

The Penn Program on

# **Democracy, Citizenship, and Constitutionalism**

## **Graduate Workshop**

**Critical Citizens or Loyal Citizens: Exploring the Concept  
of Citizenship in Student Speech Rights Cases<sup>1</sup>**

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<sup>1</sup> This paper is a draft. I apologize for any incomplete citations, etc. Please contact me via email with any questions about sources, etc.

### *Abstract*

This paper examines two student speech rights cases that have led to a split in the US Circuit Courts of Appeal: *Harper v. Poway* (9<sup>th</sup> Cir., 2006) and *Saxe v. State College Area School District* (3<sup>rd</sup> Cir., 2001). The first part argues that the US Supreme Court precedent governing these cases can be better understood when examined through the lens of citizenship and civic education. This examination of the precedent demonstrates that as the Supreme Court justices have delimited student rights and applied them to conflicts between students and schools, their opinions have explicitly and implicitly drawn on different models of “good citizenship” and different visions of how the qualities of a “good citizen” are fostered. Part two turns to the opinions in *Saxe* and *Harper* and examines how the opinions make use of the Supreme Court precedent to justify opposing outcomes. The paper concludes with the argument that the decision in *Harper* accords better with the principles found in the precedent.

### **Introduction**

On February 12, 2008, the United States District Court for the District of Southern California ruled that Poway High School did not violate the rights of self-described Christian students when it prohibited those students from expressing—in school—negative views regarding homosexuality.<sup>2</sup> The case of *Harper v. Poway* began in 2004 and has been considered by the federal district court twice,<sup>3</sup> the Ninth Circuit Court of Appeals twice,<sup>4</sup> and the US Supreme Court once.<sup>5</sup> In all of these proceedings (not including the Supreme Court’s order vacating the Ninth Circuit’s decision), the school has prevailed. After this most recent ruling in favor of the school, the students and their parents are likely to appeal the case to the Ninth Circuit again and it is quite possible that the case will find its way back to the United States Supreme Court. This possibility is enhanced by the fact that, in 2001, the Third Circuit, in the

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<sup>2</sup> *Harper* is discussed at length in part three of this paper. For a discussion of the recent ruling, see “Student’s rights not violated, judge rules,” San Diego Tribune, available at <http://www.signonsandiego.com/news/education/20080213-9999-1m13student.html>.

<sup>3</sup> For the original Federal District Court decision in the case, see 345 F. Supp. 2d 1096 (2004). For a copy of the February 2008 ruling, see <http://www.alliancealert.org/2008/20080213.pdf>.

<sup>4</sup> 445 F.3d 1166 (2006) and 455 F.3d 1052 (2006).

<sup>5</sup> A copy of the US Supreme Court’s order vacating the Ninth Circuit’s decision as moot is available at: <http://www.supremecourtus.gov/orders/courtorders/030507pzor.pdf>.

case of *Saxe v. State College Area School District*,<sup>6</sup> issued an opinion that arguably conflicts with the opinions issued by the Ninth Circuit in *Harper*. This sort of “split” in the Circuits makes it more likely that the Supreme Court will agree to hear the case. It also makes it difficult for schools and lower courts to resolve conflicts of the sort presented in *Harper*.

In this paper, I compare the opinions in *Saxe* and *Harper* in terms of how they apply the student speech rights precedent from the Supreme Court. I first argue that the precedent can be better understood when examined through the lens of citizenship and civic education. My examination of the precedent demonstrates that as the Supreme Court justices have delimited student rights and applied them to conflicts between students and schools, their opinions have explicitly and implicitly drawn on different models of “good citizenship” and different visions of how the qualities of a “good citizen” are fostered. Since the decisions in these cases are based on different visions of citizenship and different beliefs about how children learn to be citizens, the analysis I present in part one of the paper deepens our understanding of the decisions and thus allows us to apply them better to current and future conflicts over student speech rights. In part two of the paper, I turn to the opinions in *Saxe* and *Harper* and examine how the opinions make use of the Supreme Court precedent to justify opposing outcomes, a decision in favor of the school in *Harper* and in favor of the student in *Saxe*. I conclude with the argument that the decision in *Harper* accords better with the principles found in the precedent.

