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Tryphena Liu

Untangling *Tinker* and Defining the Scope of the Heckler's Veto Doctrine's Protection of Students' Free Speech Rights

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In the last thirty years, courts have steadily chipped away at the protections afforded student free speech on K-12 campuses by the Supreme Court's decision in Tinker v. Des Moines Independent Community School District. *In* Tinker*, the Court held that schools may not restrict students' right to speak unless the speech causes, or threatens to cause, a substantial disruption or infringes on the rights of other students. This Note argues that the diminishing force of* Tinker*'s protection of student free speech is largely the result of the difficulty of applying* Tinker*'s ostensibly straightforward holding, and of establishing the appropriate balance between maintaining a safe and effective learning environment and protecting students' First Amendment rights. This Note proposes revisiting the heckler's veto doctrine, which prohibits the government from restricting speech solely based on the disruptive or violent reaction of the listeners or onlookers (i.e., hecklers), as a way to push back against the increasing encroachment on students' First Amendment rights. Although the Court articulated the principles of the heckler's veto doctrine in* Tinker*, subsequent courts have failed to clearly identify the implications of the doctrine on the* Tinker *analysis, thus further weakening* Tinker*'s protection of student free speech. This Note argues that future courts deciding student free speech questions must explicitly address the heckler's veto doctrine to prevent hecklers from contributing to the infringement on students' constitutional right to both speak and hear. The Note concludes by suggesting a possible solution that aims to adequately balance competing student rights.*

*Tryphena Liu is a junior associate at Lenze Lawyers, PLC in Manhattan Beach, California. She received a bachelor's degree in English literature from Scripps College and a juris doctor from the University of California, Irvine School of Law. Her current area of practice is civil litigation, specifically mass tort pharmaceutical drug and device defect, medical malpractice, and employment discrimination litigation.

INTRODUCTION

The evolution of the doctrine espoused in the Supreme Court's opinion in *Tinker v. Des Moines Independent Community School District*, decided in 1969, has weakened students' free speech rights on K-12 campuses. One manifestation of this evolution is increasing disregard for the heckler's veto doctrine. A heckler's veto occurs when the government restricts speech solely based on the disruptive or violent reaction of the listeners or onlookers.[1] The heckler's veto doctrine holds that such action is unconstitutional.[2] Despite the many court decisions upholding bans on student expression that have led to the conclusion that *Tinker* is a principle with no bite, courts have long relied on *Tinker* for the notion that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] The majority in *Tinker* was concerned about preventing state-operated schools from becoming "enclaves of totalitarianism," where students may only express state-sanctioned ideas.[4] The Court noted that the protection of constitutional rights in schools is especially important because schools are where the nation's young citizens learn the values of democracy.[5] The Court relied on Justice Brennan's articulation of this principle in *Keyishian v. Board of Regents of University of State of New York*:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly

1. *See* Nicole A. Maruzzi, Case Comment, *Constitutional Law – First Amendment Gives Way to a Heckler's Veto* – Dariano v. Morgan Hill Unified School District, *767 F.3d 764 (9th Cir. 2014)*, 48 SUFFOLK U. L. REV. 991, 993–94 (2015).

2. *See* Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949); Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't, 533 F.3d 780, 787–88 (9th Cir. 2008).

3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

4. *Id.* at 511.

5. *See id.* at 507.

> 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."[6]

Nevertheless, the Court also acknowledged the deference given to school officials to control conduct in schools.[7] In order to balance these two interests, the Court held that where students' First Amendment freedom of expression rights are at stake, the school "must be able to show that its action [to restrict student speech] was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[8] Instead, the school must demonstrate that school officials had reason to anticipate that the banned speech would "substantially interfere with the work of the school or impinge upon the rights of other students."[9]

Applying these principles to the facts of *Tinker*, the Court found there was no reasonable basis to support the school officials' prediction that the wearing of black armbands to protest the hostilities in Vietnam would cause substantial disruption or a material interference with school activity.[10] Additionally, the school failed to demonstrate that the wearing of the armbands actually disrupted the work of the school or any class because there were no threats or acts of violence on school premises—only a few students had made hostile remarks to the students wearing armbands.[11] The Court thus concluded that the prohibition of the wearing of the armbands to school violated students' First Amendment rights.[12]

Scholars have noted that since the Supreme Court decided *Tinker*, lower courts and the Supreme Court itself have problematically retreated from the opinion's original protections.[13] Indeed, *Tinker*'s ostensibly easy conclusion is undercut by subsequent applications of the "substantial disruption" test and the second prong of the *Tinker* test: whether the challenged speech "impinge[s] upon the rights of other students."[14] For example, in *Bethel School District No. 403 v. Fraser*, decided in 1986, the Supreme Court found that schools may proscribe speech that is "vulgar and lewd" or "plainly offensive" without a showing of a threat of substantial disruption.[15] In balancing the free speech rights of students and the discretion of school officials to control conduct in school, the Court weighed more in favor of

