A Reexamination of the *Tinker* Standard: Freedom of Speech in Public Schools

by JERICO LAVARIAS*

He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.

Thomas Paine[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

United States Constitution[2]

Introduction

The protections given to individuals that are enshrined in the First Amendment are at the heart of American democracy. By invoking one's right to engage in free speech, an individual actively participates in the marketplace of ideas, and can thereby potentially change social institutions by influencing peoples' notions on certain topics. The question of whether homosexuality is a sin has been, especially in the last decade, at the center of public discourse. According to *Romans 1:27*, people who practice any Christian religion would strongly answer in the affirmative to this question.[3] However, we live in modern times where the right to freedom of

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1. United States v. Alvarez-Machain, 504 U.S. 655, 688 (1992) (Stevens, J., dissenting).

2. U.S. CONST. amend. I.

3. *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, recompense of their error which was met.")(emphasis added).

speech and enjoyment of civil liberties are arguably at their height. As such, contrary to religious conclusions many positive viewpoints have arisen on the practice of homosexuality. In addition, one could argue that homosexuality has been accepted by the majority of people, or at the very least is tolerated. For example, in *Lawrence v. Texas*[4] the Supreme Court invalidated a Texas law prohibiting consensual sexual acts between same sex adults. Thus the Court altered its jurisprudence with respect to gay relations. The Court afforded homosexual relations more privacy rights vis-à-vis federal and state restrictions on such acts. In some countries, such as the Netherlands and Canada, gay marriage has been a legal right granted to gay and lesbian citizens.[5] Yet the debate continues. Pursuant to the very purpose of the First Amendment, to protect and promote debate, every adult in this country is entitled to his or her own viewpoint on this issue.

Although there is no question to the right afforded to adults to freely and openly discuss the issue of whether homosexuality is a sin, there is not a similar consensus as to whether minors should be entitled to engage in similar debate while in the arena of public schools. Some argue that, once at school-age, children, like adults, have the intellectual and emotional capacity to express their ideas on even controversial topics, and therefore have coextensive rights to freedom of speech. By contrast, others argue that youth ought to be able to develop in a school environment in which they can learn and be free from exposure to hate speech or offensive words, and thus such restrictions against negative views should be upheld in the public school setting.

Imagine this: A gay American public student goes to school wearing a T-shirt that reads "GAY PRIDE: BE OUT, BE PROUD, BE GAY." Conversely, a heterosexual student goes to school the next day and wears a T-shirt, which reads, "STRAIGHT PRIDE: Homosexuality is SHAMEFUL." Are both these students entitled to their views? More importantly, do they have the legal right to display them in the forum of the American public school? First, notice the difference between these two statements: One is positive and one is negative. Therefore, should the positive statement be allowed, whereas the negative and seemingly derogatory statement be banned from the public school setting? According to a recent decision by the Ninth Circuit in *Harper v. Poway Unified School District*, that is exactly what should happen, students in public schools can debate the issue, but only in a positive manner.[6] In *Harper*,

4. Lawrence v. Texas, 539 U.S. 558, 575-79 (2003).

5. MSNBC.com, *Canada Supreme Court Rules for Gay Marriage*, ASSOCIATED PRESS, Dec. 9, 2004, *http://www.msnbc.msn.com/id/6685653/* (last visited Nov. 16, 2006).

6. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171, 1192 (9th Cir. 2006).

Tyler Chase Harper, wore a homemade T-shirt in response to other students' speech supporting the "Day of Silence" (a day for gay and lesbian students to promote the acceptance of homosexual behavior, tolerance, and related issues through silent protest).[7] On the T-shirt he placed the statements: "I will not accept what God has condemned," and "Homosexuality is shameful. Romans 1:27."[8] As a result of his T-shirt, his teacher told him he was in violation of the school dress code, and must either remove the T-shirt or report directly to the school office.[9] Harper decided to report to the office where he spoke with the Assistant Principal, who informed him that his T-shirt was against the dress code because it was "homemade" and more importantly "inflammatory."[10] Harper again refused and was suspended from school because the content of his T-shirt was inflammatory.[11]

Thereafter, Harper filed suit. Among other causes of action, he alleged that the school infringed his First Amendment right to free speech under the United States Constitution.[12] The Ninth Circuit held, over a vigorous dissent, that school officials are permitted to censor the "negative" side of a political debate if the views expressed may be considered "demeaning" or "derogatory."[13] The court in *Harper* rested on one of the theories provided by the seminal decision in *Tinker v. Des Moines Independent Community School District*[14] and held that this viewpoint censorship is justified because it is speech that infringes upon the rights of other students. However, the vast majority of cases applying *Tinker* have focused on the "substantial disruption" prong, whereas the *Harper* panel opinion seized on the often-ignored *Tinker* language of "invades the rights of others."[15] Most courts have particularly ignored this prong of the standard, because of the ambiguity of what "invades the rights of others" actually extends to. Such "invades the rights of others" argument held by the court in *Harper,* without a more finite explanation or legal limit, allows critics to purport

7. *Id.* at 1171.

8. *Id.* (internal quotations omitted).

9. *Id.* at 1172.