## 1. The Supreme Court Precedent

This part of the paper examines the different visions of citizenship and civic education found within three landmark US Supreme Court cases from the area of student speech rights:

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<sup>6</sup> 240 F.3d 200 (2001). As discussed below, while both cases technically predate the Day of Truth campaign and subsequent lawsuits, the legal questions in *Harper* and *Saxe* and the more recent Day of Truth cases are fundamentally the same.

*West Virginia State Board of Education v. Barnette*,<sup>7</sup> *Tinker v. Des Moines Independent Community School District*,<sup>8</sup> and *Bethel School District No. 403 v. Fraser*.<sup>9</sup> I argue that while the opinions in these cases all endorse the teaching of citizenship by schools, they also draw on three different and somewhat competing visions of the ideal citizen: 1) the liberal republican citizen who values democratic principles and (perhaps) participates in civic affairs; 2) the loyal citizen who feels united with the rest of society; and 3) the “civilized” citizen who is respectful of society’s values and mores. These different visions of citizenship are linked to the justices’ understanding of how student speech should be treated and thus to the justices’ decisions to vote to protect or limit student speech.

For most of the history of American jurisprudence, children were seen as, at most, indirect holders of rights through their parents. Under the case law of the U.S. Supreme Court prior to the 1960s, student rights under the US Constitution, including speech rights, were almost nonexistent. In the words of Martin Guggenheim, a clinical professor at New York University School of Law,

For the vast majority of American history, there was no subject of “children’s rights.” It was only in the 1960s that the Children’s Rights Movement became prominent, when an important literature developed extolling children’s rights and the Supreme Court decided several prominent cases involving children.<sup>10</sup>

This historical reality regarding the rights of students vis-à-vis the State is reflected in the words of an education law textbook published in 1962: “[p]upils have the responsibility of obeying the school laws and rules and regulations of the State and local governing officials....[and] the duty of submitting to orders of their teachers and other school authorities.”<sup>11</sup> However, as

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<sup>7</sup> 319 U.S. 624 (1943).

<sup>8</sup> 393 U.S. 503 (1969).

<sup>9</sup> 478 U.S. 675 (1986).

<sup>10</sup> Guggenheim 2003, 765. Citations removed.

<sup>11</sup> Remmlein 1962, quoted in Imber and van Geel 2004, 115.

Guggenheim also notes, this historical reality “does not mean...that children's legal interests had never before been the subject of judicial decisions.” The courts simply did not frame these interests as “rights.”<sup>12</sup>

Arguably, this approach to children was a reflection of the traditional treatment of children under liberalism. The “liberal model for the attribution of rights is of a competent rational person”<sup>13</sup> and this model, coupled with the belief that children lack rationality, made it difficult to assert rights for children within a liberal framework. Jenks calls liberalism’s notion of the child the “immanent child” and finds its roots in the philosophy of Locke.<sup>14</sup> For Locke, “children do not possess in-built, or *a priori*, categories of understanding nor a general facility to reason....There are no innate capacities, no knowledge lodged in a universal human condition but the drives and dispositions that the child does possess are on a gradient of becoming, towards reason.”<sup>15</sup> Thus, traditional liberalism withholds from children the rights that accompany autonomy because children are seen as lacking the requisite skills for being autonomous.

### 1.1. *West Virginia State Board of Education v. Barnette*

The traditional liberal treatment of children that had been embraced by the US Supreme Court began to show some cracks in the case of *West Virginia State Board of Education v. Barnette*.<sup>16</sup> As explained in the Court’s summary of the background of the case, the policy being challenged in *Barnette* called for the West Virginia schools to play a strong role in the promotion of citizenship.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis*, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in

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<sup>12</sup> Guggenheim 2003, 766.

<sup>13</sup> Brighthouse 2002, 31.

<sup>14</sup> Jenks 2001, 28.

<sup>15</sup> *Id.*, 28-29.

<sup>16</sup> 319 U.S. 624 (1943).

history, civics, and in the Constitutions of the United States and of the State “for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.” Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to “prescribe the courses of study covering these subjects” for public schools....The Board of Education on January 9, 1942, adopted a resolution....ordering that the salute to the flag become “a regular part of the program of activities in the public schools,” that all teachers and pupils “shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.”<sup>17</sup>

In ordering that the salute and pledge take place in all public schools, the West Virginia State Board of Education asserted that “the public schools...are dealing with the formative period in the development in [sic] citizenship” and that “national unity is the basis of national security [and] the flag of our Nation is the symbol of our National Unity transcending all internal differences.”<sup>18</sup>

Thus, *Barnette* presented the Court with a challenge to a policy that placed schools at the center of the State’s effort to create citizens with civic knowledge and a common, unifying identity based on “the ideals, principles and spirit of Americanism.” The challenge to the policy mainly centered on the policy’s flag salute requirement. The salute is explained in Justice Robert Jackson’s majority opinion: “What is now required is the ‘stiff-arm’ salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: ‘I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation,

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<sup>17</sup> 319 U.S. 624, 626, footnote 2. Per West Virginia code, “If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school.” 319 U.S. 624, 671, footnote 1.