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6. *Id.* at 512 (quoting Keyishian v. Bd. of Regents of Univ., 385 U.S. 589, 603 (1967)).
7. *See id.* at 507.
8. *Id.* at 509.
9. *Id.*
10. *See id.* at 514.
11. *See id.* at 508.
12. *See id.*
13. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 528 (2000); Lucinda Housley Luetkemeyer, *Silencing the Rebel Yell: The Eighth Circuit Upholds a Public School's Ban on Confederate Flags*, 75 MO. L. REV. 989, 995 (2010).
14. *Tinker*, 337 U.S. at 509.
15. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–85 (1986).

the latter, emphasizing the importance of preserving the school's basic educational mission of advancing "the appropriate form of civil discourse and political expression."[16] Even in lower court decisions that focused on the safety of the students, courts expanded *Tinker*'s "substantial disruption" test to say that restriction of free speech may be permissible even when the mode of expression at issue has never caused or contributed to any prior disruptions.[17]

Another factor that has contributed to the diminishing protection of students' free speech rights is an issue with the *Tinker* decision itself. Although the Supreme Court articulated the principles of the heckler's veto doctrine in *Tinker*, it did not have an opportunity to address how the doctrine would apply in practice. Specifically, the Court failed to consider the implications of the "substantial disruption" test on the concerns the heckler's veto doctrine sought to combat. In effect, the "substantial disruption" test and the heckler's veto doctrine are inconsistent with each other. In addition, because the Court likely came to its findings in *Tinker* based on the assumption that the school was the only silencing agent, it inadvertently created a road map for ways in which other students could bypass the heckler's veto doctrine and silence the speaker. For example, under the "substantial disruption" test, students can cause the school to silence the speaker merely by threatening substantial disruption.

Students' right to speak is enshrined in but also limited by doctrine. Students have the right to speak unrestricted by the school if the speech does not cause, or threaten to cause, a substantial disruption, or infringe on the rights of other students.[18] However, this basic formulation of the *Tinker* test, which was perhaps once clear, has now become muddled as courts grapple with finding the proper balance between preserving schools as the marketplace of ideas and ensuring schools are able to advance their educational goals, which include both protecting students and maintaining classroom decorum. More often than not, courts decide to silence speakers, finding that the latter interest outweighs students' free speech rights.[19] Furthermore, sophisticated opponents of speakers recognize that they can turn these tests to their advantage, a move that implicates the heckler's veto doctrine.

Part I of this Note discusses three different frameworks courts have used to analyze restrictions on student free speech under *Tinker*: (A) *Tinker*'s "substantial disruption" test, (B) *Fraser*'s "plainly offensive" standard, and (C) the heckler's veto doctrine. Part I demonstrates how the "substantial disruption" test and the plainly offensive standard, developed from *Tinker*'s "rights of other students" prong, fail to adequately protect speakers from being silenced by hecklers. Part I also points out that even decisions that have applied the heckler's veto doctrine do not provide

16. *Id.*

17. *See* B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009); Luetkemeyer, *supra* note 13, at 1002.

18. *Tinker*, 337 U.S. at 509.

19. *See* Luetkemeyer, *supra* note 13, at 1002.

clear guidance on how schools can distinguish between hecklers who merely disagree with the speaker's message and genuinely aggrieved listeners who are reasonably offended or harmed by the speech. Part II illustrates how lower courts' application of the two prongs of the *Tinker* test—the "rights of other students" prong and the "substantial disruption" prong—chip away at the protections afforded by the heckler's veto doctrine. Lastly, Part III argues that schools and courts are not appropriately balancing the rights of students because they not only privilege the rights of potential hecklers over those of speakers, but they also fail to take into account the constitutionally-protected right of students who are not opposed to the contested expression to hear the speaker. Part III concludes that it is especially important for analyses of students' free speech rights on campus to explicitly address the heckler's veto doctrine in order to prevent hecklers from infringing on the rights of students to both speak and hear.

I. COMPLICATIONS WITH APPLICATION OF *TINKER*

Student free speech rights decisions issued after *Tinker* use the "substantial disruption" prong and the "rights of other students" prong of the *Tinker* test to create exceptions to the free speech guarantees of *Tinker*. These exceptions undermine the heckler's veto doctrine and make it easier for schools to silence students. Specifically, applications of *Tinker*'s "substantial disruption" test fail to consider the possibility that students may be tactically threatening or engaging in substantial disruption just to silence the speaker. As a result, the "substantial disruption" exception creates the possibility of schools silencing speakers based on the reactions of hecklers anytime the school can establish a threat of substantial disruption. *Fraser*'s "plainly offensive" standard also facilitates schools' ability to silence speakers by allowing schools and courts to impose their own judgment about the effects of speech on students to justify a ban on the speech. This Part concludes by noting that the protections supposedly afforded by the heckler's veto doctrine do little to combat the effect of these exceptions. Not only are applications of the heckler's veto doctrine inconsistent with each other, but they also leave many questions unanswered.