10. *Id.*

11. *Id.*

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

13. *Id.*

14. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

15. *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260, 266 (1988) (focusing on the material and substantial disruption of articles concerning teen pregnancy published in the school-sponsored newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (focusing on the material and substantial disruption of vulgar and lewd speech during a school-sponsored debate).

that by banning Harper's negative and derogatory speech, his rights as a practicing Christian have also been invaded, with the promotion of a Day of Silence advocating the acceptance of homosexuality. As Judge Kozinski's dissenting opinion in *Harper* points out, it is a dicey business for schools to favor one side of a matter of great and ongoing religious and political controversy.[16] Accordingly, the question that arises is whether the court can ban negative speech while promoting positive speech. The answer is no, and the court's holding prohibiting Harper's speech because it "collides with the rights of other students" is erroneous. In fact, the Ninth Circuit's reasoning strongly conflicts with *Tinker*—the seminal case in the interpretation of freedom of speech in public schools. Indeed, one could make the argument that if the Court in *Tinker* used the same analysis in the majority opinion of *Harper*, school officials would have been justified in censoring Mary Beth Tinker's armband, which she wore in protest of the Vietnam War, if other students could have felt demeaned by her "negative view" of the Vietnam War.[17]

Moreover, it is very hard to even make the distinction between positive and negative speech because it can subjectively vary depending on one's system of beliefs. Therefore, the object of this paper is to highlight the problematic nature of the "invades the rights of others" standard because the question of whether or not an exercise of free speech violates such a standard would likely turn on a school official's or school district's particular viewpoint. A student's ability to convey a particular message would, in other words, depend on whether or not school officials favored or disfavored the particular message. As such, with respect to students who want to promote gay rights through invocation of their First Amendment right to free speech, the court's rule cuts in both ways.

Part I details the history and precedent dealing with the freedom of speech in public schools, and explains why the freedom of speech in the First Amendment is applied differently in the public school environment. Part II argues why the Ninth Circuit has misread the *Tinker* standard, and accordingly set forth an erroneous precedent that as a result contradicts free speech and open debate in public schools. Part III of this note provides a new perspective on the *Tinker* standard and its application to the freedom of speech in public schools. Specifically, I propose the adoption of hate speech codes in the public school setting to promote a positive educational environment, but at the same time allow debate on contested issues, such as the question of whether homosexuality should be accepted in America.

16. *Harper*, 445 F.3d at 1197.

17. *See Tinker*, 393 U.S. at 504.

I. Freedom of Speech in American Public Schools

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 . . . [I]t must indicate the habits and manner of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[18] Accordingly, the Court has construed the First Amendment as applied to public schools with certain limitations in order to balance the freedom of student speech rights with the unique need to maintain a safe, secure and effective learning environment. They do so in order to receive what society hopes will be a fair and full education—an education without which they will almost certainly fail in later life, likely sooner rather than later.[19]

Although school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[20] the Supreme Court has declared that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment.'"[21] As such, the Court has identified "three [separate] areas of student speech," each of which is governed by different Supreme Court precedent: (1) vulgar, lewd, obscene, and plainly offensive speech, which is governed by *Fraser*, (2) school-sponsored speech which, is governed by *Hazelwood*, and (3) all other speech, which is governed by *Tinker*.[22] Here, the court in *Harper* decided that Harper's free speech claim need not be considered under *Fraser*, but instead on the basis of *Tinker*, and neither party claimed that Harper's speech was "school-sponsored," and thus governed by *Hazelwood*.[23] As such, *Tinker* is the governing law in this case.[24] In *Tinker,* while the Vietnam War was raging with full force, students at Des Moines, Iowa, high schools decided to wear black

18. CHARLES AUSTIN BEARD & MARY RITTER BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968). *See also* Ambach v. Norwick, 441 U.S. 68, 77 (1979) ("These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.").

19. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

20. *Tinker*, 393 U.S. at 506.

21. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (internal citations omitted).

22. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).

23. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 n.14, 15 (9th Cir. 2006) ("Because we decide Harper's free speech claim on the basis of *Tinker*, we need not consider whether his speech was 'plainly offensive' under *Fraser*.").

24. *Id.*

armbands to school one day to protest what they say was an unjust struggle.[25] The school administrators learned of their plan and passed a rule banning black armbands from the schools and suspending any student caught wearing one who refused to remove the armband.[26] The students, aware of the schools' regulations, wore the armbands anyway, and as a result were suspended.[27] The students filed suit and the Court held in their favor, affirming that a high school student's expression of opposition to the Vietnam War by wearing a black armband could not be censored by officials unless it "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of others."[28]

Accordingly, here, Harper's speech should not be censored under the first prong related to "substantial disruption." If a school cannot bar a student from wearing an anti-war black armband in the midst of a heated national controversy over the Vietnam War, it is difficult to see how a school could bar a student from wearing an anti-gay T-shirt in the midst of a heated national culture war over homosexuality. While the school had some vague evidence that there had been past "altercations" over such messages, and that some students in one class started talking about the T-shirt instead of doing their class work,[29] it is again difficult to see how any of this rises to the level of reasonably threatening "substantial disruption of or material interference with school activities" required before such messages can be banned.

Furthermore, even if examined under the more recent precedent of *Fraser*, Harper's speech would not rise to the level of "conduct which materially and substantially interferes with the educational process . . . [that] includ[es] the use of obscene, profane language or gestures."[30] In *Fraser*, Matthew Fraser filed a civil rights action after he was disciplined for language used in nominating speech at a student assembly.[31] His speech included reference to terms of an elaborate, graphic, and explicit sexual metaphor.[32] Prior to giving the speech Fraser was warned by two of his teachers that the speech was "'inappropriate and that he probably should not deliver it,' and that delivery of his speech might have 'severe

25. *Tinker*, 393 U.S. at 504.
26. *Id.*
27. *Id.*
28. *Id.* at 504, 513-14.
29. *Harper*, 445 F.3d at 1193-95.
30. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).
31. *Fraser*, 478 U.S. at 679.
32. *Id.* at 677-78.

consequences.'"[33] During Fraser's actual delivery of the speech, "[s]ome students hooted and yelled; some by gestures graphically simulating the sexual activities pointedly alluded to" by Fraser's speech.[34] "Other students appeared to be bewildered and embarrassed by the speech."[35] One teacher even found it necessary the day following the speech to forgo a portion of the scheduled class lesson and discuss the speech with the class.[36] The Court held that the school district acted entirely within its permissible authority in imposing sanctions upon the student in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection.[37] Further, the Court held that the school's disciplinary rule proscribing obscene language and free speech admonitions of teachers gave adequate warnings to the student that his lewd speech could subject him to sanctions.[38]

