F.2d 772 (1957).

v. United States.[86]

When the postmaster refused to allow mailing privileges for a magazine containing pictures of nude men the Supreme Court again reversed, in a fractured opinion.[87] Justices Harlan and Stewart found the pictures of nude men not patently offensive. They concluded that male nudity was no more offensive to community standards than female nudity.[88] The other concurring justices found the post office procedures for denying mailing privileges constitutionally deficient.[89] Lawyers for the magazine suggested that homosexuals should have First Amendment rights just as heterosexuals did, and, by extensive discussion of the Kinsey Report,[90] they specifically attacked the idea of homosexuality as abnormal and sick. An obscenity case provided a vehicle by which lawyers used the Kinsey report in an effort to educate the judges and refute stereotypes about the abnormal and "sick" nature of homosexuality.

Protection of public employees' rights to freedom of expression eventually provided substantial protection for gay public employees as well. They could not be fired for speaking out on gay issues or for coming out, provided that the speech did not significantly interfere with the government's interest in effectively performing its services.[91] More recently First Amendment rights of association have limited anti-discrimination statutes invoked to protect gays. Under this approach, for example, the Boy Scouts could reject an openly gay Scout Master, relying on freedom of association to trump a state's anti-discrimination laws.[92] Still a court held that a city could refuse facilities to the Scouts because of its discrimination

86. One, Inc. v. Olesen, 355 U.S. 371 (1958) (per curiam) (citing *Roth v. United States*, 354 U.S. 476 (1957)). The per curiam reversal did not explain the reason for the decision, but the following passage from *Roth* provides a probable explanation: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Roth*, 354 U.S. at 484.

87. Manual Enters., Inc. v. Day, 370 U.S. 478 (1962) (reversing a lower court decision that a magazine with pictures of nude male models was not mailable).

88. *Id.* at 490.

89. *Id.* at 519.

90. Brief of Appellant at 16–17, 20–22, Manual Enters, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

91. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 570–71 (1968) (examining a teacher's statements to see if they would have an impact on her ability to perform her job); *see* Aumiller v. Univ. of Del., 434 F. Supp. 1273, 1301 (D. Del. 1977).

92. Boy Scouts of Am. v. Dale, 530 U.S. 640, 640–41 (2000) (holding that the right of "expressive association" allows the Boy Scouts to reject a homosexual assistant scoutmaster).

policy.[93]

There was no doubt a feedback loop in all of these free speech developments that advanced the cause of gays. By coming out and speaking out, gays increasingly put the issue of homosexuality on the agenda. Increased free speech protections substantially facilitated this process, and coming out and free speech on homosexuality helped to normalize gays.

None of these cases involved "special rights" for gays. They gave gays the broad free speech protections enjoyed by virtually everyone else. Protecting gays in this way was controversial, but because the issue was also about free speech, it was not simply about homosexuality. Instead, it was about protecting everyone's right to free speech.

More comprehensive views of free speech affected public schools as well.

IV. FREE SPEECH IN PUBLIC SCHOOLS

A. From Barnette *to* Tinker*: Expansion of Student Free Speech Rights*

In the 1943 case of *West Virginia Board of Education v. Barnette*,[94] the Court confronted the expulsion from public schools of Jehovah's Witness children who refused to salute the flag. The Witness children considered pledging allegiance to the flag to be worshiping a graven image.[95] As the Court saw it, in a decision rendered in the midst of World War II and on Flag Day, the children were compelled to express a belief. If they refused, they were to be expelled from school.[96]

The Court held that First Amendment guarantees of freedom of expression meant that a ceremony "so touching [on] matters of opinion and political attitude" could not be imposed on school children or others.[97] The children were peaceful; their failure to salute did not bring them into collision with the rights of others. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[98]

"To enforce [Bill of Rights liberties]," the Court insisted "is not

93. Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006) (holding that a city could require a statement of non-discrimination from Boy Scout troop before allowing continued free use of the city's marina).

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

95. *Id.* at 629.

96. *Id.* at 630.

97. *Id.* at 636.

98. *Id.* at 642.

to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[99] The Court rejected the claim that it should simply defer to the expertise of school boards. Constitutional rights applied to all agencies of government, including school boards. "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[100]

Finally, the Court in *Barnette* saw the schools as educating students for citizenship in a democracy. From the flag salute controversy, students would learn about state power and the right to dissent. "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[101]

The role of the school in teaching students about citizenship in a democracy re-emerged as a theme in *Tinker v. Des Moines Independent Community School District*.[102] In *Tinker* three public school students wore black armbands to school to protest the Vietnam War and to mourn soldiers killed in the conflict. School authorities learned of the plan, and they promptly passed a rule banning black armbands. When the students refused to remove the armbands they were sent home. As the Court saw it, they were punished "for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance. . ."[103] It found no indication that the work of the school was disrupted. Some students made hostile remarks, but there were no threats or acts of violence on the premises of the school.

The Court first recognized that wearing the armbands was a symbolic expression within the Free Speech Clause of the First Amendment. The First Amendment, "applied in light of the special characteristics of the school environment," protected teachers and students in public schools.[104] Neither "teachers or students shed

99. *Id.* at 637.

102. *Id.* at 640.

101. *Id.* at 637. Just as courts are narrowing rights of students under *Tinker*, the Eleventh Circuit has narrowed the rights of students against being compelled to recite the Pledge of Allegiance. *See* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008) (upholding against a facial attack a Florida statute providing that dissenting students must recite the Pledge unless they have a note from a parent requesting that they be excused).

102. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (quoting *Barnette*, 319 U.S. at 637).

103. *Id.* at 508.

104. *Id.* at 506.

their constitutional rights to freedom of speech or expression at the schoolhouse gate."[105]

At the same time, the Court recognized the need to affirm the broad authority of states and school officials to regulate education, though the regulation had to be consistent with fundamental constitutional safeguards.[106]

School officials explained that they had feared that wearing the armbands would create a disturbance. That explanation did not satisfy the Court:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[107]

School officials thought that schools were no place for demonstrations; student discontent with government policy should be dealt with at the ballot box and not in the halls of our public schools. The Court rejected that justification.[108]

The Court noted that a particular symbol had been singled out for prohibition. "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[109] Though the ban

105. *Id.*
106. *Id.* at 507.
107. *Id.* at 508–09 (citation omitted) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
108. *Id.* at 503, 509 n.3.
109. *Id.* at 511.

reached one viewpoint, the Court's rejection of the school rule was not justified on that limited ground. The Court did not suggest that banning all viewpoints on the war would have been permissible. Instead the Court explained that

> [i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[110]

As the Court saw it, "personal intercommunication among the students" was "an important part of the educational process."[111] Students "in the cafeteria, or on the playing field, or on the campus during the authorized hours . . . may express [their] opinions, even on controversial subjects like the conflict in Vietnam."[112] That was true so long as they did not materially interfere with the operation of the school or collide with the rights of others.[113]

For the majority, an important aspect of the First Amendment was protecting speech in a number of places and venues. As the *Tinker* Court explained:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.[114]

Justice Black dissented and expressed a very different idea about the role of student discussion in education.

> [P]ublic school students [are not] sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that

110. *Id.*
111. *Id.* at 512.
112. *Id.* at 512–13.
113. *Id.* at 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
114. *Id.*

> children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders.[115]

For Justice Black, teaching obedience to authority was the crucial part of educating students for citizenship. As he saw it, youth rebellion was a serious problem. "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[116] But in *Tinker* "a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so."[117] The result would be students ready to defy teachers "on practically all orders."[118] Students were already "running loose" and conducting "sit-ins, lie-ins, and smash-ins."[119]

Justice Black was also distressed by what he saw as a resurrection of a judicial-reasonableness test to decide when student speech was protected.[120]

The *Tinker* decision was cited in cases protecting the right of gay students to form university-recognized gay and pro-gay student groups.[121] Unfortunately for student free speech rights, all subsequent Supreme Court cases on student rights in middle schools and high schools have narrowed or distinguished *Tinker*.

B. The Supreme Court Limits Tinker*: Sexual Innuendo, School Newspapers, and "Bong Hits 4 Jesus"*

Bethel School District No. 403 v. Fraser[122] involved a nominating speech Fraser had made in a school assembly in support of a student running for a school office. According to the Court, the assembly was part of a school-sponsored educational program in self-government. Students could either attend the assembly or go to study hall. Fraser's speech advocated "a man who is firm—he's firm in his pants . . . . Jeff Kuhlman is a man who takes his point and pounds it in. . . . [H]e drives hard, pushing . . . . Jeff is a man who will go to the very end—even the climax, for each and every one of you."[123]

Fraser was suspended for three days and removed from the ballot for class orator. The punishment was based on violating a

115. *Id.* at 522 (Black, J., dissenting).
116. *Id.* at 524.
117. *Id.* at 524–25.
118. *Id.* at 525.
119. *Id.*
120. *Id.* at 517.
121. Gay Lib v. Univ. of Mo., 558 F.2d 848, 853 n.9, 854 n.12, 856–57 (8th Cir. 1977); Gay Activists Alliance v. Bd. of Regents, 638 P.2d 1116, 1120–21 (Okla. 1981).
122. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
123. *Id.* at 687 (Brennan, J., concurring in the judgment).

school rule against conduct which "materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."[124]

In upholding the school's decision, the *Fraser* Court emphasized the role of the school in educating students for citizenship.

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation…."[125]

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[126]

The Court majority said that democratic values of tolerance and civility in schools were undermined by offensive or threatening language. So, schools were free to limit indecent speech that threatened the "essential lessons of civil, mature conduct."[127]

Justice Brennan concurred. For him, the punishment of Fraser was constitutional because of the discretion of school officials to teach high school students how to conduct civil and effective discourse, and because they had discretion to take steps necessary to prevent disruption of the educational process.[128] The school's victory

124. *Id.* at 678 (majority opinion).

125. *Id.* at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

126. *Id.*

127. *Id.* at 683.

128. *Id.* at 687–88 (Brennan, J., concurring in the judgment). For the unfortunate lesson about democracy, see Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1357 (C.A. Wash. 1985) (describing the school's decision to nullify Fraser's election as one graduation speaker. Fraser won as a result of a student write-in vote. Fraser's name had been struck from the official school ballot).

in *Fraser* had an ironic twist. To pursue the worthy objective of teaching civil democratic discourse, school officials felt constrained to remove Fraser from the ballot as class orator and then, when he won on a write-in vote, to refuse to accept the validity of the vote.

After *Fraser*, the Court extended administrative discretion to censor student speech in school newspapers. Under the *Tinker* decision, students had won a number of free press cases when public schools censored articles in the school's student newspaper.[129] But in *Hazelwood School District v. Kuhlmeier*,[130] the Court upheld a school decision to censor articles in the school newspaper that dealt with the impact of pregnancy and divorce on students.[131] As the majority saw it, the school newspaper was not a forum for expression, because the school had not opened it for indiscriminate use by the public or by students. The newspaper, published in connection with journalism class, was part of the curriculum.[132] The *Tinker* standard applied to student speech that happened to occur on school premises. It did not apply when educators exercised editorial control over student speech in school-sponsored educational activities.