A. Tinker*'s "Substantial Disruption" Test*

Tinker's "substantial disruption" test is inherently in tension with the heckler's veto doctrine because it allows schools to silence speakers based on the actual or feared reaction of other students if the reaction rises to the level of substantial disruption. This tension is evident in appellate courts' application of the "substantial disruption" test to cases deciding the constitutionality of prohibitions of the display of the Confederate flag.[20] The majority of these cases have found that a history of

20. *See* Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 432 (4th Cir. 2013); Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 334 (6th Cir. 2010); *B.W.A.*, 554 F.3d at 740–41; Barr v. Lafon, 538 F.3d 554, 567 (6th Cir. 2008); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th

racial tension made the school's prediction of substantial disruption reasonable.[21] The Eighth Circuit reasoned, "Racial tension can devolve to violence suddenly. Schools may act proactively to prohibit race-related violence or even excessive racial tension that forces unnecessary departures of minority students from the school."[22] Similarly, in *Defoe v. Spiva*, the Sixth Circuit concluded that even if the display of the Confederate flag does not actually disrupt the learning environment, a school could still reasonably forecast that displays of the flag would likely contribute to disruption in the future due to the "incendiary atmosphere then existing."[23] Based on the facts of *Defoe*, the court found it was not unconstitutional for the school to prohibit students from wearing T-shirts displaying the Confederate flag to campus because the "racial violence, tension, and threats occurring in Anderson County schools as well as the fact that the Confederate flag is a 'controversial racial and political symbol'" supported the school officials' conclusion that displays of the Confederate flag would result in substantial disruption of the school environment.[24]

These cases indicate that a school may ban certain student expression as long as the school officials can point to instances in which the mode of expression at issue has caused disruptions in the past. This seemingly straightforward analysis becomes complicated when determining whether the seriousness or the number of past disruptions matters. It also raises the question of whether these courts were easily able to find bans on the display of the Confederate flag constitutional because the Confederate flag is an unquestionably divisive symbol. For example, it is less clear whether a case concerning a ban on the display of the American flag in a specific context would be as readily held constitutional, especially when the display does not cause a substantial disruption.[25] More importantly, this analysis does not account for the heckler's veto problem. Because there is no disagreement that the Confederate flag is a controversial symbol, the schools and the courts did not have to consider the possibility that students were tactically attempting to silence the speaker. Thus, cases dealing with incontestably controversial symbols do not fully address the tension between *Tinker*'s "substantial disruption" test and the heckler's veto doctrine, and consequently fail to provide any guidance on how to assess whether a disruption in response to a student's expression is tactical or genuine.

B. Fraser*'s "Plainly Offensive" Standard*

As mentioned, the Supreme Court carved out an exception to *Tinker*'s "substantial disruption" test by finding prohibitions of "plainly offensive"

Cir. 2000); Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972); Guzick v. Drebus, 431 F.2d 594, 598 (6th Cir. 1970).

21. *Supra* note 20.

22. *B.W.A.*, 554 F.3d at 741.

23. *Defoe*, 625 F.3d at 335 (quoting D.B. *ex rel.* Brogdon v. Lafon, 217 F. App'x 518, 523 (6th Cir. 2007)).

24. *Id.* at 336 (quoting Castorina v. Madison Cty. Sch. Bd., 246 F.3d 536, 542 (6th Cir. 2001)).

25. *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 779 (9th Cir. 2014).

expression, such as lewd and vulgar speech, constitutional in *Fraser*.[26] In so finding, the Court underscored the context of the school, where the sensibility of minors is at stake: "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[27] The Court noted, "This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children."[28] The Court focused on the need to prevent minors from both being exposed to and perpetuating speech that conflicts with the standards of decency of a democratic society.[29] The Court stated that "schools must teach by example the shared values of a civilized social order."[30] Consequently, in *Fraser*, the Court found it permissible for the school to restrict a student's free speech rights where, during a speech nominating a classmate for student office, the student referred to his candidate in terms of an "elaborate, graphic, and explicit sexual metaphor."[31] The Court indicated that unlike the passive expression of a political viewpoint in *Tinker*, the sexual content of the speech in the present case intruded upon the work of the school and the rights of the other students.[32] Specifically, the Court stated that "[b]y glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."[33]