<sup>18</sup> *Id.*, 626-627.

indivisible, with liberty and justice for all.’’<sup>19</sup> The parents’ challenge to the law was based on the rights of free speech and free exercise of religion found in the First Amendment. However, the majority opinion focuses mainly on the free speech element, noting that in this case

we are dealing with a compulsion of students to declare a belief....There is no doubt that, in connection with the pledges, the flag salute is a form of utterance....It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.<sup>20</sup>

As summarized by the majority, the case presented the Court with a conflict

...between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.<sup>21</sup>

While it is true that the majority opinion does not explicitly refer to “children’s rights” or “the right of a student to speak or not to speak,” it is also true that the opinion, unlike earlier cases dealing with the issue of sending children to private rather than public school<sup>22</sup> or with the teaching of foreign languages,<sup>23</sup> is not clearly based on “parents’ rights” or “the right of parents to have their child speak or not speak” either. However, since the majority opinion in *Barnette* focuses on freedom of speech, and the students were the ones being compelled to speak, it seems reasonable to conclude that the majority based its decision at least partly on the rights of the students, rather than the rights of the parents. As stated by the majority, “The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be **imposed upon the individual** by official authority.”<sup>24</sup>

In striking down the compulsory flag salute, the *Barnette* majority seems to apply a somewhat different vision of citizenship and the power of the State than that contained in the

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<sup>19</sup> Id., 628-629.

<sup>20</sup> Id., 631-633.

<sup>21</sup> Id., 630-631.

<sup>22</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>23</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>24</sup> 319 U.S. 624, 636. (Emphasis added.)

policy of West Virginia and the West Virginia State school board. Rather than being primarily concerned with “national unity,” the majority opinion stresses the importance of individual freedom and the danger of excessive state power: “[Striking down the law] is only to adhere as a means of strength to **individual freedom of mind in preference to officially disciplined uniformity** for which history indicates a disappointing and disastrous end.”<sup>25</sup> This preference for “individual freedom of mind” over “disciplined uniformity” partly may be explained by the historical context of the case: the school board policy was adopted in 1942 and the case was decided in 1943. In the midst of World War II, the specter of totalitarianism was on Justice Jackson’s mind as he wrote the majority opinion:

As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to embrace. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. **Compulsory unification of opinion achieves only the unanimity of the graveyard.**<sup>26</sup>

In contrast, in a case decided just three years earlier,<sup>27</sup> the Court, voting 8-1 to uphold a school pledge policy, provided much of the language West Virginia included in the policy challenged in *Barnette*. In that case, *Minersville School District v. Gobitis*, as explained in the majority opinion in *Barnette*, the Court “reason[ed] that ‘National unity is the basis of national security,’ that the authorities have ‘the right to select appropriate means for its attainment,’ and hence reach[ed] the conclusion that such compulsory measures toward ‘national unity’ are

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<sup>25</sup> *Id.*, 637. (Emphasis added.)

<sup>26</sup> *Id.*, 640-641. (Emphasis added.)

<sup>27</sup> *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).



constitutional.”<sup>28</sup> In upholding the policy, the *Gobitis* Court held that a reasonable legislature could conclude “that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.”<sup>29</sup>

The *Barnette* decision justifies its break with liberalism’s traditional treatment of children by arguing that in order for children to become the kind of “good citizens” that the justices envisioned, the State must respect individual rights and show children that these rights have meaning.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. **That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.**<sup>30</sup>

Thus, the majority in *Barnette* accepts the claim that the State may legitimately foster a sense of unity and that it may do so through the public schools. However, the majority balances the State’s interest in fostering unity with two other needs: first, the need to develop citizens who respect and value individual freedom; and second, the need to protect the “right to differ as to things that touch the heart of the existing order.”<sup>31</sup> Meeting the first need helps promote the second since citizens who respect and value individual freedom will fight to protect the right to differ. Meeting the second need protects the social environment conducive to “intellectual individualism and the rich cultural diversities that we owe to exceptional minds.”<sup>32</sup> Thus,

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<sup>28</sup> 319 U.S. 624, 640. Citations removed.