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
>
> Educators are entitled to exercise greater control over this second form of student expression to assure that participants

129. Gambino v. Fairfax County Sch. Bd., 564 F.2d 157, 157–58 (4th Cir. 1977) (holding that a student newspaper is a forum protected by the First Amendment and that the school cannot censor an article on birth control); Bayer v. Kinzler, 383 F. Supp. 1164, 1165–66 (E.D.N.Y. 1974) (preventing distribution of a sex-education supplement in a school newspaper violated the First and Fourteenth Amendments).

130. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

131. *Id.* at 273–74.

134. *Id.* at 260–61.

> learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[133]

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. For them, as for the Circuit Court, the student newspaper was a "forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution . . . ."[134] Part of education was teaching students the fundamental values necessary to maintain the democratic political system.[135]

The dissenters insisted that *Tinker* supplied the appropriate test. They rejected each of the Court's justifications. Censoring the article on student pregnancy, they wrote, "in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."[136] They also rejected the rationale of shielding high school students from unsuitable material. *Tinker* had properly rejected

> stifling discussion of all but state-approved topics and advocacy of all but the official position. . . . The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or thorough official assessment of topic sensitivity. The former would constitute unabashed and unconstitutional viewpoint discrimination.[137]

The dissenters doubted that the school's real purpose was protecting students from potentially sensitive topics since the school had approved articles on teenage sexuality and contraception.[138] Instead, the *Hazelwood* case illustrated "how readily school officials (and courts) can camouflage viewpoint discrimination as 'mere' protection of students from sensitive topics."[139]

For the dissenters, the newspaper censorship in *Hazelwood* "served no legitimate pedagogical purpose" and was, therefore, not designed to "prevent 'materia[l] disrupt[ion of] classwork.'"[140] Nor could it be justified as preventing student expression that invaded

133. *Id.* at 270–71.
134. *Id.* at 277 (Brennan, J., dissenting).
135. *Id.* at 278.
136. *Id.* at 284.
137. *Id.* at 285–87.
138. *Id.* at 288.
139. *Id.*
140. *Id.* at 289.

the rights of others. "If that term is to have any content, it must be limited to rights that are protected by law."[141]

The Court again upheld the discretion of school officials to censor student speech in *Morse v. Frederick*.[142] There the Court considered the case of a high school student who displayed, at what the Court considered a school event, a banner that read "Bong Hits 4 Jesus."[143] The school had taken students to watch the Olympic torch as it passed though their home town of Juneau, Alaska. Frederick did not attend school that day, but joined his fellow students on the street. After he unfurled his banner, his principal ordered him to take it down, but he refused and was punished. The majority of the Court held that "[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use . . . ."[144] and it read Frederick's somewhat inscrutable banner to do just that.[145] Chief Justice Roberts, writing for the majority, discussed at length the dangers of using illegal drugs, the duty of schools to protect students from the danger, and the school policy against students encouraging such use.[146] Justice Thomas concurred on the ground that the First Amendment, as originally understood, did not protect student speech in public schools.[147] *Tinker* was a departure from the original understanding (or more accurately from the likely originally expected application) and should be flatly overruled.

Justices Stevens, Ginsburg, and Souter dissented. They agreed that the principal should not be held liable for damages resulting from pulling down Frederick's banner. However, they would hold "that the school's interest in protecting its students from exposure to speech 'reasonably regarded as promoting illegal drug use,' cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs."[148] The pressing need to combat student use of illegal drugs supported a school rule that banned willful conduct that "expressly 'advocates the use of substances that are illegal to minors.'"[149] But it did not follow that the school could ban "student speech that was never meant to persuade anyone to do anything."[150]

The dissenters said that "two cardinal First Amendment

141. *Id.*
142. Morse v. Frederick, 127 S. Ct. 2618 (2007).
143. *Id.* at 2622.
144. *Id.*
145. *Id.* at 2624.
146. *Id.* at 2628–29.
147. *Id.* at 2630 (Thomas, J., concurring).
148. *Id.* at 2643 (internal citations omitted) (Stevens, J., dissenting).
149. *Id.* at 2643–44
150. *Id.* at 2644 .

principles animate[d] . . . the Court's opinion in *Tinker* . . . . First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification . . . "[151] and "second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid."[152] The dissenters thought the Court had fashioned a test for speech at school that undermines "the two cardinal principles upon which *Tinker* rests."[153] This was so because the "Court's test invites stark viewpoint discrimination."[154] The dissenters said that the Court's rule would chill speech that argued for legalization of marijuana.[155]

The dissenters recognized that in the school environment "it might well be appropriate to tolerate some targeted viewpoint discrimination . . . ." and to somewhat relax the *Brandenburg* standard that allowed punishment only of speech directed to inciting imminent lawless action.[156] Still they insisted that the school must "show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana."[157] The dissenters rejected the majority opinion's "ham-handed, categorical approach . . . ." which was "deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs . . . ."[158]

> "[Students] may not be confined to the expression of those sentiments that are officially approved."[159] If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting drugs.[160]

Justices Alito and Kennedy joined the Court's opinion, but wrote a concurring opinion expressing their understanding of it. For them, it went "no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."[161] They specifically denied that the

151. *Id.* (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (1995)).
152. *Id.* at 2645 (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).
153. *Id.* (Stevens, J., dissenting).
154. *Id.*
155. *Id.* at 2649.
156. *Id.* at 2646.
157. *Id.* at 2647.
158. *Id.* at 2649.
159. *Id.* at 2650 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).
160. *Id.* at 2650.
161. *Id.* at 2636 (Alito, J., concurring).

opinion provided any support "for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs'. . . ."[162]

In the Warren Court years, courts were more likely to give broad protection to speech while simultaneously recognizing the challenges of a school environment. At the same time, some courts, and many more recently, found a threat of disruption adequate to justify suppressing speech.[163] In recent Supreme Court cases, student speech claims have lost.[164] Courts considering bans on pro- or anti-gay t-shirts must grapple with *Tinker* and the substantial pressure to limit its holding.

V. SEXUAL ORIENTATION AT SCHOOL: DUELING DAYS OF SILENCE AND DAYS OF TRUTH & DUELING T-SHIRTS

Two views of student speech emerge from the preceding discussion. One view is apparent in *Tinker* and in the cases about

162. *Id.*

163. *See* D.B. *ex rel.* Brogdon v. Lafon, 217 F. App'x 518, 521, 523, 526 (6th Cir. 2007) (per curiam) (upholding ban on wearing or otherwise displaying the Confederate flag because the school had reason to believe it would cause a substantial disruption due to past incidents at the school); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1247 (11th Cir. 2003) (per curiam) (identifying ban based on concern due to prior disruption); Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000) (upholding ban on Confederate flag; displaying the Confederate flag was against the school's countervailing interest in teaching students the boundaries of socially acceptable behavior); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1358, 1362 (10th Cir. 2000) (upholding ban on Confederate flag, Black Power symbols, and "hate group" materials because the school had reason to believe it would cause a substantial disruption due to past racial incidents including fights and verbal confrontations between white and black students); Melton v. Young, 465 F.2d 1332, 1332–33 (6th Cir. 1970) (upholding ban on Confederate flag due to racial tension stemming from desegregation); B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp. 2d 740, 749 (E.D. Mo. 2007) (upholding a ban on wearing or otherwise displaying the Confederate flag because school officials had reason to believe it would cause a substantial disruption because of past incidents at the school which included a fight at a basketball game, white students threatening a black student at his house, and white students urinating on a black student); Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 488, 489 (D.S.C. 1997) (upholding ban on Confederate flag because the school had reason to believe it would cause a substantial disruption due to several racial incidents directly involving the flag).

164. *See supra* text accompanying notes 122–64. Student speech rights have also been recently restricted in the Pledge of Allegiance context. *See, e.g.*, Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008) (rejecting a facial challenge to a Florida statute providing that dissenting students must recite the Pledge unless they have a note from a parent requesting that they be excused; the Court balanced parental rights against student free speech rights and treated the statute as upholding parental rights).

recognizing pro-gay groups in public colleges and universities. This view recognizes that the rights of students are not always co-extensive with those of adults. Still, it seeks to apply a number of basic free speech principles: a very strong presumption against viewpoint discrimination, a strong protection for the right of students to express opinions on matters of public concern, a strong view of the school as an appropriate place for student speech, and an insistence on a strong showing of the connection between the speech or association to be banned and the harm to be prevented. In the college cases, prevention of illegal sex acts and protecting "vulnerable" young students from being "infected" with homosexuality—plausible as those concerns were given the law and benighted understanding of homosexuality at the time—were simply not sufficient justifications.[165] A "reasonable" assumption by administrators that college age students who met in a pro-gay student association would be more likely to meet a person to whom they were sexually attracted and engage in oral or anal sex was not enough. Much more substantial proof was required. If the harm was illegal acts, the college cases suggested that the acts, not the speech or expressive association, needed to be targeted. Though the college cases often relied on *Tinker*, free speech protection in public colleges and universities has been more robust and less subject to erosion than in high school.[166]

The other approach defers more than *Tinker* to the decisions of school administrators. Where the judges find a substantial evil to be averted, this approach does not require much to support banning speech. The school need not demonstrate (rather than assume as obvious) that the evil is caused by the speech and will be averted by censoring it. The connection between the speech and the evil to be averted can be tenuous. This is similar to the old bad-tendency approach. Furthermore, it provides additional rationales for suppressing "troublesome" student speech. If student speech can be characterized as part of the curriculum or speech that might reasonably be ascribed to the school, it can also be banned.

In evaluating speech by students at school, the problem is knowing which of these two lines of approach (or perhaps some other) is more likely to be controlling. Is there a unique "advocacy of drugs" exception? Would the same rationale apply to students who said abstinence only was a stupid policy and who said that students should learn about safer sex? Some studies strongly suggest that

165. *See supra* notes 49–51 and accompanying text.

166. *See, e.g.*, *Farmington,* 508 F. Supp. 2d at 749. *But cf., e.g.*, Papish v. Bd. Of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (upholding the constitutional protection of the distribution of newspaper on university campus with cartoon of police officer raping the Statue of Liberty and bearing the headline "Motherfucker Acquitted"—referring to an acquittal of a member of a group called "Up Against the Wall Motherfucker").

abstinence only education has little effect beyond wasting taxpayers' money.[167] Are students free to argue for that perspective, or might doing so be seen as advocacy of premarital sex, with its host of potential problems?

Dueling T-Shirts Revisited

At this point I return to student expression in high schools and to messages on t-shirts that express political, religious, or ideological ideas. Specifically, I look at student expression on t-shirts over whether homosexuality should be tolerated or accepted or whether homosexuality is shameful and not acceptable. The controversy in schools over this subject mirrors one in the society at large. Some students find homosexuality unacceptable, based on religious or other beliefs. Others find it acceptable. Some who find it acceptable also rely on religious teaching. Others, no doubt, are somewhere in between or are unconcerned about the issue.