In contrast, Harper's speech did not result in a material and substantial disruption of the educational process. In *Harper*, there was no evidence that teachers had to stop lessons to discuss the T-shirt and its ramifications, or that any students adversely reacted to the words on the T-shirt. Furthermore, Harper's T-shirt was not displayed at any school-sponsored event that mandated attendance like the election assembly in *Fraser*. Accordingly, Harper's speech does not come under the substantial disruption prong of *Tinker*, and at the very most Harper's speech could only be argued to have caused a "fear" or "apprehension" of disturbance, which according to *Tinker* is not enough to overcome the right to freedom of expression. This leads us to the Ninth Circuit's application of the "invades the rights of others" prong in *Tinker*.

II. The Erroneous Interpretation of *Tinker*'s "Invades the Rights of Others."

In *Harper*, the Ninth Circuit latched onto the "invasion of the rights of others" language as authority for allowing school officials to censor any student speech that may be perceived by other students as demeaning or derogatory.[39] The court explained that vulgar, lewd, obscene, indecent, and plainly offensive speech "by definition, may well 'impinge[ ] upon the rights of other students,' even if the speaker does not directly accost

33. *Id.* at 678.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 685.
38. *Id.* at 686.
39. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

individual students with his remarks."[40] In addition, the court also provided support from the Tenth Circuit, which held that "the 'display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone,' even though there was no indication that any student was physically accosted with the flag, aside from its general display."[41]

A. *Harper* Conflicts with Circuit Courts

1. Conflict with the Third Circuit

However, *Harper*'s interpretation of "invades the rights of others" conflicts with a majority of circuit courts that have interpreted the precedent in *Tinker*. The Third Circuit has struck down a public school district's anti-harassment policy that banned harassment such as derogatory remarks or jokes, demeaning comments or behaviors, negative name calling, and degrading behavior.[42] Most importantly, in analyzing the "rights of others" prong of *Tinker*, the Third Circuit reasoned: "[t]he precise scope of *Tinker's* 'interference with the rights of others' language is unclear; at least one court has opined that it covers only independently tortuous speech like libel, slander or intentional infliction of emotional distress."[43] As a result, in determining what speech may infringe upon the rights of others, the court held that "it is certainly not enough that the speech is merely offensive to some listener," and, accordingly, a high school speech policy which prohibited negative, demeaning, and derogatory speech was unconstitutional.[44] Also, in a later Third Circuit case, *Sypniewski v. Warren Hills Regional Board of Education*, the court held that "[t]he history of racial difficulties in Warren Hills provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy."[45] Nonetheless, the court determined that the policy could be unconstitutional if a "subcategory of disruptive speech had been singled out simply because the school officials disfavored the views expressed."[46] In *Harper*, this is exactly what occurred. There was a history

40. *Id.* at 1177-78 (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 509 (1969))).

41. *Id.* at 1178 (quoting West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000)).

42. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 202-03, 217 (3d Cir. 2001).

43. *Id.* at 201. *See* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991).

44. *Saxe*, 240 F.3d at 217.

45. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 262 (3d Cir. 2002).

46. *Id.* at 268 n.27.

of disruption between students on the Poway High School campus over the issue of homosexuality.[47] Moreover, Harper told the school's administration that the main impetus for his creation and display of the T-shirt with the offensive hate speech was directed at presenting the other side of the issue in light of the observance and promotion of the Day of Silence.[48] As such, *Sypniewski* provides a holding that would ban favoring positive over a subcategory of negative speech, even in those situations where substantial disruption may occur between controversial issues, such as homosexuality and race previously.[49]

Furthermore, *Tinker* itself provides support of the Third Circuit reading of what might "invade the rights of others." In *Tinker*, the Court reasoned: "the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would . . . impinge upon the rights of other students."[50] Similarly, here, Harper's T-shirt would not invade the rights of other students, although it would be highly offensive to gay students. Accordingly, symbolic speech expressed in a T-shirt, an armband, or any other piece of clothing or clothing accessory would not rise to such offense that it would clearly "invade the rights of others" in the public school setting.

2. Conflict with the Sixth Circuit

The Ninth Circuit ruling also conflicts with the Sixth Circuit's understanding of the "invades the rights of others" prong. In *Castorina ex rel. Rewt v. Madison County School Board,* similar to *Harper*, speech written on a T-shirt was at issue, and the Sixth Circuit considered whether Confederate flag T-shirts worn by two high school students could be censored if the school allowed students to wear Malcolm X T-shirts.[51] As in *Harper*, *Castorina* dealt with the distinction between positive and negative speech. However, the court in *Castorina* held differently, finding that "even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols."[52] Central to the decision by the Sixth Circuit in *Castorina* was the fact that the school district had not banned other clothing that expressed controversial views, including Iron Crosses, which were often understood as symbols of Hitler

47. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006).

48. *Id.*

49. *Sypniewski*, 307 F.3d at 268 n.27.

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

51. Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 541 (6th Cir. 2001).