<sup>29</sup> *Id.*, 635, footnote 16.

<sup>30</sup> *Id.*, 637.

<sup>31</sup> *Id.*, 642.

<sup>32</sup> *Id.*, 642.

meeting these needs helps guard against the rise of totalitarianism by buttressing the power of the individual vis-à-vis the State and preventing the State from gaining a monopoly on ideas.

The concurring opinions of Justice Hugo Black and Justice Frank Murphy in *Barnette* emphasize a somewhat different set of concerns. First, they focus more on the principles of free exercise than on free speech.<sup>33</sup> Second, in place of the majority's concern with the potential rise of totalitarianism, the concurring opinions stress the importance of social order and respect for the law:

No **well-ordered society** can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves **obediently to laws** which are either imperatively necessary to **protect society as a whole from grave and pressingly imminent dangers** or which, without any general prohibition, merely regulate time, place or manner of religious activity.<sup>34</sup>

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, **except in so far as essential operations of government may require it for the preservation of an orderly society....**<sup>35</sup>

In comparison to the majority opinion, the concurring opinions place greater emphasis on the State's interest in instilling loyalty and unity; nonetheless, they join the majority in striking down the pledge requirement because the State's interest in requiring the pledge is outweighed by the burden the requirement places on free exercise.

Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of **loyalty and patriotism by requiring a declaration of allegiance** as a feature of public education, or unduly

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<sup>33</sup> In the words of Justice Black, "We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments" (id., 643). Justice Murphy is more emphatic on the issue of free exercise: "But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches" (id., 645).

<sup>34</sup> Id., 644. Justice Black, concurring. (Emphasis added.)

<sup>35</sup> Id., 645, Justice Murphy, concurring. (Emphasis added.)

belittle the benefits that may accrue therefrom, I am impelled to conclude that **such a requirement is not essential to the maintenance of effective government and orderly society.**<sup>36</sup>

Words uttered under coercion are proof of loyalty to nothing but self-interest. **Love of country must spring from willing hearts and free minds**, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.<sup>37</sup>

Overall, the visions of good citizenship contained within the *Barnette* majority and concurring opinions both differ from and overlap with each other. All three opinions acknowledge the State's interest in fostering national unity. However, while the majority opinion emphasizes the importance of having citizens who are capable of exercising independent thought and resisting totalitarianism, the concurring opinions emphasize the importance of having citizens who will respect and promote social order.

In comparison with the concurring opinions in *Barnette*, Justice Felix Frankfurter's dissent in the case takes a further step away from the reasoning of the *Barnette* majority. Although space precludes detailed discussion of Justice Frankfurter's opinion, one contrast between his opinion and that of the majority is worth noting here. For Frankfurter, the West Virginia flag salute and pledge of allegiance policy is constitutional for two main reasons. First, since parents are not *compelled* to send their children to public school (if parents object to the pledge, they can enroll their children in private school), no one is being *compelled* to participate. Second, any compulsion that may be read into the West Virginia policy is not the compulsion to *believe* anything; the policy merely requires students to *perform* a particular action.

Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it.<sup>38</sup>

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<sup>36</sup> *Ibid.* (Emphasis added.)

<sup>37</sup> *Id.*, 644. Justice Black, concurring. (Emphasis added.)

<sup>38</sup> *Id.*, 664.

One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.<sup>39</sup>

For these reasons, Frankfurter argues that the Court should respect the State's decision to attach conditions to the provision of free education and defer to the State's judgment that the pledge is "a measure conducive to the training of children in good citizenship."<sup>40</sup>

Why did the majority in *Barnette* not accept Frankfurter's argument that the pledge requirement was constitutional because it only amounted to "conformity of action"? On the surface, the difference between the two opinions boils down to whether or not the State has the *power* to compel the flag salute and pledge, with the majority arguing that compelling people to speak about political matters exceeds the State's constitutional powers and the dissent saying that the Constitution only limits the State's power to compel belief. However, the opinions also seem separated by different visions of good citizenship and civic education. For the majority, exposing children to this example of state power—the power to compel a citizen to speak, absent some immediate, important need such as for testimony at a criminal trial—makes it less likely that they will learn to be the kind of citizens who demand a State with limited power. In addition, the pledge and salute requirement favors the creation of citizens with a sense of patriotic loyalty based on participation in rote exercises over the creation of citizens with the capacity for "individual freedom of thought." The majority opinion, unlike Justice Frankfurter's dissent, rather than embracing the vision of citizenship contained in the West Virginia policy—that of "loyal, united citizens"—recognizes the need for schools to foster a sense of unity and common identity in future citizens, while at the same arguing that these citizens must be taught to respect

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<sup>39</sup> Id., 656.