In *Nixon v. Local School District Board of Education*, an Ohio district court interpreted *Fraser*'s holding to mean that the "plainly offensive" standard only applies to speech that is offensive "because of the manner in which it is conveyed."[34] The court stated that some examples of such expression include speech containing "vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."[35] The court distinguished this expression from speech that conveys a potentially offensive political viewpoint.[36] In *Nixon*, a student wore a T-shirt to school that contained the following statements: "Homosexuality is a sin! Islam is a lie! Abortion is murder!"[37] Having established the distinction between the types of speech regulated by *Fraser* and those by *Tinker*, the court concluded, "Clearly, [the student's] shirt is not plainly offensive based on the manner in which its message is conveyed. Rather, any offensive characteristics of [the student's] shirt stem from the views espoused thereon, thus rendering it necessary to analyze this

26. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–85 (1986).
27. *Id.* at 682.
28. *Id.*
29. *See id.* at 681–84.
30. *Id.* at 683.
31. *Id.* at 678.
32. *Id.* at 680.
33. *Id.* at 683.
34. Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005).
35. *Id.*
36. *See id.*
37. *Id.* at 967.

case under *Tinker*."[38] The court then applied *Tinker*'s substantial disruption test. However, as discussed more in Part II, this attempt to distinguish between "plainly offensive" speech and speech that conveys a potentially offensive political viewpoint is largely futile, especially because the Ninth Circuit has opened the door to upholding restrictions on speech where "the views espoused thereon" are directed at students of a certain minority status.[39] Therefore, *Fraser* not only undercuts *Tinker*'s protection of students' free speech rights, but it also pulls *Tinker* even further away from the heckler's veto doctrine by lowering the bar for both the school and the student to silence the speaker.

C. The Heckler's Veto Doctrine

In theory, the heckler's veto doctrine places limits on schools' discretion in determining what types of speech are proscribable. The Supreme Court articulated this doctrine in its decision in *Terminiello v. City of Chicago*, where it reversed a conviction that was based on a city ordinance prohibiting speech which "stir[red] the public to anger, invite[d] dispute, [brought] about a condition of unrest, or create[d] a disturbance."[40] The Court stated that none of these grounds may be the basis for a conviction.[41] The Court further explained this holding in its opinion in *Street v. New York*, where it found it unconstitutional to criminally convict an individual for standing across the street from a burning American flag and stating to a crowd of people: "We don't need no damn flag."[42] The Court reasoned that such a conviction could not be justified by "the possible tendency of appellant's words to provoke violent retaliation"[43] or sustained on the ground that "appellant's words were likely to shock passers-by."[44] It explained that "any shock effect of appellant's speech must be attributed to the content of the ideas expressed"[45] and that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[46] The Court therefore concluded that the speaker could not be silenced based on the effect of his words on listeners, demonstrating a great concern for protecting the right to freedom of expression. However, the Court has noted an exception to the heckler's veto doctrine for "fighting words." In *Chaplinsky v. New Hampshire*, the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane,

38. *Id.*
39. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).
40. Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).
41. *See id.* at 5.
42. Street v. New York, 394 U.S. 576, 590–91 (1969).
43. *Id.* at 592.
44. *Id.*
45. *Id.*
46. *Id.*

> the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[47]

This exception makes the heckler's veto doctrine a challenge to apply because it is difficult to distinguish between "fighting words" that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"[48] and speech that merely "stirs the public to anger" or "creates a disturbance."[49]

If it is difficult to determine when the heckler's veto doctrine applies in First Amendment cases in general, its invocation in school settings is likely arbitrary, especially with the added consideration of the protection of minors from harmful speech.[50] At first glance, *Tinker* appears to be a paradigmatic articulation of the doctrine. This is evidenced by the fact that in *Tinker*, the Supreme Court cites to its decision in *Terminiello* for the notion that the right to freedom of expression must be protected despite the risk of disturbance, stating:

> [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 . . . .[51]

Consequently, the Seventh and Eleventh Circuits have interpreted *Tinker* as an application of the doctrine to free speech regulation in schools.[52] These courts have relied on the doctrine to say that unless the speaker's speech constitutes "fighting words," it is impermissible to use threats of violence or disruption by hecklers to silence a speaker.[53] The Seventh Circuit stated:

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponent's mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response.[54]

Applying this principle in *Zamecnik v. Indian Prairie School District*, the Seventh Circuit found that a school unconstitutionally restricted students' free speech when it banned the display of the slogan, "Be Happy, Not Gay," as a violation of a school

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47. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
48. *Id.* at 572.
49. Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).
50. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
51. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969).
52. *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879 (7th Cir. 2011); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1275 (11th Cir. 2004).
53. *See Zamecnik*, 636 F.3d at 879; *Holloman*, 370 F.3d at 1275–76.
54. *Zamecnik*, 636 F.3d at 879.