52. *Id.* at 544.

and the Nazis.[53] "This aspect of the decision is consistent with a number of later Supreme Court decisions signaling that viewpoint-specific speech restrictions are an egregious violation of the First Amendment."[54]

Comparatively, in *Harper*, the Ninth Circuit incorrectly applied a viewpoint-specific ban on religious opinions or symbolic speech that would be insensitive to homosexuals. Thus, Harper's speech should not be banned in the public school setting, even though it would be negative and insensitive to the plight of gays and lesbians in everyday society. In addition, the viewpoint discrimination found in *Harper* is even more egregious because there was no evidence that Harper's speech was so disruptive that it invaded the rights of others, whereas the observance of the Day of Silence—which the school did allow—obviously interfered with the classroom teaching and actually caused disruption.[55]

3. Conflict with the Second Circuit

Furthermore, the ruling in *Harper* also conflicts with the Second Circuit ruling that struck down a school's ban on a 13-year-old middle school student's T-shirt depicting President Bush as a drug-abusing drunk in *Guiles v. Marineau*.[56] The shirt contained images of alcohol and drug use in contravention of a school policy banning such depictions.[57] The court found that the shirt caused no disruption and concluded *Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only where it is substantially disruptive.[58] Note the striking difference with the Ninth Circuit's ruling that *Tinker* permits censorship of "negative" student speech that is "demeaning" or "derogatory" even if there is no material disruption. The Second Circuit ruling strongly disagrees with this holding by reasoning that allowing a ban of speech solely because it might be offensive or cause resentment cannot be reconciled with *Tinker*.[59] Such holding in *Harper* would overrule *Tinker* and provide it no real effect because "it could have been said that the school administrators in *Tinker* found wearing anti-war

53. *Id.* at 540.

54. *Id. See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (striking down a Minnesota city's hate-speech statute on the basis of impermissible viewpoint discrimination).

55. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006).

56. Guiles v. Marineau, 461 F.3d 320, 331 (2d Cir. 2006).

57. *Id.* at 321.

58. *Id.* at 331.

59. *Id.*

armbands offensive and repugnant to their sense of patriotism."[60] Moreover, such reasoning provides an overly vague and broad rule of law with respect to freedom of speech in public schools that would give school administration great censorship power. As such, public school administrators could censor much student speech if founded on a rational basis for exclusion because of its mere offense to any general values other students may hold.

4. Equal Protection Analysis: Are Homosexuals a Protected Class?

However, we should take note of the Ninth Circuit's explanation of the specific invasion of rights in the context of Harper's anti-gay speech. The majority opinion in *Harper* concluded that "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."[61] As *Tinker* clearly states, students have the right to "be secure and to be let alone."[62] The *Harper* court elaborated that: "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[63] Particularly, the court was persuaded by evidence of the negative ramifications caused by anti-gay harassment in public schools. For example, one study found among teenage victims of anti-gay discrimination, seventy-five percent experienced a decline in academic performance, thirty-nine percent had truancy problems, and twenty-eight percent dropped out of school.[64] Another study confirmed that gay students had difficulty concentrating in school and feared for their safety as a result of peer harassment, and that verbal abuse led some gay students to skip school or to drop out altogether.[65] The *Harper* court reasoned that speech that attacks high school students on the basis of their sexual orientation is harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.[66]

60. *Id.* at 328.

61. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

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

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

64. Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 225 (2005).

65. HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001), http://hrw.org/reports/2001/uslgbt/Final-05.htm#P609_91364 (last visited Jan. 6, 2007).

66. *Harper*, 445 F.3d at 1178-79.

Therefore, the court held that there is a "recognizable privacy interest in avoiding unwanted communication," particularly "when persons are powerless to avoid it" because minors are subject to mandatory attendance requirements and school authorities act *in loco parentis* to protect children.[67]

Nevertheless, different types of negative speech, including speech involving race, gender, and class, may cause psychological harm to students within the public education system and can lead to student drop out and failure, hindering their opportunity for a fair and free public education. So, where is the line drawn with regard to types of psychological harm necessitating similar protection afforded by the Ninth Circuit to homosexual students in *Harper*? Does one need to look at the history of oppression directed at a class of people? However, even with such evidence, I do not believe the court would readily order a ban on negative speech directed at groups, including obese children in public schools, or student cruelty to their peers based on one's social class. Accordingly, such expansion by the Ninth Circuit of the "invades the rights of others" prong in *Tinker* is overly broad and vague, leaving many unanswered questions as to who is really afforded higher protection because of their group associations.

The Tenth Circuit has recognized a higher class of protection for racial minorities, holding that the "display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone," specifically looking to the history of oppression and inferiority directed at African Americans.[68] In *Derby*, a student ("T.W.") drew the Confederate flag and was suspended in violation of school policy prohibiting the drawing of the Confederate flag.[69] Previously, the student was suspended for calling another student "blackie."[70] In early 1995, prior to the adoption of this policy, several verbal confrontations occurred between black and white students at Derby High School.[71] Some white students wore shirts bearing the image of the Confederate flag, while some black students wore shirts with an "X," denoting support for the teachings of Malcolm X.[72] Members of the Aryan Nation and Ku Klux Klan became active off campus circulating materials to students encouraging racism.[73] Around the same

67. *Id.* at 1178 (internal quotations omitted).

68. West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000).

69. *Id.* at 1361.

70. *Id.* at 1363.

71. *Id.* at 1366.

72. *Id.* at 1362.