In *Harper v. Poway Unified School District*,[168] the Ninth Circuit Court of Appeals confronted the public-school controversy over gays. In 2003 and again in 2004, Poway High School permitted the school's Gay-Straight Alliance to hold a "Day of Silence."[169] The purpose of the Day of Silence was to protest against intolerance of gay students and against what the participating students saw as the silencing effect intolerance had on the gay students. Participating students wore black duct tape over their mouths and spoke in class only thorough a designated representative. Some participating students also wore "National Day of Silence" t-shirts that had a purple square with a yellow equals sign in the middle.[170] Participating students saw the Day of Silence as about tolerance, or, perhaps as the logo suggests, acceptance. The school also allowed students to put up posters about the event.[171]

Poway High School had had other conflicts about homosexuality. Two students had successfully sued the school for failing to protect them from students who harassed them because they were gay. At his trial, one of these students testified that students repeatedly called him names, shoved him in the hallways,

167. CHRISTOPHER TRENHOLM ET AL., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS: FINAL REPORT 59 (2007); *see also* Press Release, Office of Congressman Jim Moran, Report Shows Abstinence-Only Education Failing Our Youth (March 20, 2008), *available at* http://www.house.gov/apps/list/press/va08_moran/AbOnlyLetter.shtml #startcontent.

168. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (identifying high school student suspended for wearing t-shirt with anti-homosexual message), *vacated as moot mem.*, 127 S. Ct. 1484 (2007).

169. *Id.* at 1171.

170. *Id.* at 1171 n.3.

171. *Id.*

threw food at him, and spit on him.[172] (Most of this behavior is not speech and none of it should be protected speech in schools.)

Some Poway High School students had a very negative reaction to the "Day of Silence." The 2003 Day of Silence at Poway provoked what the court described as "a series of incidents and altercations" following "anti-homosexual comments made by some students."[173] One confrontation "required the principal to separate students physically."[174]

The 2004 Day of Silence was also controversial. Some student critics of homosexuality were outspoken. High school student Tyler Harper was one of these. On the 2004 Day of Silence he wore a t-shirt that said: "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," on the front, and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27,'" on the back.[175] When the shirt was observed by Tyler's teacher, he sent Harper to the front office where school officials discussed the issue with him and proposed various alternatives, all of which Harper rejected. The assistant principal told Harper that the Day of Silence was not designed to promote homosexuality but was "trying to raise other students' awareness regarding tolerance in their judgment of others."[176]

Harper also met with the principal who explained that he thought Harper's shirt was inflammatory, that the school's intent was "to avoid physical conflict on campus," and "that it was not healthy for students to be addressed in such a derogatory manner."[177] According to the principal, Harper told him that he had already been "'confronted by a group of students on campus'" and had been "'involved in a tense verbal conversation.'"[178] The principal decided that Harper would not be permitted to wear his t-shirt on campus, and since he refused to remove it, Harper spent the day in the school conference room, doing his homework. He was not otherwise disciplined or suspended, and no misconduct was noted on his record.[179] Tyler Harper filed suit. As he saw it, "'the true purpose' of the Day of Silence was 'to endorse, promote, and encourage homosexual activity.'"[180]

In the district court, Tyler Harper lost his motion for a preliminary injunction, seeking, among other things, to protect his right to wear his anti-gay t-shirt.[181] The District Court found the t-

172. *Id.* at 1172 n.6.
173. *Id.* at 1171.
174. *Id.*
175. *Id.*
176. *Id.* at 1172.
177. *Id.*
178. *Id.*
179. *Id.* at 1172–73.
180. *Id.* at 1171 n.2.
181. *Id.* at 1173.

shirt was disruptive under the *Tinker* standard.[182] Two of the three Ninth Circuit judges voted to affirm.[183] They found a different justification under *Tinker*—interference with the rights of others—that allowed the school to ban the t-shirt. These judges explained that speech capable of causing psychological injury could constitutionally be prohibited; the court "conclude[d] that Harper's wearing of his T-shirt 'colli[des] with the rights of other students' in the most fundamental way."[184] "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."[185] As *Tinker* clearly states, students have the right to "'be secure and to be let alone.'"[186] "Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[187]

According to the court:

> 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. The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school."[188]

The court thought that "the fact that Harper's demeaning statement is harmful to gay students" was obvious, though the court did suggest that more proof might be required at a trial on the merits.[189]

That Harper wore his t-shirt in response to the Day of Silence (and some Day of Silence t-shirts) was of no moment. For gays, blacks, Jews, or Latinos to "recognize that they . . . are not 'respected' or considered equal by some in certain public schools . . .

182. *Id.* at 1184–85.
183. *Id.* at 1167, 1170.
184. *Id.* at 1178 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
185. *Id.*
186. *Id.* at 1177 n.16 (quoting *Tinker*, 393 U.S. at 508).
187. *Id.* at 1178.
188. *Id.* at 1178–79.
189. *Id.* at 1180.

does not mean that they are not injured when the usually unspoken prejudice turns into harmful verbal conduct."[190] The majority rejected Harper's argument that banning his t-shirt amounted to *impermissible* viewpoint discrimination.

> [S]peech in the public schools is not always governed by the same rules that apply in other circumstances. Indeed, the Court in *Tinker* held that a school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive….[191] Thus, pursuant to *Tinker,* courts have allowed schools to ban the display of Confederate flags despite the fact that such a ban may constitute viewpoint discrimination. While the Confederate flag may express a particular viewpoint, "[i]t is not only constitutionally allowable for school officials" to limit the expression of racially explosive views, "it is their duty to do so."[192]

Because, as the court explained, "the record demonstrates that Harper's speech intruded upon the rights of other students, the School's restriction is permissible under *Tinker,* and [the court] must reject Harper's viewpoint discrimination claim."[193]

The *Harper* Court explained that part of the basic mission of public schools was to inculcate fundamental democratic values. Schools could permit or even encourage speech advocating tolerance, equality, and democracy without providing equal time for student speech espousing intolerance and bigotry.[194]

Judge Kozinski dissented. He concluded that the school had provided no valid reason for banning Tyler Harper's t-shirt. For him, it was a close question whether Harper's t-shirt could be banned in the school setting as plainly offensive speech under *Fraser*,[195] but he concluded that issue had been resolved in the Ninth Circuit decision *Frederick v. Morse*,[196] the "Bong Hits 4 Jesus" decision later reversed by the Supreme Court.[197] As Judge Kozinski noted, "reconciling *Tinker* and *Fraser* is no easy task."[198] According to Judge Kozinski, school authorities needed to present evidence that the ban was required to avoid "material and substantial interference with schoolwork or discipline."[199] He found the evidence

190. *Id.* at 1181.
191. *Id.* at 1184 (internal citations omitted) (citing *Tinker*, 393 U.S. at 511).
192. *Id*. at 1185 (internal citations omitted) (quoting Scott v. Sch. Bd., 324 F.3d 1246, 1249 (11th Cir. 2003)).
193. *Id.* at 1185.
194. *Id.*
195. *Id.* at 1193 (Kozinski, J., dissenting).
196. *Id.* (citing Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006)).
197. Morse v. Frederick, 127 S. Ct. 2618 (2007).
198. *Poway*, 445 F.3d at 1193 n.1 (Kozinski, J., dissenting).
199. *Id.* at 1193 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

of such disruption lacking. While there had been altercations over homosexuality in the past, it was not clear that t-shirt messages had been involved.[200] In any case the evidence did not support the claim that Harper's t-shirt would cause substantial disruption—indeed the evidence was merely that it had provoked discussion and criticism.[201] He found the viewpoint discrimination involved particularly troubling:

> [T]olerance toward homosexuality and homosexual conduct is anathema to those who believe that intimate relations among people of the same sex are immoral or sinful. So long as the subject is kept out of the school environment, these differences of opinion need not clash. But a visible and highly publicized political action by those on one side of the issue will provoke those on the other side to express a different point of view, if only to avoid the implication that they agree[202] . . . . Given the history of violent confrontation between those who support the Day of Silence and those who oppose it, the school authorities may have been justified in banning the subject altogether by denying both sides permission to express their views during the school day.[203] I find it far more problematic—and more than a little ironic—to try to solve the problem of violent confrontations by gagging only those who oppose the Day of Silence and the point of view it represents.[204]

Finally, Judge Kozinski rejected the invasion of the rights of others rationale:

> Surely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech. Otherwise, a state legislature could effectively overrule *Tinker* by granting students an affirmative right not to be offended.[205]

The majority found Harper's t-shirt caused serious educational injuries to gay students, but Judge Kozinski noted the lack of specific facts to support the claim. Many of the articles cited by the majority cited the educational harm caused by physical abuse and threats. Judge Kozinski pointed out that threats and abuse can and should be stamped out in a viewpoint neutral way.[206] None of the sources cited by the majority, he wrote, "provides support for the

200. *Id.* at 1195.
201. *Id.* at 1195–96.
202. *Id.* at 1196.
203. *Id.* at 1197 (internal citations omitted).
204. *Id.*
205. *Id.* at 1198.
206. *Id.* at 1199.

notion that disparaging statements by other students, in the context of a political debate, materially interfere with the ability of homosexual students to profit from the school environment."[207] He did not "find the proposition at the heart of the majority's opinion—that homosexual students are severely harmed by any and all statements casting aspersion on their sexual orientation—so self-evident as to require no evidentiary support."[208]

In the end, however, Judge Kozinski's opinion was hardly a ringing endorsement of broad free speech rights for students. He was sympathetic with the position that students are a captive audience and should not be forced to endure speech they find demeaning. "Perhaps schools authorities should have greater latitude to control student speech than allowed by . . . *Tinker*. Perhaps Justice Black's concerns . . . should have been given more weight. Perhaps the narrow exceptions of *Tinker* should be broadened and multiplied. Perhaps *Tinker* should be overruled."[209] But these questions were for the Supreme Court.

Poway is not an isolated case. Instead, cases arising out of critical responses to the Day of Silence in public schools seem to be proliferating. In *Nuxoll v. Indian Prairie School District No. 204*,[210] the Seventh Circuit considered another banned t-shirt. Nequa Valley High School also has had its Day of Silence. Some supportive students wore Day of Silence t-shirts with legends such as "Be Who You Are."[211] According to Judge Posner's majority opinion, none of the pro-Day of Silence t-shirts advocated homosexuality or opposed heterosexuality. Instead, one purpose of the day was to oppose harassment of gay students.[212]

Still, legends such as "Be Who You Are" seem (commendably) to support acceptance of gays.