rule forbidding "'derogatory comments' spoken or written, 'that refer to race, ethnicity, religion, gender, *sexual orientation*, or disability.'"[55] The court stated that because "Be Happy, Not Gay" did not constitute fighting words, the school could not ban the speech based on the fact that other students had harassed the speaker because of their disapproval of her message.[56] The court explained that such a ban would violate the heckler's veto doctrine.[57]

Similarly, the Eleventh Circuit alluded to the heckler's veto doctrine in its decision in *Holloman v. Harland*, stating, "While the same constitutional standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason."[58] However, the court also added the caveat that the protection only applies if the speech is not "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"[59] In *Holloman*, a school punished a student for refusing to recite the Pledge of Allegiance and silently raising his fist in the air during the class recitation of the pledge.[60] The court found the school's restriction of the student's free speech unconstitutional because the student's expression "was not directed 'toward' anyone or any group and could not be construed by a reasonable person . . . as a personal offense or insult."[61] In other words, the student's speech did not constitute fighting words.

Interestingly, the Eleventh Circuit's interpretation of the fighting words exception is actually consistent with the heckler's veto doctrine. In *Holloman*, the court equates the use of fighting words with substantial disruption, focusing on the actions of the speaker rather than the response of the listeners. It concluded:

> Even if [the school was] correct in fearing that other students may react inappropriately or illegally, such reactions do not justify suppression of [the student's] expression . . . because the record reveals no way in which he "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."[62]

Thus, if the speaker's expression of fighting words does not cause a substantial disruption, then the school may not silence the speaker, regardless of whether the school reasonably predicted a threat of substantial disruption by listeners. Because the school can only ban speech based on the actions of the speaker under this principle, there is no risk of violating the heckler's veto doctrine. This suggests that

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55. *Id.* at 875.
56. *See id.* at 879.
57. *See id.*
58. *Holloman*, 370 F.3d at 1276.
59. *Id.* (quoting Street v. New York, 394 U.S. 576, 592 (1969)).
60. *See id.* at 1261.
61. *Id.* at 1275.
62. *Id.* at 1276 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

one way to determine whether the substantial disruption is tactical or genuine is by looking at the conduct of the speaker. If the speaker uses fighting words, then the school may assume that the protesting listeners are not hecklers because such words "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[63] However, the court provides little guidance on how to determine when speech constitutes fighting words. On one end of the spectrum is raising a fist during the Pledge of Allegiance, on the other end is doing a Nazi salute, but what if the student had raised a middle finger during the pledge? In addition, as will be discussed more in Part II, courts have looked at whether the speech is targeted, denigrating members of specific groups, as a way to assess whether speech may be limited. However, this leads to Kellam Conover's question in his article, *Protecting the Children: When Can Schools Restrict Harmful Student Speech?*: "Does the speech have to be individually targeted, or are broad political statements also proscribable?"[64] As mentioned previously, in *Nixon*, the district court deemed speech conveying an offensive political viewpoint innocuous, but it is not hard to imagine situations in which such speech could be nonetheless considered inherently inflammatory. For instance, does a history of racial tension make an offensive political viewpoint inherently inflammatory?

To add further to these complications, the Seventh Circuit's opinion in *Zamecnik* indicates that, contrary to the Eleventh Circuit's interpretation of the "substantial disruption" test, there are certain circumstances in which the school may silence the speaker if the hostility incited by the speech threatens or causes substantial disruption, regardless of whether the speaker used fighting words.[65] Indeed, the court acknowledged that although *Tinker* endorsed the heckler's veto doctrine, *Tinker* is "also the source of the 'substantial disruption' test of permissible school censorship."[66] Ultimately, the court concluded that the anger incited by the student's display of the words "Be Happy, Not Gay" did not rise to the level of substantial disruption, and therefore, the school could not constitutionally proscribe such speech.[67] Nevertheless, because the Seventh Circuit has indicated that there are situations in which the "substantial disruption" test can trump the heckler's veto doctrine, even if the speech does not fall under the fighting words exception, the protections ostensibly guaranteed by the heckler's veto doctrine are tenuous. In addition, several questions are left unanswered. For example, how do we distinguish between speech that is proscribable because it is "inherently inflammatory and not inherently provocative speech that schools cannot ban even though the speech may elicit a violent response from other students? When does a response become sufficiently disruptive to justify a ban on the speech?

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63. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

64. Kellam Conover, *Protecting the Children: When Can Schools Restrict Harmful Student Speech?*, 26 STAN. L. & POL'Y REV. 349, 351 (2015).

65. *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879 (7th Cir. 2011).

66. *Id.*

67. *See id.* at 880.