73. *Id.*

time, graffiti stating such things as "KKK" (Ku Klux Klan), "KKKK" (Ku Klux Klan Killer), and "Die Nigger" appeared on campus in bathrooms and on walls and sidewalks.[74] School officials received reports of racial incidents on school buses and at football games.[75] At least one fight broke out as a result of a student wearing a Confederate flag headband.[76] These included students drawing the Confederate flag on their notebooks and arms.[77] In response to the situation, the Derby School District organized a task force comprised of parents, teachers, and other community members to propose a course of action for the district.[78] The task force recommended the adoption of a racial harassment policy to help alleviate the problem.[79] The school district subsequently adopted the "Racial Harassment and Intimidation" policy.[80] The policy resulted in a "marked decline of incidents of racial harassment and discord" in the school district."[81] The number of referrals in the middle school dealing with racial problems in the last two years was significantly lower than the number observed in 1996."[82] Thus, the Tenth Circuit held that the school district's legitimate interest was clearly "to prevent potentially disruptive student conduct from interfering with the educational process."[83] The court concluded that the school district's harassment and intimidation policy did not violate T.W.'s right to equal protection under the Fourteenth Amendment.[84] Further, the court concluded that the Derby School District did not violate T.W.'s First Amendment right to free speech when it suspended him from school for three days after he drew a picture of the Confederate flag during class in violation of the school district's harassment and intimidation policy.[85] Again, while students do not "shed the constitutional rights to freedom of speech or expression at the schoolhouse gate, the Supreme Court has recognized that the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings," and a "school need not tolerate student speech that is inconsistent

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *West*, 206 F.3d at 1362.
82. *Id.*
83. *Id.* at 1365.
84. *Id.*
85. *Id.*

with its basic educational mission even though the government could not censor similar speech outside the school."[86]

In comparison to *Harper*, there are three key distinctions in *Derby*. First, *Derby* deals with speech that resulted from violation of a policy implemented to combat years of deeply penetrating racial tensions between black and white students in the Derby public school system. Although Harper's speech was also in violation of school code, it was not in violation of school policy because of numerous incidents of harassment and altercations between heterosexual and homosexual students. In fact, there were only two minor incidents that show a dispute on the issue of homosexuality at Poway High School. Secondly, the court, in holding for the school district, focused on the substantial and material disruption prong in *Tinker* and in light of substantial evidence that drawing the confederate flag would elicit heated racial tensions and discord in the Derby schools. Comparatively, such disruption was not apparent to result at Poway High School. Lastly and most importantly, the cases can be distinguished by the respective groups protected from negative speech in the public school setting. In *Derby*, the speech centered on racism directed at African-American students. On the other hand, the speech in *Harper* attacked homosexuals on the basis of their sexual orientation.

Accordingly, the major difference is the protection of different classes of people—race vis-à-vis gender; a suspect class vis-à-vis a non-suspect class of people. As such, one can make the argument that because race and racism in the American courts has been treated with more importance and heightened scrutiny than the rights of sexual minorities, the Ninth Circuit's goal to protect the rights of homosexuals from psychological harm against negative speech would not pass muster against the legitimate governmental interest in protecting the fundamental right to express negative viewpoints on homosexuality in public schools.

Therefore, the real question is whether the interest of protecting gay and lesbian adolescents from harassment clearly outweighs the fundamental First Amendment right to free speech for students who desire to openly express their viewpoints against homosexuality in the public school setting. To answer this question, one can examine the standard of review applied by the Supreme Court in equal protection cases assessing the rights of minorities, specifically those dealing with race, and cases dealing with sexual orientation, the right to homosexual sex, and same-sex marriage. A key question in equal protection cases is what level of scrutiny the case should be examined under. The most frequent debate in cases

86. *Id.* at 1365-66 (internal citations and quotations omitted).

dealing with sexual orientation is whether discrimination on the basis of sexual orientation is deserving of strict scrutiny—the highest level of scrutiny in American courts. Strict scrutiny is reserved for statutes or state constitutional amendments that discriminate against members of traditionally suspect classes[87] or infringe on any fundamental constitutional right.[88] Laws that are subject to strict scrutiny will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible.[89] Because factors such as race, alienage, or national origin are so seldom relevant to the achievement of any legitimate state interest, laws grounded in such considerations are deemed to reflect prejudice and antipathy. However, in most cases dealing with sexual orientation discrimination, the Supreme Court has concluded that rational basis review is the standard of review that should be applied and not heightened scrutiny. For example, in *Romer v. Evans*, the citizens of the state of Colorado voted to implement "Amendment 2" to the state constitution.[90] The ultimate effect of Amendment 2 was to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies to protect persons from discrimination based on sexual orientation in the future unless the state constitution is first amended to permit such measures.[91] The Court argued that the amendment withdrew from homosexuals, but no others, specific legal protection from injuries caused by discrimination, and it forbids reinstatement of these laws and policies.[92] The Court held Amendment 2 to the Colorado state constitution as unconstitutional because it did not classify homosexuals to further a proper legislative end, but to make them unequal to everyone else.[93] Further, the Court declared that a state cannot so deem a class of persons a stranger to its laws and as such, Amendment 2 was a violation of the Equal Protection Clause.[94]

More important, however, is the standard of review applied by the Court. Before reaching the Supreme Court, the Colorado Supreme Court

87. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin).

88. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 440 (1985).

89. Plyler v. Doe, 457 U.S. 202, 217 (1982).

90. Romer v. Evans, 517 U.S. 620, 623 (1996).

91. *Id.* at 624.

92. *Romer*, 517 U.S. at 627.

93. *Id.* at 635.

94. *Id.*

applied strict scrutiny, arguing that amendment was subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment as infringing upon the "fundamental right" of homosexuals to participate in the political process.[95] However, the Supreme Court did not agree and only applied rational basis review: A legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.[96] The Court stated that if a law neither burdens a fundamental right nor targets a suspect class, it will uphold the legislative classification so long as it bears a rational relation to some legitimate end.[97] Accordingly, by the Court's use of rational basis review, it concluded that *Romer* did not involve a fundamental right or a suspect class deemed worthy of strict scrutiny.[98] Furthermore, rational basis review is also the standard that has been applied in same-sex marriage cases. In *Goodridge v. Department of Public Health*, several Massachusetts couples challenged the state's restriction of marriage to opposite-sex couples as a violation of various provisions of the state constitution.[99] In its opinion, the Supreme Judicial Court concluded that Massachusetts' restriction of marriage to opposite-sex couples did not satisfy rationality review and rejected the state's argument that the prohibition on same-sex marriage reflected a permissible judgment that marriage was fundamentally concerned with procreation.[100] The court noted that opposite-sex couples who either did not intend to or were unable to procreate were entitled nonetheless to get married.[101] However, in both *Goodridge* and *Romer*, each court only applied the minimum rational basis review to these equal protection claims. There is the plausible argument that because gays and lesbians have long been a target of hatred and discrimination, strict scrutiny is justified in sexual orientation cases. Nonetheless, many opponents of a heightened level of review in sexual orientation cases note that homosexuals are an economically advantaged group in society.[102] They further point out that homosexuals are an affluent and highly educated class, politically powerful, and more likely to vote. Also, the Human Rights Campaign is

95. Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993).