Some students at Nequa Valley High School disapproved of homosexuality. They participated in a counter demonstration, held the day after the Day of Silence—the "Day of Truth." The Day of Truth also had its recommended t-shirts: "day of truth" and "The Truth Cannot Be Silenced."[213] In a prior year, one student wore a t-shirt that read "My Day of Silence, Straight Alliance" on the front and "Be Happy, Not Gay" on the back.[214] The school required "Not Gay" to be inked out.[215] The t-shirt was held to violate a school rule that forbade oral or written "'derogatory comments' . . . 'that refer to

207. *Id.*
208. *Id.*
209. *Id.* at 1207 (internal citations omitted).
210. 523 F.3d 668 (3d Cir. 2008).
211. *Id.* at 670.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*

race, ethnicity, religion, gender, sexual orientation, or disability.'"[216] Alexander Nuxoll, a sophomore at Nequa Valley High School, filed suit. He alleged that the school rule was facially unconstitutional as a violation of the First Amendment and that he wanted to wear a "Be Happy, Not Gay" t-shirt but feared punishment under the school rule. He claimed a right to wear other derogatory comments as well.[217]

In an opinion by Judge Posner, the majority upheld the school rule, but held it could not constitutionally be applied to ban the slogan "Be Happy, Not Gay."[218] This was because the slogan was only "tepidly" anti-gay.[219] As to the rule, Judge Posner said the school had

> prohibited only (1) *derogatory* comments on (2) unalterable or otherwise deeply rooted personal characteristics about which most people, including—perhaps especially including—adolescent schoolchildren, are highly sensitive. People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being.
>
> There is evidence, though it is suggestive rather than conclusive, that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school's expectations.[220]

Balancing interests, Judge Posner saw great potential for wounding speech and little First Amendment benefit in "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 . . ."[221] Judge Posner rejected the claim that the school's rule was valid because it protected "the 'rights' of the students against whom derogatory comments are directed" because "people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life."[222] Instead, for the majority, the school's interest in its core mission of ordered learning was at stake:

216. *Id.*
217. *Id.*
218. *Id.* at 675–76.
219. *Id.* at 676.
220. *Id.* at 671.
221. *Id.*
222. *Id.* at 672.

> We foresee a deterioration in the school's ability to educate its students if negative comments on homosexuality by students like Nuxoll who believe that the Bible is the word of God to be interpreted literally incite negative comments on the Bible by students who believe either that there is no God or that the Bible should be interpreted figuratively. Mutual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning.[223]

Though discussion of homosexuality and acceptance of gays might seem to be an important political issue, the majority did not see high school students' discussion and debate about sexual orientation as of significant First Amendment value: "one may doubt just how close debate by high-school students on sexual preferences really is to the heart of the First Amendment."[224]

> [H]igh-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students. Because of that relationship and responsibility, we are concerned that if the rule is invalidated the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment, as in *Nabozny v. Podlesny,* 92 F.3d 446, 457 (7th Cir. 1996).[225]

The majority conceded that the rule adopted by the school "would not wash if it were being imposed on adults"[226] (including college students) "because they can handle such remarks better than kids can and because adult debates on social issues are more valuable than debates among children."[227] It conceded that it probably could not be applied to

> students when they are outside of the school, where students who would be hurt by the remarks could avoid exposure to them. It would not wash if the school understood "derogatory comments" to embrace *any* statement that could be construed by the very sensitive as critical of one of the protected group

223. *Id.*

224. *Id.* at 673.

225. *Id.* at 674–75. *Nabozny* was a case in which a gay student was subjected to gross physical abuse and focused verbal harassment. *See* Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

226. *Id.* at 674 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

227. *Id.*

identities.[228]

As to *Tinker*, the majority noted that the rule had been modified in later cases. Basically the majority held 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."[229] In effect, the Posner opinion revived the bad tendency test for schools. Because of a lack of judicial competence, the majority thought a "judicial policy of hands off" student speech questions ("within reason") had "much to recommend it."[230]

Judge Posner reinterpreted *Tinker*. Rather than protecting a student right of freedom of expression at school, it was a rule against taking sides—banning anti-war speech would have been taking sides since "the debate over the war was started, maintained, and escalated by the war's opponents."[231] As Judge Posner saw it, the school rule in *Nuxoll* did not take sides. It banned derogatory comments that refer to race, religion, sexual orientation, or disability. Students could advocate heterosexuality on religious grounds, but could not say "homosexuals are going to Hell."[232]

However, the problem is more complicated than Judge Posner suggests. To the extent that students could wear a "gay, fine by me" t-shirt or one that said, "it is o.k. to be gay," a rule that banned the contrary view—"I think it is not o.k. to be gay; homosexuality is immoral" would be viewpoint discrimination. The view that being gay is acceptable would be permitted; the view that it is not, would not. Allowing one and banning the other would be taking sides on the issue of acceptability of homosexuality. In their own speech, schools can take the side of accepting homosexuality and rejecting intolerance. They may be able to go further and ban only anti-acceptance student speech because the reasons for doing so are so weighty. If so, it is because they can take sides in the debate by suppressing student speech on one side of the issue.

In the end, Nuxoll won a preliminary injunction against the ban on his "Be Happy, Not Gay" slogan. It was "only tepidly negative," not strong enough to be "demeaning."[233] It would be too speculative to assume that the t-shirt would contribute to the sort of anti-homosexual incidents the school had experienced.[234] At trial on the merits,

228. *Id.*
229. *Id.*
230. *Id.* at 671.
231. *Id.* at 675.
232. *Id.* at 674.
233. *Id.* at 676.
234. *Id.*

> [t]he district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity.[235]

Judge Rovner concurred. He agreed that Nuxoll was entitled to an injunction allowing him to wear his "Be Happy, Not Gay" t-shirt. But he thought the case was controlled by *Tinker*, and he rejected Judge Posner's reinterpretation of the case. *Tinker* had concluded that "the prohibition . . . of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[236] *Tinker* did not turn on viewpoint discrimination; that was so because there was no evidence of whether or not the school had allowed pro-war expression.[237]

In contrast to the majority, Judge Rovner found student speech on political and social subjects valuable.

> I heartily disagree with my brothers about the value of the speech and speech rights of high school students, which the majority repeatedly denigrates. Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women's rights movement, the anti-war protests for Vietnam and Iraq, and the recent presidential primaries where the youth voice and the youth vote are having a substantial impact. And now youth are leading a broad, societal change in attitude towards homosexuals, forming alliances among lesbian, gay, bisexual, transgendered ("LGBT") and heterosexual students to discuss issues of importance related to sexual orientation. They have initiated a dialogue in which Nuxoll wishes to participate. The young adults to whom the majority refers as "kids" and "children" are either already eligible, or a few short years away from being eligible to vote, to contract, to marry, to serve in the military, and to be tried as adults in criminal prosecutions. To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults is contrary to the values of the First Amendment.[238] Justice Brennan eloquently stated this for the Court more than forty years ago, and his words ring especially true today:
>
> The vigilant protection of constitutional freedoms is nowhere

235. *Id.*

236. *Id.* at 677 (Rovner, J., concurring) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

237. *Id.*

238. *Id.* at 677–78 (internal citations omitted).

> more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.[239]

Judge Rovner also rejected the majority's endorsement of a "hand's off" (within limits) policy on student speech questions. In response to a call to defer to school officials he recalled the words of Justice Jackson in *West Virginia Board of Education v. Barnette*:

> [School officials] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[240]

Finally, Judge Rovner saw protecting student speech (within *Tinker's* limits) as contributing to, rather than undermining, the educational mission of the schools.

> Contrary to the majority's view that "free speech and ordered learning" are "competing interests," . . . these values are compatible. The First Amendment as interpreted by *Tinker* is consistent with the school's mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive.[241]

With court approval, some schools have followed a more far reaching approach to student expression on clothing. This approach goes a long way toward turning *Tinker* into an empty promise.

VI. SCHOOL UNIFORMS AND UNIFORM SUPPRESSION OF EXPRESSION: BANNING EXPRESSION ON CLOTHING

Clearly, courts have been restricting *Tinker*. Could schools simply broadly shut down the sort of "pure speech" the Tinkers engaged in—black armbands to protest the Vietnam War? Can they ban similar pure speech (messages on shirts), provided they ban such expression for all topics and viewpoints? The Ninth Circuit upheld just such a broad ban in *Jacobs v. Clark County School*

239. *Id.* at 678 (quoting *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1969))).

240. *Id.* at 679–80 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

241. *Id.* at 680 (internal citations omitted).

District.[242]

Clark County School District established a standard dress code for students and allowed individual schools in the district to have a more stringent policy. The expressed object of the dress code was to increase student achievement, promote safety, and enhance a positive school environment.[243] Kimberly Jacobs, an eleventh grader, wanted to wear a religious message on her shirt, but her school's dress code banned *any* printed messages on student clothing—except for the school logo.[244] In accordance with the regulation, Jacobs' school prohibited her from displaying a religious message on her t-shirt.[245]

Tinker seemed to provide substantial support for Jacobs' case: under *Tinker* students retain significant free speech rights at school; the t-shirt, like Tinker's arm band, was "pure speech"; there was no showing that Jacob's message was disruptive or violated the rights of others, and the case did not seem to fit into any of the growing list of exceptions the Supreme Court had made to the *Tinker* rule.

The Ninth Circuit majority simply re-interpreted *Tinker*. As the court saw it, the constitutional problem with the *Tinker* ban on armbands ban was "*not* simply [that the rule] worked to prohibit students from engaging in a form of pure [non-disruptive] speech" on a matter of intense public concern.[246] Instead the problem was that "it did so based on the *particular opinion* the students were espousing."[247] The Ninth Circuit acknowledged that a slightly broader reading of *Tinker* would apply the rule of the case to content based restrictions—bans on discussion of an entire topic. At any rate, the court said that "the *Tinker* test has only been employed when a school's restrictions have been based, at least in part, on the particular messages students were attempting to communicate."[248]

The court found the Clark County School Board was not concerned with particular messages. The school policy was both viewpoint and content neutral. It did not ban selected topics (e.g. religion or sexual orientation), and it did not ban one viewpoint while allowing another. Nothing in the language or history of the regulation suggested that it was aimed at particular ideas.[249] The

242. Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 423 (9th Cir. 2008) (upholding a school policy requiring students to wear "solid khaki-colored bottoms and solid-colored polo, tee, or button-down shirts").

243. *Id.* at 422.

244. *Id.* at 423.

245. *Id.*

246. *Id.* at 431.

247. *Id.*

248. *Id. See* Lowry v. Watson Chapel Sch. Dist., Docket No. 2007 WL 3002073, at *1 (E.D. Ark. 2007) (holding that a ban on armbands imposed *because they signified disagreement with school uniform policy* violated the First Amendment as a matter of law).

249. *Jacobs*, 526 F.3d at 432.

school said that uniforms would enhance school safety by reducing the ability to hide weapons, allowing more focus on student achievement, eliminating differences in dress that emphasize different income levels, and would simplify preparing for school.[250] Of course, schools could require uniforms without banning messages on shirts of the appropriate color and style, without banning buttons, and without banning armbands. A uniform rule that accommodated free expression protected by *Tinker* would still achieve many of the stated objectives of the policy. That fact did not help Kimberly Jacobs, however. The regulation did not need to be "the *least* speech-restrictive means of advancing the government's interests."[251]

The court conceded that wearing a t-shirt with a religious message was "unquestionably protected by the First Amendment"[252] but the degree of protection was a different matter.