<sup>40</sup> Id., 655.

the rights of others, in particular the right to dissent. Justice Frankfurter’s opinion—as well as the concurring opinions—arguably reflects a lack of concern for how the pledge policy might negatively impact the students’ future citizenship skills. If “good citizenship” does not require robust individual thought, a policy like West Virginia’s is not particularly troubling.

Overall, the opinions in *Barnette* all endorse the power of the State to teach “good citizenship.” However, their different visions of good citizenship lead them to different conclusions to the question of whether the State’s power extends to requiring students to perform the salute-pledge. However, while it is true that the majority endorses a different vision of citizenship than that endorsed by Justice Frankfurter, the majority opinion does not explicitly recognize the existence of children’s rights. Nor does it call for schools to respect the right of students to dissent *actively* (as opposed to respecting the students’ right to refuse to participate in the pledge) or for the State, through schools or otherwise, to seek to develop citizens capable of and willing to dissent. Rather, the majority focuses on avoiding the dangers that could come from granting too much power to the State to promote beliefs and unity in the citizenry. In other words, the majority in *Barnette* embraces a model of liberal republican citizenship: citizens are to have robust rights and the State is to have limited power over instilling beliefs so that citizens are able to participate in resisting state power. In the context of schools, in order to increase the likelihood that children will become good liberal republican citizens, they are to be treated at least *as if* they had rights.

### 1.2 *Tinker v. Des Moines Independent Community School District*

Twenty-six years after handing down its decision in *Barnette*, the Court was faced with a case involving students who, rather than claiming a right not to perform an action required by the State (such as saluting the flag and saying the pledge of allegiance), were demanding recognition

of their right to perform an action to protest against a policy of the State. The facts of the case, *Tinker v. Des Moines Independent Community School District*,<sup>41</sup> are succinctly summarized in the majority opinion.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired -- that is, until after New Year's Day.

Compared to the *Barnette* decision, the majority opinion in *Tinker* more clearly endorses the existence of *de jure* student rights, rather than only calling on the State to treat children *as if* they were rights-bearing individuals. In other words, unlike the majority in *Barnette*, the majority in *Tinker* sees the case before it as specifically involving rights of students. While it was possible to argue that children still had no constitutional rights *per se* following *Barnette*, after *Tinker*, the precedent, at least as regards speech rights, was clear:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.<sup>42</sup>

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<sup>41</sup> 393 U.S. 503 (1969).

<sup>42</sup> *Id.*, 506.

However, the majority opinion also recognizes the interests of the State stemming from the “special characteristics of the school environment.”

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.<sup>43</sup>

Thus, the question for the majority in *Tinker* was how to apply free speech rights to the context of student speech in school. Just as different visions of good citizenship seem to have influenced the opinions in *Barnette*, the ways the justices applied free speech rights to the school context in *Tinker* reveal some of the qualities of their particular visions of “good citizenship” and the school’s role in shaping future citizens. However, in contrast with the *Barnette* majority, the *Tinker* majority explicitly embraces a model of active, participatory citizenship. For the majority, the case is not only about limiting the power of the State (freedom from State action); it is also about enhancing the capabilities of individuals (freedom to participate and dissent).

Broadly speaking, much of the language in the majority opinion in *Tinker* echoes the concerns of the majority opinion in *Barnette*. The *Tinker* opinion declares that, “in our system, state-operated schools may not be enclaves of totalitarianism.”<sup>44</sup> The opinion’s assertion that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate,” implies that the majority was concerned that allowing schools too much control over the content of the expression that children are exposed to could lead to what Mill called the “despotism of the mind.”<sup>45</sup> The majority’s concern with individual rights is further articulated through the following quote from the Court’s opinion in *Meyer v. Nebraska*, an earlier case involving limits on the State’s power to use schools to “foster a homogeneous people.”

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<sup>43</sup> Id., 507.