96. Romer v. Evans, 517 U.S. at 632-33.

97. *Id.* at 631.

98. *Id.*

99. Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 314 (Mass. 2003).

100. *Id.* at 961.

101. *Id.*

102. Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 407-08 (1994).

one of the fastest-growing political action organizations in Washington.[103] As such, the conclusion can be made that gay rights have not yet been recognized to rise to the level of "fundamental rights," and being a gay man or woman in America does not place one in a "suspect class" affording the highest level of scrutiny in terms of Equal Protection under the Fourteenth Amendment. For that matter, the protection of gay youth in public schools is not as high as the protection of black and female children. Thus, the argument made by the Ninth Circuit in protecting children in public schools and affording them a blanket ban on any negative speech directed at their sexual orientation because of the history of oppression is weak. Particularly, because the freedom of speech and to religious exercise are both "fundamental rights," a ban on any negative speech, such as Harper's, would have to be reviewed under strict scrutiny to survive. Therefore, if cases on sexual orientation are only due rational basis review it is likely that the legitimate governmental interest to protect the fundamental right of speech, moreover religious expressive speech, would be the victor over the need to protect gay youth from psychological harm in public schools.

B. Ramifications of the Application of the *Tinker* Standard in *Harper*

With the new expansion by the Ninth Circuit of the *Tinker* standard of "invades the rights of others," many negative viewpoints that are portrayed in public schools can be censored and silenced as long as such speech invades the rights of other students in the sense that it may cause them harm, even psychologically. As such, a case that was settled in 2005 would have differed from the end result of the Ninth Circuit's holding in *Harper*. In *Mathewson* my previously stated hypothetical was held true. Brad Mathewson, an openly gay student wore a T-shirt to Webb City High School with the words, "Gay-Straight Alliance" on the front.[104] The back of the T-shirt displayed the words, "Make a Difference," three pairs of symbols—two male symbols (♂♂), two female symbols (♀♀), and a male and female (♂♀) symbol—and a pink triangle, a well-known symbol of the gay rights movement.[105] On that morning, Mathewson's homeroom teacher, Ms. Gray, questioned whether Mathewson's T-shirt was appropriate and sent Mathewson to the office to discuss the T-shirt with Assistant Principal Jeff Thornsberry.[106] Mathewson went to the office and met with Thornsberry, who told Mathewson the shirt was inappropriate,

103. *Id.* at 409-10.

104. Complaint at 3, Mathewson v. Webb City R-VII Sch. Dist., (W.D. Mo. filed Apr. 2005).

105. *Id.*

106. *Id.*

distracting, and offensive to other students.[107] When Mathewson questioned Thornsberry about why the T-shirt was considered inappropriate, distracting, and offensive to others, Thornsberry refused to explain his statements.[108] When Mathewson pointed out that other students' notebooks and backpacks had stickers, signs, markers, or decals expressing their personal views that gay marriage was wrong, Thornsberry refused to reconsider and claimed that was a different situation.[109] Thornsberry gave Mathewson the option of changing his shirt or turning it inside out and Mathewson chose the latter option.[110] On the way to the bathroom to turn his shirt inside out, Mathewson met a friend in the hallway.[111] Mathewson's friend is heterosexual and his friend decided to switch shirts.[112] However, Mathewson's friend wore the shirt for the rest of the day without incident, even though Mathewson had been ordered to remove it.[113] No teacher and no one in the administration approached Mathewson's friend about removing the shirt.[114] A week later Mathewson wore a T-shirt with a rainbow, a star, and with the words, "I'm gay and I'm proud," on the front.[115] One of Mathewson's friends wore a T-shirt with the words, "I love lesbians," on the front.[116] Thornsberry approached Mathewson and demanded that he change shirts or turn the shirt inside-out.[117] Thornsberry approached Mathewson's friend and demanded that he change shirts entirely.[118] Mathewson refused to change his shirt or hide its message, and he left school to go home and call his mother.[119]

Thereafter, when Mathewson and his mother pressed for more information about Mathewson's censored speech, Gollhofer, the school's principal, said the school was trying to protect Mathewson from other students who might act out against Mathewson for being gay or his political positions related to his sexual orientation.[120] Gollhofer

107. Complaint at 3, *Mathewson*, (W.D. Mo. filed Apr. 2005).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 4.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

specifically characterized Webb City High School as being in the middle of the Bible Belt.[121] Gollhofer further stated that by Mathewson wearing the aforementioned T-shirts, he was "flaunting" being gay, which could lead to problems for him.[122] Gollhofer told Mathewson that if he was allowed to wear a gay-themed shirt, school officials would have to allow other students to express anti-gay messages.[123] However, Gollhofer failed to recognize the fact that several students had anti-gay marriage stickers on their notebooks that were never told to remove them.[124] Mathewson asked if an African-American student would be allowed to wear a T-shirt with the words, "I'm black and I'm proud," on it.[125] The school officials present at the meeting told him such a shirt would not be allowed.[126] The question of whether the school violated Mathewson's First and Fourteenth Amendment rights for censoring his pro-gay messages was never decided by the federal district court.[127] Mathewson dropped his lawsuit after months of negotiation with Webb City High School in which the school finally agreed that it would no longer illegally censor T-shirts bearing pro-gay messages.[128]