> Outside the school speech context, the Supreme Court has repeatedly held that a law restricting speech on a viewpoint- and content-neutral basis is constitutional as long as it withstands intermediate scrutiny—i.e., if: (1) "it furthers an important or substantial government interest"; (2) "the governmental interest is unrelated to the suppression of free expression"; and (3) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[253]

The court decided that the same intermediate level of scrutiny should apply in the school context. Intermediate scrutiny is quite deferential; it establishes a test the government rarely fails. Since the school uniform policy "advance[d] important government interests unrelated to the suppression of free speech and [did] so in ways that effect as minimal a restriction on student's free expression as possible," the policy should be upheld.[254] Specifically, the court found the governmental interests important and unrelated to the suppression of expression (that is, they were not adopted for the purpose of suppressing expression but for other legitimate purposes). In addition, the policies did not suppress more speech than necessary and left open ample alternative channels of communication. Though the school uniform policies "limit[ed] students' abilities to express themselves via their clothing choices," the Ninth Circuit agreed with the district court that ample alternatives were available: "[S]tudents may continue to express

250. *Id.*
251. *Id.* at 435 n.36 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994)).
252. *Id.* at 428 n.21.
253. *Id.* at 434 (citing *Turner*, 512 U.S. at 662).
254. *Id.* at 435.

themselves through other and traditional methods of communication throughout the school day."[255] They were

> still permitted (if not encouraged) to have verbal conversations with other students, publish articles in school newspapers [typically subject to school censorship], and join [school recognized] student clubs. Moreover, even a student's ability to communicate through his or her choice of clothing is not *completely* curtailed, as students are still permitted to choose what clothing to wear after school, on weekends, and at non-school functions.
>
> Because the District's uniform policies limit only one form of student expression (while leaving open many other channels for student communication) and apply during the narrowest possible window consistent with the District's goals of creating a productive, distraction-free educational environment for its students, the District's uniform policies are a narrowly-tailored way of furthering the District's pedagogical goals without infringing upon students' First Amendment rights any more than is necessary to achieve these goals.[256]

Judge Thomas dissented. He held the *Tinker* test applied and the majority was improperly ignoring the precedent.

> Rather than examining the nature of the speech, the majority has instead decided that the focus should be on the regulation of the speech. If the regulation is content- and viewpoint-neutral, the majority reasons, then the type of expressive conduct at issue is irrelevant. In that instance, regardless of the type of speech involved, a deferential level of scrutiny applies.
>
> That reasoning, of course, is diametrically opposed to the teachings of *Fraser*, *Hazelwood*, and *Tinker*…. In *Tinker*, the Supreme Court held that a school could not prohibit students from wearing black armbands. In *Chandler*, we held that a school could not prohibit students from wearing pro-teacher buttons. If we applied the Liberty High School uniform policy to those cases, that policy would have prohibited students in *Tinker* and *Chandler* from wearing those same armbands or buttons. However, under the majority's analysis, this would not have resulted in a constitutional violation because the regulations were content- and viewpoint-neutral.[257]

While the school argued that the ban on expressive messages on clothing resulted in an improvement of the educational process by

255. *Id.* at 437.
256. *Id.*
257. *Id.* at 443 (Thomas, J., dissenting).

increasing student achievement, promoting safety, and enhancing a positive school climate, Judge Thomas was unwilling to simply defer to the assumed expertise of school officials. He wanted proof. "There is no empirical evidence of this in the record, only conclusory affidavits filed by school officials."[258]

The effect of the Ninth Circuit's school uniform decision is to silence much student speech at school on controversial topics. Had Mary Beth Tinker gone to a school with such a policy during the Vietnam War, she could not have worn her armband at school. She could, however, have worn it after school and at home; she could have expressed her views to the small number of students she conversed with during the school day; and she could have joined a student club. After *Hazelwood*, her ability to express her anti-war views in the school newspaper is dubious at best. Relegating students to such options significantly limits student speech.

Content and viewpoint discrimination do suggest that the government is targeting the message rather than pursuing more legitimate objectives. Such discrimination strongly suggests impermissible censorship of ideas. Critically scrutinizing such rules typically advances broad protection of free speech. But it is a serious mistake to assume that because content and viewpoint discrimination are quite troubling, viewpoint and content neutral rules that suppress even more speech are always less troubling. The idea that broader suppression of all sorts of speech should consistently receive such relaxed scrutiny is a bizarre and curious way to read the language of the First Amendment.

If schools are an appropriate place for student speech on matters of public concern, the Ninth Circuit's permissive approach to suppression of an entire medium of student expression is quite troubling. If student to student speech on matters of public concern is merely a distraction from the educational mission, the policy is useful.

The Supreme Court and lower courts *have* sometimes applied a content- and viewpoint-neutral permissive-scrutiny as the Ninth Circuit did.[259] But other cases have been far more sensitive to the negative effect on freedom of expression when courts uphold content- and viewpoint-neutral bans—bans which suppress all sorts of speech.

In the 1939 case of *Schneider v. New Jersey*, for example, a city banned hand billing on public streets and sidewalks.[260] The city had an important objective of reducing litter and the ordinance was content- and viewpoint-neutral. And the city pointed out that hand billing was still permitted in other locations such as parks. The

258. *Id.* at 445.
259. *See id.* at 434 (majority opinion).
260. Schneider v. New Jersey, 308 U.S. 147, 165 (1939).

Court flatly rejected the justification:

> It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.[261]

The Court also insisted on its duty to be "astute to examine the effect of the challenged" ordinances.[262] Because of the central importance of free speech, the city was required to use other (though somewhat less effective) methods to prevent littering. "This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."[263] Stopping one handbiller is obviously more effective than pursuing eighty individual litterers, but the Court rightly weighed the crucial importance of free speech in the balance.

The Supreme Court has recently been sensitive to the sort of concerns that influenced it in *Schneider*. In *City of Ladue v. Gilleo*,[264] Margaret Gilleo put a sign on her front lawn in the run up to the first Iraq war. It read, "Say No to War in the Persian Gulf, Call Congress Now."[265] When she reported to the police that her sign had been knocked down, they informed her that such signs were prohibited by city ordinance.[266]

After she successfully sued, the city enacted a new ordinance broadly banning residential signs with a few limited exceptions. After her experience with free speech vandals, Ms. Gilleo had moved her sign to her window, but the new ordinance banned signs in windows as well. She again sued.[267]

The city ordinance listed important reasons unrelated to the message: proliferation of signs would "create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape . . . impair property values . . . [and] impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards…."[268]

The city argued that its ordinance was content and viewpoint

261. *Id.* at 163.
262. *Id.* at 161.
263. *Id.* at 162.
264. 512 U.S. 43, 45 (1994).
265. *Id.*
266. *Id.*
267. *Id.* at 46–47.
268. *Id.* at 47.

neutral, and, for purposes of its opinion, the Court assumed that was so.[269] The Court noted that the city had entirely closed an important form of communication to all political, religious, and personal messages. The yard sign was cheap and convenient, open to persons with modest means. The signs were often designed to reach a particular audience—neighbors—and they linked the message to the speaker. Particularly troubling was the fact that an entire medium of expression had been foreclosed. As the Court noted, "[o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression."[270] The Court cited cases that completely banned distribution of pamphlets in a town, that banned handbills on public streets, that banned door to door distribution of literature, that banned live entertainment, and that broadly banned picketing on residential streets.[271] Finally, the Court suggested that "more temperate measures could in large part satisfy [the city's] stated regulatory needs . . ."[272]

The school uniform ban on expressive messages is analogous to the ban on yard signs. The slogan on a shirt or wearing an armband is a particularly cheap and effective way of getting one's message out to a large number of students, far more students than one is likely to reach in conversation. Beyond that, a t-shirt message is likely to spark discussion. Like the yard sign, the t-shirt links the expression directly to the person of the wearer. Like hand billing, putting a message on one's shirt is a substantial medium of communication. The dress-code rule entirely shut down this medium at school. None of the alternatives the court suggests are comparable and some, like the school newspaper option, are anemic. Implicitly, the Ninth Circuit majority rejected increased student discussion at school of matters of public concern as a "distraction."

VII. TENSIONS AND PARADOXES

A. Gay Speech, Speech Critical of Homosexuality, and Schools

Student free speech in school is filled with paradoxes and tensions. Teaching democratic values is a part of the mission of the school. Free speech and equality are democratic values. Local control of schools is a democratic value, but local control is limited by constitutional rights and federal law. Not all students are adults (though some high school students are and others are getting close),

269. *Id.* at 53 ("In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, *arguendo,* the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.").

270. *Id.* at 55.

271. *Id.*

272. *Id.* at 58.

and minors have more restricted free speech rights than adults. Still, we hope to teach students free speech values.

Free speech principles apply in a more restricted way in limited environments such as schools than in the public domain. In the public domain (places where you are allowed access, as on the Internet, or are allowed to speak, as in parks), government power to restrict speech is much more limited.

Issues of sexual orientation at school raise tensions and paradoxes as well. Adolescent sexuality is a delicate issue for students, parents, politicians, and schools. Gay students are coming out and though intensely personal, coming out is also powerfully persuasive speech. It is also speech on a matter of public concern. In addition, gay and straight students are organizing Gay-Straight Alliances that meet on school property after school. Generally, under the federal Equal Access Act,[273] school clubs not related to the

273. The Equal Access Act, 20 U.S.C.A. §§ 4071–4072 (West 2008), provides:

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited. It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined. A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time.

(c) Fair opportunity criteria. Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights. Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

curriculum have a right to use school facilities after school if the school extends such opportunities to other non-curricular clubs.[274] The Act protects rights of a wide range of community groups, religious groups, fundamentalist groups, *and* gay groups, to organize and meet on school property after school. It is analogous to the basic free speech bargain: we tolerate the speech with which we vehemently disagree because the principle protects the speech we cherish.

Historically, social movements for greater equality have provoked a backlash, often a violent and lawless backlash. When abolitionists began to challenge slavery in the 1830s, those who opposed raising the slavery issue held mass meetings throughout the North that condemned abolitionist "agitation."[275] In the North, some who sought to silence abolitionists broke up their meetings, destroyed their printing presses, and attacked abolitionist orators and newspaper editors.[276] Elijah Lovejoy was killed defending his anti-slavery printing press from a mob.[277] In response to these attacks, abolitionists and many others in the North re-framed the issue. The issue was no longer simply freedom for slaves. It was an issue of free speech and civil liberty for all.[278] Though abolitionists were initially quite unpopular, free speech was not. Attempts to silence anti-slavery speech did not work as intended; instead it strengthened opposition to slavery.[279]

Similarly, when black students began to protest segregation and to challenge the racial caste system (a protest soon joined by white students and black and white adults) and when black children attempted to attend newly integrated schools, there was also a

> (6) to limit the rights of groups of students which are not of a specified numerical size; or
> (7) to abridge the constitutional rights of any person.
> (e) Federal financial assistance to schools unaffected. . . .
> (f) Authority of schools with respect to order, discipline, well-being, and attendance concerns. Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

274. *See* Gay-Straight Alliance v. Sch. Bd., 483 F. Supp. 2d 1224 (S.D. Fla. 2007) (holding that failing to recognize a student group while other extracurricular groups were recognized was a violation of the Equal Access Act); East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166 (D. Utah 1999) (holding that denying access for meetings of a high school student group after school while other extracurricular-related groups operated was a violation of the Equal Access Act).

275. CURTIS, *supra* note 82, at 127–30.

276. *Id.* at 129, 140–41, 148–49.

277. *Id.* at 216–17.

278. *Id.* at 231–34.