II. A CASE STUDY OF THE DIFFERENT BRANCHES OF THE *TINKER* ANALYSIS

On top of the already tenuous foundation of the heckler's veto doctrine, subsequent applications of the *Tinker* analysis continue to undermine the protections of speech afforded by the doctrine. In fact, both prongs of the *Tinker* test, the "rights of other students" prong and the "substantial disruption" prong, provide an avenue for schools and courts to sidestep the doctrine. Specifically, the rights of others prong presents courts the opportunity to uphold prohibitions of speech based on their own judgment about what constitutes sufficiently offensive speech. At the same time, the "substantial disruption" prong allows hecklers to use the threat of substantial disruption to silence speech that would otherwise be protected.

A. Tinker *Test Prong One: Rights of Other Students*

Like *Fraser*'s plainly offensive standard and the Eleventh Circuit's fighting words exception, the Ninth Circuit's reasoning in *Harper v. Poway Unified School District* avoids running into the heckler's veto doctrine by determining that listeners are not merely hecklers if they are genuinely aggrieved by the challenged speech.[68] Consistent with the fighting words exception, which excludes offensive speech "directed 'toward' anyone or any group"[69] from First Amendment protection, the court focused on the identity of the listeners and whether the speech singles out for denigration a particular, vulnerable group (regardless of whether the group is in the audience). This is problematic because the Ninth Circuit expands the definition of "plainly offensive" or "inherently inflammatory" speech using the "rights of other students" prong of the *Tinker* test. In *Harper*, a student wore a T-shirt to school reading "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED." on the front, and "HOMOSEXUALITY IS SHAMEFUL." on the back.[70] Focusing on the "rights of other students" analysis, the court found it permissible for schools to ban such speech, because speech targeted at students who are members of minority groups that have historically been oppressed "serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn."[71] Interestingly, the court adds the caveat that its holding is limited to "instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[72] It grounds its reasoning in the principles *Tinker* espoused, emphasizing, "Engaging in controversial political speech, even when it is offensive to others, is an important right of all Americans and learning the value of such freedoms is an essential part of a public school education."[73] However, despite the court's attempt to limit its holding, the court's

68. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).
69. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1275 (11th Cir. 2004).
70. *Harper*, 445 F.3d at 1171.
71. *Id.* at 1178.
72. *Id.* at 1183.
73. *Id.* at 1182–83.

rationale is similar to that of the Supreme Court in *Fraser*, where the Court expanded the scope of proscribable speech by imposing its own judgment as to what constitutes impermissibly offensive speech. In her article, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, Abby Marie Mollen states that this violates *Tinker* because "it indirectly gives schools the power to suppress the expression of ideas they oppose by characterizing those ideas as harmful."[74] In fact, the reasoning in *Harper* gives schools even broader discretion to decide when student speech is proscribable because, in addition to speech deemed offensive by societal standards, certain types of speech may be deemed offensive based on the identity of the listener.

Furthermore, the Ninth Circuit's holding in *Harper* conflicts with the Seventh Circuit's decision in *Zamecnik*, where the court indicated that a school could only justify a ban on speech if it presented empirical evidence of the harmful effects of the speech on the particular minority targeted.[75] Such an objective standard would place limits on schools' and courts' ability to impose their own determination of offensive speech. This objective test would also resolve the Eleventh Circuit's heckler's veto doctrine concerns that students could silence a speaker by "[cloaking] their disagreement in the guise of offense or disgust."[76] However, the Seventh Circuit's test fails to account for other identities that may not fit cleanly within a minority category, thus potentially privileging the rights of certain students over others. In his article, *Post*-Tinker, Raymond George Wright posits that *Harper* demonstrates the potential for broadly expanding the "rights of others" prong of the *Tinker* test,[77] noting, "What is emotionally central to students' identities may vary broadly. And whether purely numerical minority status, locally or more broadly, should entirely exhaust the logic of the court's opinion in *Harper* is an unresolved further issue."[78] These unanswered questions and the circuit split over how schools can justify a ban on speech based on the minority status of the listeners provide schools unclear guidance on how to balance the heckler's veto doctrine, which would require allowing potentially offensive speakers to speak, against the rights of minority students who might find themselves the targets of the speaker's derogatory remarks.

B. Tinker *Test Prong Two: Substantial Disruption*

In yet another case upholding a restriction on students' free speech, *Dariano v. Morgan Hill Unified School District*, the Ninth Circuit relied on *Tinker*'s "substantial disruption" prong to hold a school's ban on wearing American flags to school

74. Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1505 (2008).

75. *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 881 (7th Cir. 2011).

76. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1275 (11th Cir. 2004).

77. *See* Raymond George Wright, *Post*-Tinker, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 10 (2014).