<sup>44</sup> Id., 511.

<sup>45</sup> Mill, J. S. 1974, 177.

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.<sup>46</sup>

Thus, the *Tinker* opinion, like the *Barnette* opinion, limits the power of schools to control student speech because 1) we must limit the power of the State to develop and enforce unity of thought and 2) teaching students to be good citizens requires that they be treated at least somewhat in the same way that adults are treated. However, *Tinker* differs from *Barnette* in at least three ways. First, it more explicitly states that children have rights (unlike in *Barnette*, where it is not clear if the Court is saying that children *have* rights or that we should treat them *as if* they had rights). Second, the *Tinker* majority sees the public schools as part—albeit a special part—of the public sphere, and thus they must be conducive to robust expression. Third, schools should actively seek to develop children into citizens who are capable of effectively participating in that public sphere. Thus, the opinion embraces a somewhat different vision of good citizenship and appropriate civic education, as demonstrated by its inclusion of a quote from another earlier case, *Keyishian v. Board of Regents*, which quoted an even earlier case, *Shelton v. Tucker*.

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”<sup>47</sup>

For the *Tinker* majority, it is not enough to simply restrict the power of the State to compel belief. Rather, public spaces, including schools, must be places where individuals,

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<sup>46</sup> 393 U.S. 503 (1969), 511-512.

<sup>47</sup> *Id.*, 512. Citations removed.



including students, may participate in a robust “marketplace of ideas.” In addition, *Tinker* also embraces *Barnette*’s connection between protecting students’ current speech and preparing students for their future roles as citizens. The *Tinker* opinion makes this connection by quoting what arguably has become the best-known passage from *Barnette*:

That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>48</sup>

Thus, the majority opinion in *Tinker* clearly embraces *Barnette*’s vision of students being treated, at least somewhat, as citizens in a liberal democracy. However, *Tinker* goes much further, recognizing not only students’ negative freedom (to not be compelled to say the pledge and salute the flag) but also their positive freedom (to speak and participate in the marketplace of ideas). While the opinion also establishes that student speech rights in school are limited compared to the speech rights afforded the general public (“conduct by the student, in class or out of it, which...materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech”<sup>49</sup>), the majority in *Tinker* seems more concerned with placing limits on the power of the *schools* than on limiting the rights of students.

Nonetheless, although it is fairly clear what the *Tinker* majority thinks schools should *not* be able to do, it is less clear what the majority thinks the schools should do in order to encourage the development of students as citizens. The opinion is more explicit on this question than the *Barnette* opinion is: the *Tinker* majority opinion believes that students should be exposed to a “multitude of tongues” and have experience participating in the free exchange of ideas, and schools are a good place for this to occur. In addition, in embracing *Barnette*’s connection

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<sup>48</sup> Id., 507.

<sup>49</sup> Id., 513.

between student speech and learning citizenship, the majority implies agreement with the view that failing to respect the rights of students will lead to the creation of citizens who do not value and respect democratic principles. The supposed connection between how students are treated in school, what kind of citizens they become, and the health of the democratic system was clearly presented to the Court by the lawyers for the students in *Tinker*:

Because the principle of free speech, as embodied in the First Amendment, will not be recognized by our citizens as fundamental to our society unless that principle is a living reality during their formative school years, the Courts have recognized that school authorities not only are forbidden to adopt regulations that infringe upon the First Amendment rights of students, but that **schools should be treated as models of our democratic society. The rights of free speech and free expression which are to be encouraged in the adult democratic society must affirmatively be fostered in the school system.**<sup>50</sup>

In other words, not only are schools to respect student speech so as to instill respect for free speech rights. The exercise of the right to free speech must be actively encouraged by the schools and schools should be a place where students learn to be democratic citizens by *being* democratic citizens (this seems to be an endorsement of a “learn by doing” approach). While the vision offered by the students’ lawyers seems to be in harmony with the arguments of the *Tinker* majority, the majority did not explicitly adopt it.