279. *See generally Id.* at 131–54.

violent backlash.[280] Violent opponents of civil rights beat and killed civil rights advocates, bombed churches, and bombed homes. An attack on a peaceful march for voting rights helped to spur the passage of the 1965 Voting Rights Act.[281] The violent response of racists led many heretofore passive Americans to recognize the importance of civil rights.

As the issue of sexual orientation has come out of the closet at school, gay students have also faced a backlash, ranging from harassment and name calling to grotesque physical abuse. Schools can and should punish such conduct. Sadly, from an historical perspective, persecution and violence faced by gays in response to their struggle for social change is nothing new. Though it has produced a backlash and controversy at school, student speech on tolerance, acceptance, and sexual orientation has changed the dialogue. That speech about homosexuality is out of the closet at school is a net gain for gay equality. Or so, judging from past movements for social change, it seems to me.

As noted above, to protest mistreatment of gay students, gay and straight students have held Days of Silence at school. The object is to call for tolerance of gay students, though often calls for tolerance are mixed with calls for acceptance (e.g., = in a purple square or "Be Who You Are" or "it is o.k. to be gay"). T-shirts proclaiming "gay fine by me" or "it is o.k. to be gay" are clearly calls for acceptance.

Students who disapprove of homosexuality countered with Days of Truth. The t-shirt for the Day of Truth simply had those words on the front and "The Truth Cannot Be Silenced" on the back. Some wore t-shirts more clearly condemning homosexuality (e.g., "Homosexuality is a sin" or "Homosexuality is shameful").[282] These students typically insist "homosexuality" means same-sex sex acts, so they claim they are condemning acts, not people.

The dueling Days of Silence and Days of Truth and dueling t-shirts raise democratic paradoxes. Free speech is not cost free. Anti-war speech can impede the war effort. Anti-gay speech that is directed to an issue of public concern (e.g., the purported evils of homosexuality, of adoption by gay couples, or of decriminalizing the "crime against nature") can and does cause psychological distress. Since student speech at school is not co-extensive with adult speech in the public domain, there are problems as to what model to apply.

280. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 222–24 (1988).

281. LYNDON B. JOHNSON, *Special Message to the Congress: The American Promise, March 15, 1965*, *in* 1 PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT 1965, at 281, 284 (1966).

282. *See, e.g.*, Deepa Ranganathan et al., *Gay Rights Face-off: Day of Silence Spurs Protests, Suspensions*: *Free Speech at Issue as Students Rally for and Against Homosexuality*, SACRAMENTO BEE, Apr. 27, 2006, at A1.

If one bans counter speech *at school*, as some schools have done, pro-gay expression is likely to be countered with anti-gay expression across the street, frustrating efforts to shield gay students from anti-gay speech. When twelve California students refused to remove their t-shirts critical of homosexuality and responding to the Day of Silence, the school suspended them. It also suspended a student wearing what the news report described as an "anti-Christian" message.[283]

After school, one hundred protestors stood on the sidewalk across from the school. Slogans on the sinfulness of homosexuality were mixed with others protesting denial of free speech.[284] Since the sidewalk across from the school is part of the public domain where strong free speech principles apply, the protest there is strongly protected speech.

Obviously there is no simple, easy, problem-free solution to the dueling t-shirt conundrum and the related conundrums for which it stands. What follows discusses possible responses and the difficulties they pose. Whatever the response of the school, there are certain things the school can and should do. Of course, schools should protect students from physical mistreatment, threats, and focused verbal harassment (verbal bullying). Beyond that, the school as educator can and should craft its own message: "We believe that all students have a right to be here; all students are equally entitled to dignity and respect. That is true regardless of personal characteristics including race, religion, national origin, sex, or sexual orientation."

B. Possible School Responses

1. Return the Issue to the Closet

There are various solutions to the battle for tolerance and acceptance of gays that has emerged in public schools. One approach would be, at school, to try to push the subject back into the closet as much as possible. The Equal Access Act would generally not allow banning gay-straight alliances (or fundamentalist groups) that meet after school and use school facilities. That is so if other non-curricular groups are also allowed. On school grounds, but after school, all sorts of groups could meet and discuss the issues, including gay students and their supporters and religious groups. Each group would be separate, insulated from competing messages. Schools would attempt, to the greatest degree legally and practically possible, to discourage discussion of the subject outside the clubs. No "Days of Silence," no "Days of Truth," no dueling t-shirts. The

283. *Id.*
284. *Id.*

fundamentalists could be shielded from gay expression and gays from fundamentalist expression. Student discussion would be limited to its respective after-school clubs—if any non-curricular clubs were allowed—with speech on the subject closed down as much as possible during the school day.

Judicial acceptance of this solution would rely substantially on deference to school officials. In limited areas some judges have expressed support for something like this approach. In a Confederate Flag and Malcolm X controversy, one circuit banned both forms of expression as disruptive.[285] School uniform rules that ban expressive clothing are a long step in the direction of shutting down discussion in one major medium.

Blocking school speech on the subject (to the extent possible) could be supported by the claim that the issue of homosexuality is disruptive. Ironically, attacks and harassment of gay students or perhaps "intense conversations" between pro-gay or pro-tolerance students and "homosexuality is shameful" students could be used to show disruption.

The disruption justification is troubling since it gives a heckler's veto to disruptive students. The better approach would be protecting the student speaker rather than suppressing the speech because of the likely reaction. In *Fricke v. Lynch*, Aaron Fricke, a male high school student, wanted to have Paul Guibert, a former student and another male, as his escort at his school's senior dance.[286] The proposed escort had expressed the same desire the year before and had been taunted, spit upon, and on one occasion slapped. To protect Guibert, the principal had provided him an escort between classes.[287] History repeated itself the following year; some students attacked Fricke after his desire for a same sex escort became public. He was shoved on one occasion and punched on another. Again the school provided an escort to protect him. The school prohibited him from taking his male escort to the dance in order to avoid disruption.

Still, the court rejected disruption as a justification for suppressing his expressive activity of having a male escort at the school dance: "To rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide—through prohibited and violent methods—what speech will be heard."[288] In a decision remarkably protective of

285. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1362, 1365–66 (10th Cir. 2000) (upholding a school policy banning Confederate flags and Black Power symbols because these symbols would likely lead to a material disruption in the school environment).

286. Fricke v. Lynch, 491 F. Supp. 381, 383 (D.R.I. 1980).

287. *Id.*

288. *Id.* at 387. For a similar refusal to allow the "heckler's veto" to silence anti-gay speech, see Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1195 n.5 (9th Cir. 2006) (Kozinski, J., dissenting) (rejecting the "incongruity of

free speech rights (though admittedly from an earlier era) the court found that the school could avoid disruption by providing security. This would be a "realistic, and less restrictive, alternative" to banning Aaron Fricke's expression.[289] Unfortunately, later Supreme Court precedent has significantly undermined the less restrictive alternative approach.[290]

This response, banning discussion of homosexuality, would be formally viewpoint neutral. Of course, for adults, in the public domain such a ban should not be permitted. It is content discrimination, a ban on discussing a topic. But in the school, cases allowing content and viewpoint discrimination could provide legal support for this response. Shutting down discussion would receive some support from the feeling that the subject is simply too sensitive and disruptive and the potential psychological harm too great to allow discussion. This approach would prevent the "distraction" of intense conversations and perhaps worse between pro-acceptance and "homosexuality is sinful" students. It would be viewpoint neutral. The approach of shutting down expression on the topic student clothing might be attractive to many school districts. It might seem to protect them from parents and students who would otherwise accuse them of favoring homosexuality or of playing favorites or taking sides in the dispute.

But being exposed to divergent views is often an educational value. In the larger society outside of school, the clash of opposing views on issues of public concern is typically a crucial part of the democratic process. Stuffing in-school student speech on sexual orientation (outside of clubs) back in the closet is not neutral. That is also true of bans of expression on t-shirts or by means of buttons. Those who seek to raise the issue and transform existing beliefs suffer the most. Students are heavily influenced by peers and shielding students at school from exposure to opposing views helps to leave existing views unchallenged.

Some schools have adopted a limited form of the general ban on speech. For example, a school in Guilford County, North Carolina bans t-shirts, etc. that deal with sexual subjects[291] so the school banned "gay: fine by me" t-shirts.[292] But ingenious students simply covered the word gay on the t-shirts. Now the shirts read "fine by me" and presumably everyone got the message. Similarly, a Day of

prohibiting speech because others respond to it with violence. . . . Maybe the right response is to expel students who attack other students on school premises"). In the school setting, this may be a minority view.

289. *Fricke*, 491 F. Supp. at 386, 388.

290. *See, e.g.*, Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 435 n.36 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994)).

291. Interview by Michael Curtis with Donna Allred, Sch. Counselor, Guilford County Sch.

292. *Id.*

Truth t-shirt with the slogan "The Truth Cannot Be Silenced" would not facially deal with a sexual subject.

In fact, both "fine by me" and "The Truth Cannot Be Silenced" t-shirts do deal with sexual subjects. The episode shows the problems and paradoxes of censorship. If "fine by me" is censored because it alludes to the entire message, presumably administrators would also have to ban t-shirts that said "fine." But it begins to look pretty silly. The same problem could emerge on the other side. If "The Truth Cannot Be Silenced" is banned because it alludes to the subject of homosexuality and the Bible passage invoked by opponents of acceptance, what about a t-shirt that simply says "Truth"? (Perhaps, instead, "The Truth Cannot Be Silenced" suggests that if gay students are silenced they are not speaking the truth). A strong no-expression uniform policy surmounts many of these problems by banning a large category of expression.

2. Allow Pro-Gay-Acceptance Speech and Ban the Anti-Identity Speech that Opposes Acceptance

A second approach would be to allow gay-tolerance-and-acceptance speech at school and suppress what its critics call "anti-identity speech." Students could wear "gay, fine by me" and "be who you are" t-shirts, and have their Days of Silence, but critics could not wear "homosexuality is shameful" and "homosexuality is a sin" t-shirts and perhaps not "The Truth Cannot Be Silenced." For those of us who think that prejudice against people because of sexual orientation is comparable to racial prejudice, this approach has intuitive appeal. Would we allow "blacks are inferior" t-shirts in public schools? Of course, we would still allow "all people are created equal," though it expresses a pro-equality viewpoint. Why then allow "homosexuality is shameful" or "homosexuality is a sin"?

Some religious students, of course, insist that they are not denouncing people. They say they are denouncing sexual acts between people of the same sex—a sinful choice, not a status. But for those of us who see sexual orientation as akin to race, homosexuality and heterosexuality are simply part of a person's identity. From this perspective, "hate the sin, but love the sinner" is akin to "love the black person, hate the blackness."

At any rate, as suggested above, as with all censorship regimes, there are problems of administration. Presumably, "Gay, Wrong by God" would not be allowed. What to do when the student simply wears a t-shirt that says "wrong"? If the "Day of Truth—The Truth Cannot be Silenced" t-shirts refer to an assumed Biblical "truth" about the shamefulness or sinfulness of homosexuality, should that t-shirt also be banned? It is simply a subtler way of saying the same thing. But silencing "The Truth Cannot Be Silenced" is a likely public relations disaster, even if the ban survives a court test. What about "heterosexuality is the only right choice"? That is indirectly

rather than directly derogatory. A wise school administrator might simply ignore these problems and only pursue the blatant anti-gay speech, but at the expense of tolerating "anti-identity speech." But if some "anti-identity speech" should be tolerated for prudential reasons, might "homosexuality is a sin" fall in the same category?