Although a victory for gay rights in 2005, the facts in *Mathewson* are strikingly similar to the facts in *Harper*, with the only distinction being what speech the school characterized as negative and positive. To the Missouri high school in the middle of the Bible Belt the negative speech was actually advocating for gay rights and homosexuality in general. In contrast, in *Harper,* Harper's T-shirt against homosexuality arose in a high school situated in the liberal state of California. Therefore, under the Ninth Circuit reading of the "invades the rights of others" prong of the *Tinker* standard, censoring Mathewson's speech would also be justified because such speech would "invade the rights of others," specifically students who believe that homosexuality is a sin and should not be endorsed in a public school. Accordingly, it would not be surprising for those advocating anti-gay messages to use such analysis found in *Harper* to claim some type of psychological harm against their Christian values and beliefs that would

121. *Id.*

122. Complaint at 4, *Mathewson*, (W.D. Mo. filed Apr. 2005).

123. *Id.* at 5.

124. *Id.*

125. *Id.*

126. *Id.*

127. American Civil Liberties Union of Kansas & Western Missouri, *ACLU Secures Promise from Missouri High School to Stop Censoring Student's Gay-Supportive T-Shirts* (June 23, 2005), http://www.aclukswmo.org/news/tshirt.htm (last visited Jan. 7, 2007) [hereinafter ACLU].

128. *Id.*

directly affect their learning in some way. Therefore, the ruling in *Harper* has dire consequences for promoting any type of speech advocating for any side on a politically charged issue, including homosexuality, and provides an arbitrary and vague precedent that will allow public schools across the country to further their own favored views on certain issues and censor other views on other issues by deeming them negative based upon their own school mission and personal values.

III. A New Perspective: Tweaking the *Tinker* Standard

As I have shown, the expansion of the "invades the rights of others" prong of the *Tinker* standard by the Ninth Circuit is wholly problematic because the standard is overly vague and broad, and is a dangerous conduit for the suppression of viewpoints depending on one's system of beliefs. Thus, symbolic speech expressed on a T-shirt, an armband, or any other piece of clothing or clothing accessory should not be banned under *Harper's* erroneous expansion of the "invade the rights of others" prong in *Tinker* in the public school setting. More importantly, *Harper* provides for the inevitable use of such precedent to censor any positive gay messages deemed negative by a public school administration, as illustrated in *Mathewson.*

Although I assert that the Ninth Circuit misapplied the "invades the rights of others" prong, I do agree with the Ninth Circuit that because of the history of oppression that homosexuals have faced in society there needs to be special consideration that allows gay children the opportunity to a free and fair education without constant persecution and psychological attack. Although it has been argued that homosexuals have not been deemed a suspect class because homosexuals are found to be more educated, politically active, and economically advantaged, there is a substantial distinction between confident self-actualized gay adults and impressionable and politically powerless gay youth. And to quote Justice Stone's most famous footnote in *Carolene Products*, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[129] As such, although gay and lesbian adults may somewhat be able to protect themselves from prejudice and hate in public society, there is a key distinction between gay adults and vulnerable gay youth who are powerless against the cruelty of their peers. In addition, in light of such substantial evidence the negative ramifications caused by anti-gay harassment in public schools, including declined academic

129. United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938).

performance, truancy problems, and high drop out rates.[130] As such, rather than expand the interpretation of the "invades the rights of others" standard, I instead propose that schools implement hate speech codes within the public school system to protect sexual minorities from hate speech that would produce deep psychological harm at a stage in child development when it is so critical for children to grow and develop without hateful animus against specific characteristics of their person.

A. Hate Speech Codes

During the 1960s, college campuses were full of violent demonstrations including protests concerning the Vietnam Conflict and the denial of civil rights to millions of African Americans.[131] Growing out of the aftermath of the McCarthy-era paranoia, there was a serious commitment to protecting free expression at the nation's universities.[132] In the 1980s, there was a "rise in the number of verbal, physical and political attacks on members of minority groups in the United States."[133] As a result, universities responded to the rise in hate crimes, passing hate speech codes in order to "achieve . . . equality for traditionally subordinated groups in the marketplace of ideas."[134] The passage of speech codes on college campuses also paralleled the international community's response to the rise of hate crimes around the world.[135] Thus, although there has been a strong commitment to academic freedom at American universities, many college administrations have implicitly placed the right to equality above the right to free expression by passing speech codes to protect minority students from hateful speech.[136] Accordingly:

If a university is a place for knowledge, it is also a special kind of small society. Yet, it is not primarily a fellowship, a club, a circle of friends, a replica of the civil society outside it. Without sacrificing its central purpose [to discover and disseminate knowledge], it cannot make its

130. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178-79 (9th Cir. 2006).

131. Matthew Silversten, Note, *What's Next for Wayne Dick? The Next Phase of the Debate over College Hate Speech Codes*, 61 OHIO ST. L.J. 1247, 1256 (2000).

132. *Id.*

133. *Id.* at 1256-57 (quoting Jeanne M. Craddock, *Constitutional Law—"Words that Injure; Laws that Silence:" Campus Hate Speech Codes and the Threat to American Education.* 22 FLA. ST. U. L. REV. 1047, 1050 (1995)).

134. *Id.* at 1257 (quoting Craddock, *supra* note 134, at 1048).