78. *Id.* at 11.

on Cinco de Mayo constitutional.[79] The court found the facts of *Dariano* distinguishable from those in *Tinker*, determining that there was significant evidence of "nascent and escalating violence" at the school.[80] Specifically, the school officials' prediction of violence was based on the context of ongoing racial tension and gang violence at the school, in addition to an almost-violent dispute over the display of an American flag during Cinco de Mayo the year before.[81] Notably, the court acknowledged concerns about the heckler's veto because the school was restricting speech based on the reactions to the speech. However, the court nonetheless declined to apply the doctrine and instead relied on *Tinker*'s "substantial disruption" test: "Where speech 'for any reason . . . materially disrupts classwork or involves substantial disorder . . .' school officials may limit the speech."[82] It reasoned that it would be overly burdensome to require schools to specifically identify the source of a violent threat before taking preemptive measures to ensure the safety of students.[83] In fact, because of the special context of the school and the paramount interest in protecting a school's learning environment and its students, the court essentially concluded that the heckler's veto doctrine does not apply at all in the school context. It stated, "[T]he crucial distinction is the nature of the speech, not the source of it," indicating that schools may suppress speech based on the reactions of hecklers.[84] Thus, the Ninth Circuit has determined that *Tinker*'s "substantial disruption" test overrides the heckler's veto doctrine. Because listeners can tactically plan violent or substantially disruptive protests in order to silence a speaker under this principle, the triumph of *Tinker*'s "substantial disruption" test effectively undermines any residual protection of students' free speech rights afforded by the heckler's veto doctrine.

III. POSSIBLE SOLUTIONS

Courts' emphasis on *Tinker*'s "substantial disruption" test is understandable because schools undoubtedly have a strong interest in protecting the safety of students. "[B]ecause school attendance is compelled, students are not able to remove themselves, or be as easily removed, from the situation," and, therefore, "the duty to protect [students] from harm is arguably heightened in this environment."[85] Nevertheless, although schools may be uniquely vulnerable to disruption by speakers' speech, schools are also uniquely equipped to manage different points of view in pursuit of the education of the future citizenry. The following sections discuss the ideal solution to combating the diminishing

79. *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 779 (9th Cir. 2014).
80. *Id.* at 776.
81. *See id.* at 777.
82. *Id.* at 778.
83. *See id.*
84. *Id.*
85. Case Note, Dariano v. Morgan Hill Unified School District, *767 F.3d 764 (9th Cir. 2014), Cert. Denied, 2015 WL 1400871*, 128 HARV. L. REV. 2066, 2072 (2015).

protections of *Tinker*, the factors that schools and courts should be careful to consider in moving forward in order to adequately protect students' free speech rights, and the possibilities of one pragmatic solution.

A. The Ideal

In an ideal world, a solution to the problem of balancing students' rights is to require schools to hold a large assembly to talk through issues whenever there is a dispute over a speaker's expression. This would be in line with the Court's assertion in *Tinker* that as U.S. citizens, we must take the risk of disturbance in order to protect the right to freedom of expression because "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."[86] In fact, this has been a firmly held notion even before *Tinker*. In *West Virginia State Board of Education v. Barnette*, where the Supreme Court found it an unconstitutional violation of First Amendment rights to compel unwilling students to salute the American flag,[87] the Court stated, "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom."[88] Therefore, requiring an open forum in school to allow students to express their different views and opinions and respectfully respond to those of others would truly adhere to the principles espoused in *Tinker* by upholding schools as the "market place of ideas," emphasizing the importance of open discussion, and protecting the free speech rights of students to express different opinions and views, even when such views may be controversial.

B. Balancing the Rights of Others

However, requiring a student assembly for every free speech dispute is likely unrealistic considering time and cost constraints. In formulating a more pragmatic solution, courts should take into account the fact that both the "substantial disruption" prong and the rights of other students prong of the *Tinker* test fail to consider the rights of a third group of students—third-party students who may, at least initially, have no particular feelings about the speaker. The Supreme Court has recognized the right to hear, or the "right to receive information and ideas," as a constitutional right.[89] For example, in *Thomas v. Collins*, the Court held that a state law requiring organizers to register before soliciting union membership was unconstitutional because it impermissibly restricted not only a labor organizer's right to speak, but also the "rights of the workers to hear what he had to say."[90] The

86. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969).
87. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
88. *Id.*
89. Stanley v. Georgia, 394 U.S. 557, 564 (1969).
90. Thomas v. Collins, 323 U.S. 516, 534 (1945).

Supreme Court has even stated that the right to receive information and ideas is "'nowhere more vital' than in our schools and universities."[91] In *Sheck v. Baileyville School Committee*, the district court explained the importance of this right in schools, stating, "The robust traditions of public education in our constitutional jurisprudence contradict assertions that the Bill of Rights constrains the abridgement of free expression for the exclusive benefit of the speaker."[92] Although the court was deciding the constitutionality of a ban on a library book in *Sheck*, the court nevertheless cited the *Tinker* principles to support the protection of students' right to hear: "Public schools are major marketplaces of ideas, and First Amendment rights must be accorded all 'persons' in the market for ideas."[93] Therefore, courts should be cautious of minimizing concerns about the heckler's veto, because by disregarding the doctrine, courts allow hecklers to abridge not only the speaker's free speech rights, but also third-party students' right to hear.