Banning the explicit anti-gay speech may drive critics to subtler and more effective messages. Experience in the schools suggests that "homosexuality is sinful" tends to produce a negative response and provoke counter arguments. "The Truth Cannot Be Silenced" is more subtle, more effective, and harder to respond to. So an ironic effect of the "anti-identity" censorship regime may well be to help opponents of gay acceptance craft more effective messages.

Common sense and experience show that people do not react well to being told they may not express their views, though those with opposing views may. (Nonetheless, of course, there are settings where such bans are and need to be imposed). Teenagers are especially likely to resist such restrictions. The story that follows was provided to me by Laura Dildine, a law student and former public school teacher.

> At a local high school, students were facing rising cafeteria prices. The conglomerate food services provider was charging students for the cardboard container in which their french-fries were served. This, being the only meal for some of the kids, did not go unnoticed by the students.
>
> Meanwhile, in a U.S. History class, the students were learning about the Montgomery Bus Boycott. One young man in the back of the room had a brilliant idea. He had never been interested in school, let alone history, before; however, having suffered dire economic straights in his recent history, he launched a plan. He would wear a sign to lunch that day, inspired by his history lesson, to boycott and protest the high lunch prices.
>
> He walked into the cafeteria with his home-made sign taped to his t-shirt, seeking a quiet revolution. The school resource [police] officer, quickly spotted the young student and without warning, grabbed the student's t-shirt, ripping the sign from his chest. The other 300 students in the cafeteria immediately stood up on the cafeteria tables and started chanting an explicative [bull shit]. Imagine what that was like—this young student, an African-American who knew the struggles of life at an early age, finally realizing the relevance of history, taking it upon himself to protest and boycott, confronted by a white police officer, and united with 300 fellow students of all ethnicities.

> The student was escorted to the principal's office. Meanwhile, as the students came and went to three lunch periods and back to afternoon classes, wads of paper began showing up around the school grounds. Inside, each piece of paper read, "Question Authority." Again, imagine the movement started by the young man learning about the Montgomery Bus Boycott who has united the school campus (well, the students, at least, and a handful of brilliant teachers).
>
> The principal realized what this young student was doing and allowed the young man to record the Alert Now message that the school sends home periodically to inform parents of certain issues or events. This message, recorded by the student, was about the high prices at the cafeteria and inviting students the next day to sign his petition at lunch and went out to nearly 2,000 homes.
>
> Hundreds signed the petition the student circulated. The county representative of the food services conglomerate came to the high school the next day to meet with him. This young man invited the student body president and the principal to the meeting, as well. The school system is now meeting with the food services provider to negotiate future contracts.
>
> The First Amendment—it's a beautiful thing, particularly when a young man in the back of History class takes it upon himself to educate a community.[293]

In the public domain, allowing pro-gay but banning anti-gay speech would be unacceptable viewpoint discrimination.[294] Of course, the public domain constitutional law could be changed (as some have suggested) so such expression was no longer protected by guarantees of free speech and free exercise of religion. But arresting people for quoting the Bible and arresting preachers for Biblical arguments made from the pulpit would be a political disaster. A general anti-identity speech ban applied to slogans such as "homosexuality is a sin" would transform the issue from tolerance and acceptance of gay people to the idea that protecting gays involves suppressing the speech of their critics. If American history is any guide, this would polarize people in a way quite unfortunate for gay equality. The selective ban in schools may have a similar

293. History Lesson by Laura Dildine (abridged by and on file with author).

294. Viewpoint discrimination is also problematic in a public university. *See, e.g.,* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831–32 (1995) (finding that denial of payment to a student group to support printing of a Christian periodical was impermissible viewpoint discrimination because allocation of funds to student groups creates a limited public forum).

effect.

Seeking equality by suppressing speech on issues of public concern in the public domain would be an uncharted course in the United States. In our society at large, great victories in the crusade against slavery, in the battle for women's rights, and in the battle for civil rights were not won by suppressing speech of the pro-slavery people, the opponents of women's rights, or the segregationists. Indeed, opponents of equality were the ones who sought to suppress free speech. Victories were won by political action and changes in law aimed at behavior. Attacks on free speech hurt the cause of the opponents of equality.

Of course, as the "blacks are inferior" t-shirt example shows, schools are different. Allowing pro-acceptance t-shirts and banning anti-acceptance ones at school has fewer legal and practical problems than banning such speech for adults in the public domain. At least when the school chooses that route, selective viewpoint suppression has some support in case law.[295] It may appeal to some school administrators. It protects gay students from the psychological pain of being confronted directly with anti-gay slogans at school. Of course, so far, the proof is thin that the problems of gay students at school are linked to t-shirts expressing messages on issues of public concern. To the extent that the selective ban surmounts legal challenges, it seems most likely to do so based on deference to the assumed expertise of school officials or on a "common sense" assumption of bad consequences of the sort rejected in the cases about recognizing college gay groups. Both the Ninth and Seventh Circuits deferred to school officials but a few other courts have rejected such an approach, instead treating *Tinker* as the rule.[296]

For those who see suppressing student gay-tolerance and gay-acceptance speech as unfortunate, deference is a double-edged sword. The deference to schools that today upholds suppression of anti-acceptance speech, tomorrow may be used to uphold a broad ban on discussion of the topic.

At any rate, allowing pro-tolerance *and* pro-acceptance speech but banning anti-acceptance speech raises questions of practical wisdom. As noted above, will we silence "The Truth Cannot Be Silenced"—assuming it refers to the Biblical "truth" that homosexuality is a shameful sin?

The Ninth Circuit justified the school's decision to suppress anti-gay speech based on the psychological harm such speech would

295. *See* B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp. 2d 740, 750 (E.D. Mo. 2007).

296. *See e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3d Cir. 2001) (holding a school's anti-harassment policy to be overbroad because it failed to satisfy the substantial-disruption prong of *Tinker*).

impose on gay students at school. Judge Posner's opinion for the Seventh Circuit took a similar approach, though it allowed tepid anti-gay speech. The approach is not cost free.

Suppressing the anti-gay side may energize opponents of gay rights, win them allies on the speech issue, and divide supporters of gay equality. As a result, it may increase, rather than decrease, "homosexuality is sinful" speech. When the school bans the "homosexuality is a sin" t-shirts, it ends up broadcasting the message through the news media because the ban produces news stories and counter-demonstrations in the public domain. And it shifts the issue from tolerance or acceptance to suppression of speech.

The ban on anti-homosexuality t-shirts was imposed on a handful of students at Oakmont High School in Sacramento, California.[297] The effect was telling. Gay students were not shielded from anti-gay speech. Instead of seeing a few t-shirts at school, gay students saw over one hundred protestors who appeared after school on the sidewalk across from the school as part of the public forum from which such protests cannot be excluded. Protests were also staged at other area schools that imposed the ban.[298]

In California, school officials explained that they banned t-shirts that targeted specific groups of students–gays, fundamentalists, etc. They said that they feared confrontation and violence and that they acted pursuant to their duty to keep students safe.[299] The link between the t-shirts and violence was assumed. At any rate, these explanations did not quiet protests. Protestors insisted that they were expressing their moral beliefs, not advocating violence,[300] and the protestors denounced the suspensions as "fascist censorship of religious speech."[301]

There may be other unintended consequences as well. Perhaps those who oppose homosexuality based on their reading of the Bible—confronted in school with a view they abhor and denied the ability to controvert it—will simply remove their children from public schools. Schools would then be less of a microcosm of society at large and students would be less likely to engage in dialogue with students who hold opposing perspectives.

In the *Harper* case, the Ninth Circuit upheld the school officials' ban on anti-gay speech. It supported the school decision under *Tinker* by citing a list of articles about the awful abuse, harassment, and persecution gay students had suffered at school. None of the articles dealt with t-shirt slogans or religious speech condemning

297. Ranganathan et al., *supra* note 282.
298. *Id.*
299. *High School Students Defend Right to Wear Shirt*, SACRAMENTO UNION, Nov. 17, 2006.
300. *Id.*
301. Ranganathan et al., *supra* note 282.

homosexuality. None advocated general suppression of "anti-identity" speech directed to issues of public concern as a cure. Instead, they advocated greater education on sexual orientation, education to help teachers and others recognize harassment, and prevention of harassment. One article specifically advocated increased dialogue on the issue.[302]

In college cases, gay groups were protected because the courts refused to allow deference to college officials (supported by "expert testimony" on the danger to vulnerable young students from recognizing gay groups). The courts choose free speech values and insisted on specific proof of imminent harm. In the high school cases, administrators assume rather than demonstrate the harm and assume that banning the t-shirts prevents or reduces the harm. The cases can be distinguished based on the supposed maturity of college students.

A third approach would put the public schools where the earlier court decisions put the colleges. Both pro- and anti-gay speech would be allowed, though within limits.

3. Allow Substantial Free Speech at School to Both Advocates of Acceptance and to Their Opponents

The third approach would follow a speech protective reading of *Tinker*. Some schools have followed it, allowing both sorts of t-shirts. According to the *Sacramento Bee,* at one California school in the area:

> expressions for and against the Day of Silence peacefully co-existed, said student Lance Chih, co-chair of the Sacramento Regional Gay Straight Alliance. Many students wore rainbow arm bands and Day of Silence shirts, while a few students wore T-shirts stating homosexuality is a sin, he said.
>
> Chih wasn't bothered by the open expression of homophobic messages, he said, because they weren't violent or vulgar.
>
> "If they're stating their own belief that homosexuality is wrong, that's not promoting hate or violence against us," said Chih, 18. "If I want to promote my civil rights, I can't tell another group of students that they can't do it."[303]

Tolerating both sorts of t-shirts would not protect all speech. In the interest of teaching civility, schools should ban focused verbal

302. Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 641, 675–76 (2001).

303. Ranganathan et al., *supra* note 282.

bullying and name calling. Calling a student a "faggot" or some other demeaning name, such as "fatty," should not be allowed and true threats are not constitutionally protected, even outside the school environment. At school, protection against threats must be at least as extensive.

Of course, physical violence aimed at one student by another would not be allowed. As the articles cited in the *Harper* case suggest, schools should be particularly vigilant to protect vulnerable students (including gay students) from physical violence and intimidation. A central mission of government is to see that all enjoy protection of the law. Equal protection implies protection for all from violence, threats, and intimidation.

Because student free speech occurs in the school environment, schools can and will exercise some control over content in the interests of civility and decency. References to "niggers," "faggots," "honkies," etc. on t-shirts as well as descriptions of sex acts would fail the civility test as well as typically failing the *Tinker* test. Suggestions that a group should be killed—"Hitler needed more ovens"—would not survive.

As a study of the cases shows, even a speech-protective reading of students' free speech rights raises administrative difficulties. It may lessen, but does not eliminate, the problems faced by all censorship regimes. Like all approaches, this one has its problems.