135. *Id.*

136. *Id. See* Patricia Hodulik, *Racist Speech on Campus*, 37 WAYNE L. REV. 1433, 1433 (1991) ("The increasing frequency of racist speech and other forms of discriminatory conduct on college campuses has led many colleges and universities to adopt or to consider adopting student conduct rules prohibiting such behavior.").

primary and dominant value the fostering of friendship, solidarity, harmony, civility or mutual respect . . . . It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression . . . .[137]

Similarly, in the K-12 public school system, it is even more necessary for civility and respect to supersede the need to guarantee student expression because in these school environments students are more vulnerable and seemingly powerless to combat against the psychological harms stemming from hate speech. Thus, a similar ideology as that applied in the college setting should be applied in K-12 public education to prevent speech presented in a hateful manner, including Harper's speech asserting "homosexuality is shameful." In actuality, many commentators have commonly proposed the justification that hate speech inflicts psychological, physical, and pecuniary harm on individual victims,[138] which is the same reason the Ninth Circuit asserted to provide for an expansion of the "invades the rights of others prong." However, hate speech codes do implicate the First Amendment, and therefore such codes must be implemented in a manner that can withstand constitutional scrutiny.[139] Even though hate speech codes would implicate the First Amendment, in the K-12 public education system, free speech rights are not coextensive as those with the rights of adults in the university environment. The Court in *Tinker* explicitly stated that a school may infringe upon the free exercise of opinion if it materially and substantially interferes with school discipline or the rights of others.[140] Furthermore, distinguishing between the educational mission of the university vis-à-vis K-12 public education provides a strong justification for the constitutionality of hate speech codes in the K-12 education system. In the university setting, "free and unfettered interplay of competing views is essential to the institution's educational mission."[141] Whereas in K-12 education, discipline and control is more essential to schools which act *in*

137. Silversten, *supra* note 132, at 1249 (quoting The Report of the Committee on Free Expression at Yale *in* Yale University Undergraduate Relations, *quoted in* NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 118 (1992).

138. TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL 31-33 (University Press of Kansas 1998) (discussing Mari Matsuda and Richard Delgado's theories about the negative effects of hate speech on minorities); *see also* Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 640 n.50 (1985) (discussing the psychological trauma residents of Skokie, Illinois, experienced when confronted with the possibility of having members of the Nazi party walk down their city's streets).

139. Silversten, *supra* note 134, at 1247.

140. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

141. Silversten, *supra* note 134, at 1267-68 (quoting Doe v. University of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

loco parentis to protect these children from any potential harms while in the public school environment.[142]

Accordingly, public schools should continue to adopt the material and substantial disruption test of the *Tinker* standard, and also adopt a University Mission Model to implement hate speech codes to protect the right to be secure and let alone of all students. The University Mission Model adopted by some universities rests upon the Post-Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—because of their guarantees of equal opportunity.[143] "Proponents contend that hateful speech denies targets of such speech their Fourteenth Amendment right of equal access to educational facilities and, therefore, the state has a duty to restrict the majority's ability to use hate speech."[144] "Proponents of this view believe that universities have a special obligation to ensure that they provide non-hostile environments for their minority students."[145] Similarly, it is central to the educational mission of the public school system to provide non-hostile environments for sexual minorities to be able to foster and develop without persecution. "Some scholars argue that the negative impact of hate speech deprives minorities of the chance to participate in the academic environment provided by universities to non-minorities, who are not exposed to hate speech."[146] However, as applied in the K-12 public school education system, racial and sexual minorities are in most instances powerless to combat majority hate speech, particularly in conservative areas of the country, including the Bible Belt. Yet, at the same time, hate speech codes should be narrowly tailored to help maintain a non-hostile environment for minorities while still posing little threat to the marketplace of ideas. Accordingly, speech that is positive or negative would be allowed; however speech that is inherently hateful and a direct attack towards a student's personal characteristics, including race, sex, and sexual orientation, would be curtailed.

Conclusion

A central theme of all First Amendment jurisprudence is whether the government regulation under review is an attempt to suppress a message because of the message or who the messenger is. Essentially there are two approaches to achieving tolerance concerning freedom of speech in public

142. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

143. Silversten, *supra* note 134, at 1260.

144. *Id.*

145. *Id.*

146. Silversten, *supra* note 134, at 1260.

schools. One is to allow all perspectives to be heard and to teach everyone to respect different ideas, even if one strongly disagrees with an opposing view. The second approach is to ban dissenting ideas so that no one feels challenged or offended, thereby avoiding tension. Some argue that the latter approach is repugnant to American law. However, although the government should not set up a debate, take sides, and then ban those with different beliefs from responding, in the K-12 public education system minority groups do need protection from hate speech. The truth of the Ninth Circuit's argument with regards to the psychological well-being of homosexuals in public schools cannot be ignored. As long ago as *Brown v. Board of Education*, the Supreme Court recognized that "[a] sense of inferiority affects the motivation of a child to learn."[147] "If a school permitted its students to wear shirts reading, 'Negroes: Go Back to Africa,' no one would doubt that the message would be harmful to young black students."[148] As such, public schools should have the power to protect students such as Mathewson from hate so that it does not result in his complete alienation from public school and the denial of a fair and full opportunity to an education.[149] Therefore, although under the Ninth Circuit's "invades the rights of others" Harper's speech should be allowed and provided protection under the First Amendment, I propose that to truly protect equality and provide all students with an equal opportunity to a fair and just education, narrowly tailored hate speech codes should be implemented in public school education. As Justice Blackmun prudently stated in his concurring opinion in *Regents of the University of California v. Bakke*, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[150] Similarly, here, with regards to homosexual youth, in order to provide them with an equal and fair opportunity to fair and full education they must be treated differently to achieve equality and to abolish the badge of inferiority applied to their persons because of their sexual orientation.

147. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (internal citation omitted).

148. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1180 (9th Cir. 2006).

149. *See* ACLU, *supra* note 128 (discussing Brad Mathewson's alienation and eventual exit from the Webb City High School because of the anti-gay treatment he faced concerning his pro-gay rights T-shirt).

150. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, concurring).