The Supreme Court emphasized the importance of appropriately balancing the rights of all three groups—the speaker, the protesting listeners, and the bystanders—in *Martin v. City of Struthers*, where it decided the constitutionality of a city ordinance prohibiting people from engaging in door-to-door distribution of literature.[94] The Court stated:

> We are faced in the instant case with the necessity of weighing the conflicting interests of the [speaker] in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not.[95]

The Court noted that it was particularly important that it carefully examine the effect and purpose of the ordinance because the ordinance assumes the judgment of the individual householder as the judgment of the community, and criminally punishes a speaker for distributing literature to householders even if the recipients may be welcome to receiving the literature.[96] This consideration offers a way to balance students' rights in public schools. Thus far, there has not been enough attention paid to the rights of third-party students, who, like the individual householder discussed in *Martin*, may welcome the speaker's speech, or at least be open to hearing the speech. Courts have always given great deference to schools to decide what speech students may hear.[97] Therefore, schools, instead of hecklers, should be the ones to make this decision. Because school officials should aspire to

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91. Kleindienst v. Mandel, 408 U.S. 753, 763 (1972) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

92. Sheck v. Baileyville Sch. Comm., 530 F. Supp. 679, 686–87 (D. Me. 1982).

93. *Id.*

94. *See* Martin v. City of Struthers, 319 U.S. 141, 141–42 (1943).

95. *Id.* at 143.

96. *See id.* at 143–44.

97. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

preserve the classroom as the "marketplace of ideas,"[98] consistent with the *Tinker* principles, such a decision should be made with the goal of protecting students' right to speak and to hear.

C. The Pragmatic Solution

Although schools should strive for the ideal assembly solution, perhaps a more pragmatic solution is to determine whether the protesting listeners are genuinely aggrieved, as the Ninth Circuit has attempted to do by looking at the identity of the "hecklers."[99] This is an important consideration because if courts uphold school bans silencing the speaker without determining whether the substantial disruption caused by the listeners is genuine or, instead, for the sole purpose of silencing the speaker, they impermissibly value the free speech rights of the listeners over those of the speaker. By being required to assess whether listeners are genuinely aggrieved before imposing a ban on student expression, a school would only be able to silence the speaker if it could cite to evidence demonstrating the harmful effects of the speech on the listener based on the fact that the student belongs to a group that has been historically oppressed. Adopting a reasonableness standard, like that implied in *Zamecnik*,[100] would enable schools to protect the rights of other students, or the listeners, without improperly restricting the First Amendment rights of speakers and third-party students. As for the "substantial disruption" prong, if a school could not demonstrate that the listeners were genuinely aggrieved students, the school would not be able to ban the speech unless it could cite to specific examples of how the speech substantially interfered with the students' ability to learn. Although this is not a perfect solution, it is perhaps the solution schools must settle for in order to properly preserve the *Tinker* principles.

CONCLUSION

Finding the right balance between ensuring schools are able to advance their educational goals and protecting the First Amendment rights of students is undoubtedly a great challenge. *Tinker*, the paragon of student free speech rights, attempted to formulate a way to achieve an appropriate balance between these interests. However, subsequent decisions have used both the "substantial disruption" prong and the "rights of other students" prong of the *Tinker* test to create exceptions that significantly diminish First Amendment protections for students. Furthermore, because at the time the Supreme Court issued its decision in *Tinker*, it did not have the opportunity to consider the possibility that hecklers could be staging substantial disruption just to silence the speaker, the decision left speakers vulnerable to attack. This note identifies the ideal solution to returning to the

98. *Id.* at 512.
99. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006).
100. *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879 (7th Cir. 2011).

original principles of *Tinker*, but proposes a more pragmatic solution that takes into account an aspect of the free speech analysis that has received little attention: the rights of bystanders and how a decision to silence a speaker based on the demands of potential hecklers must be carefully considered because of its effect on these bystanders, who have a constitutional right to listen to speech. This Note argues that in the context of K-12 public schools, school officials should be the ones to decide what students can hear instead of allowing this determination to be made by hecklers. In order to preserve schools as marketplaces of ideas, as championed by *Tinker*, officials should aim to maximize First Amendment protections for students. With this goal in mind, schools should focus on the identity of the potential hecklers and use an objective test to determine whether the potential hecklers are actually genuinely aggrieved listeners before the school decides to silence the speaker.