So here is a conundrum. T-shirts quoting the Bible on the shamefulness of homosexuality or homosexual sex acts inflict distress on gay students and others. Suppressing the t-shirts limits the ability of some students to express and explain their views. Similarly, advocacy of acceptance of homosexuality distresses Biblical literalists.

4. Searching For a Fourth Alternative

> During one of the many nineteenth-century riots in Paris the commander of an army detachment received orders to clear a city square by firing at the . . . (rabble). He commanded his soldiers to take up firing positions, their rifles leveled at the crowd, and as a ghastly silence descended he drew his sword and shouted at the top of his lungs: "Mesdames, m'sieurs, I have orders to fire at the [rabble]. But as I see a great number of honest, respectable citizens before me, I request that they leave so that I can safely shoot the [rabble]." The square was empty in a few minutes.[304]
>
> Paul Watzlawick, John Weakland, and Richard Fisch, *Change*[305]

304. PAUL WATZLAWICK ET AL., CHANGE: PRINCIPLES OF PROBLEM FORMATION AND PROBLEM RESOLUTION 81 (1974).

305. *Id.*

> The moment we deal with problems involving the higher Levels of Being, we must expect *divergence*. . . .
>
> ….
>
> Divergent problems cannot . . . be solved in the sense of establishing a "correct formula"; they can, however, be transcended. A pair of opposites—like freedom and order—are opposites at the level of ordinary life, but they cease to be opposites a the higher level, the really *human* level, where self awareness plays its proper role. It is then that such higher forces as love and compassion, understanding and empathy, become available . . . as a regular and reliable resource.[306]

In the 1980s, a number of schools confronted problems with students wearing Confederate flag patches, pins, etc.[307] Many black students, understandably, saw the Confederate flag as a symbol of slavery and racism. Some who wore the Confederate flag saw it simply as an emblem of Southern pride. No doubt some of the wearers were racist. Schools feared disorder, and a number banned the flag or both the flag and Malcolm X insignia. A school that chose suppression of the Confederate flag had a good chance of success. At least seven cases from federal circuit courts upheld bans; one struck a ban down.[308]

Schools in Raleigh and Durham, North Carolina followed a different route. They treated the controversy as a learning experience. They invited speakers who discussed free speech rights of students in school. They enlisted the assistance of mediator from the state Department of Education who had been involved in mediating disputes over school integration. They encouraged dialogue between students of opposing views.[309] White students

306. E.F. SCHUMACHER, A GUIDE FOR THE PERPLEXED 125–26 (1977).

307. *See, e.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp.2d 740, 747–49 (E.D. Mo. 2007).

308. *See* cases cited *supra* note 163; *see also Farmington*, 508 F. Supp. 2d 740, 748–49 (E.D. Mo. 2007).

309. Nat Hentoff, *The Boy with a Confederate Flag on His Back,* VILLAGE VOICE, July 5, 1988, at 31 (describing the events at the Raleigh school and reporting an interview with the principal). The text is also based on the author's personal recollection of conversations with an attorney involved. The author suggested the mediation approach. It was broadened and elaborated and improved by the school officials, students, the attorneys, and especially by the services of a state mediator. For news articles, see, for example, John Day, *Garner Student Ordered to Stop Wearing Jacket*, NEWS AND OBSERVER (Raleigh, N.C.), Feb. 20, 1988, at 2C; John Day, *Student's Rebel Flag May Spur ACLU Case*, NEWS AND OBSERVER (Raleigh, N.C.), Feb. 23, 1988, at 2C; *Symbols and Free Speech,* NEWS AND OBSERVER (Raleigh, N.C.), Feb. 24, 1988, at 8A; Susan Schoenberger, *Wake Schools, ACLU Negotiate Right to Wear Rebel Flag in Class*, NEWS AND OBSERVER (Raleigh, N.C.), Mar. 15, 1988, at 2C.

learned what the flag meant to black students. Blacks learned that not all white students saw the symbol in the same way. On learning what the flag meant to black students, some white students decided not to wear it. Both white and black students learned that if disruption could be avoided, school free speech rights had (in this case) something for both wearers of Malcolm X insignias and of the Confederate flag. Students generally decided they would prefer to tolerate both symbols. No disorder followed. Some students were overheard saying in substance "we don't want any disorder; we want to keep our free speech rights."[310]

This was a better approach. It made possible significant reconciliation and transformation and produced a peaceful resolution broadly acceptable to both groups of students.[311] The Confederate flag cases, difficult as they were, may be easier than the gay and anti-gay t-shirt issues.

Of course, dialogue can be blocked if it is seen as too threatening. Gay college students have organized a group called Soul Force. They are Christians who think acceptance of gays is consistent with the best Christian tradition. They point out that Bible verses were cited to support slavery, to deny women's rights, and to support segregation.[312] As they see it, isolated Bible passages condemning homosexual acts are not entitled to greater reverence than those upholding slavery or the subordination of women. The Soul Force students travel around to religious schools, seeking an opportunity for dialogue with students at the schools. They write in advance. The schools are private and free of First Amendment constraints. A great many tell the Soul Force students that they will not be allowed on campus. When Soul Force students arrive, they face local police protecting the campus from the ideas of the gay students.[313] Obviously the authorities in the school wanted to protect their students from dangerous ideas. In such ideological ghettoes students are not exposed to other perspectives.

As another example of an alternative approach, consider again the *Fraser* case. Fraser made his nominating speech filled with sexual double meanings. The school punished him and banned him from running for class orator: school officials removed his name from the ballot. Students elected him by a write-in vote and the school nullified the vote. What if, instead, the school had taken a different

310. John Day, *Student's Rebel Flag May Spur ACLU Case*, NEWS AND OBSERVER (Raleigh, N.C.), Feb. 23, 1988, at 2C.

311. Hentoff, *supra* note 309.

312. MEL WHITE, WHAT THE BIBLE SAYS—AND DOESN'T SAY—ABOUT HOMOSEXUALITY: A BIBLICAL RESPONSE TO THE QUESTION PEOPLE OFTEN ASK . . . "HOW CAN YOU CONSIDER YOURSELF A CHRISTIAN WHEN YOU ARE ALSO GAY?" 4–5, *available at* http://www.soulforce.org/pdf/whatthebiblesays.pdf.

313. Tad Walch, *Soulforce Is Asked to Stay Off LDS Land*, DESERT MORNING NEWS (Salt Lake City, Utah), Mar. 20, 2007, at A1, *available at* http://findarticles.com/p/articles/mi_qn4188/is_20070320/ai_n18737668.

tack? It could have held an assembly explaining why Fraser's speech was not appropriate, citing rules from the Congress and elsewhere on civility and decorum. If Fraser won the race for class orator, it could have insisted on assurances and taken other steps to insure that the speech would be appropriate, decorous, and civil.

Gay students and their allies on one side and those with an anti-gay religious belief on the other are unlikely to agree on the sinfulness of homosexuality. They might be more likely to agree on tolerance of opposing views, rejection of violence, and rejection of demeaning personal epithets. Efforts in that direction might be more effective than censorship.

A local youth minister was invited to speak to Day of Truth students during lunch time. He told them it was hypocritical for Christians to speak harshly to gays and lesbians when they themselves are sinners.[314] John F. Kennedy High School was another California school involved in the Day of Silence-Day of Truth controversy.[315] After school, pro-gay students at the school "sat side-by-side in the sunshine with students in the Christian Club. They said they thought it was only fair to allow each side a day to speak out on homosexuality."[316]

Different nations and different cultures have unique experiences. Generalizing from the American experience to what would be workable and appropriate for Germany, for example, is hazardous. The converse is also true. The struggle for gay liberty and equality in America has been doing well under the broad and neutral protection of civil liberty and free speech. Invocation of Weimar, Germany to prove gays need a more robust censorship regime is misplaced.[317] The number of Americans who think that homosexuality is acceptable has been steadily increasing in recent years. In 2001, 40% of respondents agreed that gay relationships are morally acceptable. By 2008, the percentage was up to 48%.[318]

These figures also highlight practical difficulties. If about half of Americans believe that homosexual relationships are not morally acceptable (or are sinful or shameful, to put it another way) enacting a general statute banning such "anti-identity speech" and punishing those who quote from the Bible would be as difficult to enact as it

314. Deepa Ranganathan, *Tone Eases on Gay Debate: Students Still Register Their Opposition to Homosexuality, but with Quieter Displays on the Day of Truth*, SACRAMENTO BEE, Apr. 28, 2006, at B1.

315. *Id.*

316. *Id.*

317. For an invocation of the Nazi experience, see generally, Shannon Gilreath, *"Tell Your Faggot Friend He Owes Me $500 for my Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557 (2009).

318. Charles M. Blow, *Americans Move to the Middle*, N.Y. TIMES, July 26, 2008, at A17.

would be unwise to enforce.

In the recent campaign against gay marriage in California, religious opponents of gay marriage imported Ake Green, a minister from Sweden.[319] Green had been arrested under Swedish law for his sermon asserting that homosexuality was sinful and a cancer on society. Opponents of marriage equality asserted that freedom to preach against homosexuality was under assault in California![320] They sought to re-frame the issue as about freedom of expression. Support for broad proposals to revise free speech doctrine to ban such "anti-identity speech" seems slim among supporters of gay equality in the United States. If such proposals are advanced and publicized, they may do more far more harm than good—by energizing opponents of equality, distracting others, and dividing supporters.

As the Civil Rights movement suggests, preventing discrimination, for example, in employment and places of public accommodation, works pretty well. As such measures took hold, they increased support for equality and reduced overtly racist speech. Statutes targeting speech are not the only way anti-gay violence and even "anti-gay identity speech" can be discouraged and substantially reduced. Teaching tolerance and peaceful resolution of disputes, and discouraging and punishing violence are under-utilized alternatives. As John Stuart Mill saw in his classic book *On Liberty,* public opinion strongly discourages speech it sees as obnoxious.[321] Overtly racist speech is no longer respectable and to an increasing degree overtly homophobic speech is also losing its respectability. Schools are a special and difficult case, but as more and more students join the crusade for tolerance and acceptance of gays, anti-gay speech becomes less and less acceptable.

Shutting people up has its advantages. Still, it typically leaves them angry and resentful. It may be more likely to temporarily repress problems than to resolve them. Often those opposing equality simply find cleverer and more appealing ways to package their message.

The process that begins by banning anti-homosexual religious t-shirts may also end in banning t-shirts that call for acceptance of gays. For many school administrators that may be the path of least resistance. Instead, schools should look for creative solutions to the acceptance-rejection problem. These are not likely to be found only

319. Laura Goodstein, *California*: *A Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES, Oct. 27, 2008, at A12.

320. *See id.* For an article on the original arrest, see Keith B. Richburg & Alan Cooperman, *Swede's Sermon on Gays: Bigotry or Free Speech?: Pastor Challenges Hate-Law Restrictions*, WASH. POST, Jan. 29, 2005, at A1.

321. JOHN STUART MILL, "On Liberty", *in* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 8-9 (OXFORD UNIV. PRESS 1991) (1859) (noting the power of public disapproval, its positive function, its potential for abuse, and the need for, and positive function of , some degree of social control beyond law).

in rules, court decisions, or statutes that simply suppress expression.