The kind of citizen envisioned by the majority in *Tinker* thus may be summarized as the same as that envisioned by the majority in *Barnette*—a liberal citizen who respects the rights of others and values democratic government—with an added emphasis on participation in the public sphere. This model of “good citizen” stands in contrast with that of Justice Black in his dissent in *Tinker*. In his dissent, like in his concurrence in *Barnette*, Justice Black hints at a vision of good citizenship that will be more strongly endorsed by the Court later: the orderly,

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<sup>50</sup> Brief for Petitioner on Writ of Certiorari, *Tinker v. Des Moines Independent Community School District*, 1969, 13. Emphasis added.

disciplined citizen. For example, for Black, the wearing of the armbands by the students in *Tinker* was sufficiently disruptive to uphold its restriction by the school.<sup>51</sup> For the majority, the speech was not sufficiently disruptive. I would argue that this disagreement over the disruptiveness of the armbands is not due to different readings of the factual record in the case. Rather, the two different conceptions of what constitutes a “disruption” to the work of the school are closely connected to how the majority and Justice Black differently perceived the schools’ mission.<sup>52</sup> For the *Tinker* majority, “controversial” speech in schools, even if it “distracts” (in Black’s words) students from their academic work, is not “disruptive” to the work of the school because it is important to the schools’ mission to teach citizenship that students be exposed to different ideas and be involved in fervent discussions. Likewise, the majority is not concerned about students “defy[ing] and flout[ing] orders of school officials.”<sup>53</sup> While the majority agrees that schools need to impose some degree of order, defying orders of the State is sometimes the duty of a “good citizen,” especially when that order is designed to stifle debate on an important issue. Conversely, while Justice Black might not disagree with the assertion that some orders of the State should be defied, he is more concerned with schools preparing citizens who will live in harmony with others in an orderly society. Thus, the avoidance of disruption in the schools and the instilling of obedience in students—both of which will serve to promote social order and peace—become more important than having a vibrant exchange of different ideas in the school setting. In the words of Justice Black:

The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. **Uncontrolled and uncontrollable liberty is an enemy to domestic peace.** We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. **School**

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<sup>51</sup> 393 U.S. 503 (1969), 518.

<sup>52</sup> Yudof 1995, 366-369.

<sup>53</sup> 393 U.S. 503 (1969), 518.

**discipline, like parental discipline, is an integral and important part of training our children to be good citizens -- to be better citizens....**One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.<sup>54</sup>

The final sentence in this quote from Black points to another possibly important factor in the outcome of *Tinker*. The opinion was handed down in 1969, a year after violent demonstrations at the Democratic convention in Chicago and in several U.S. cities after the assassination of Martin Luther King. The majority may have seen the wearing of the armbands as an example of the kind of nonviolent protest that should be encouraged in place of the violent protests rocking the nation. These same protests, and the violent and extreme elements connected with some of them, may have been seen by Justice Black as cause for concern: things were getting out of control and the majority's opinion would only make things worse.

Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.<sup>55</sup>

As was noted in the previous section, Justice Black voiced some concern with the preservation of social order in his opinion striking down the State's pledge and salute requirement in *Barnette*. His concerns about preserving order in the schools may at least partly explain why he voted in favor of the school's policy in *Tinker*. In addition, Black's position makes sense vis-à-vis his vision of citizenship: children should be disciplined in order to learn how to be disciplined, orderly citizens. Seventeen years later, the Court would have the

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<sup>54</sup> Id., 525.

<sup>55</sup> Ibid.

opportunity to consider the accuracy of Black’s prediction that the *Tinker* decision would lead to disorder in the schools.

### 1.3. *Bethel School District No. 403 v. Fraser* and the Retreat from *Tinker*

By the time the Court handed down its decision in *Bethel School District No. 403 v. Fraser*<sup>56</sup> in 1986, the ideological make-up of the Court had changed. *Tinker* was decided by a vote of 7-2 by a Court that had Thurgood Marshall—a justice whose overall voting record strongly favored the liberal side—at its ideological center.<sup>57</sup> By 1974, five years after Warren Burger had joined the Court as Chief Justice, the Court had become somewhat more conservative than the Court that had decided *Tinker*.<sup>58</sup> That year, the year that the Court heard the case of *Goss v. Lopez*, Justice Marshall had been replaced at the center by Justice Byron White,<sup>59</sup> a justice whose voting record placed him squarely in the moderate camp.<sup>60</sup> Although the *Goss* Court voted 5-4 in favor of granting due process rights to students when they are suspended by schools, the number of pro-student votes had shrunk from seven at the time of *Tinker* to five in *Goss*.

According to Richard Arum, the *Goss* decision marks a turning point, the end of the “student rights contestation” period of the Court.<sup>61</sup> The next period, what Arum calls the “pro-school authority” period began in 1977, when the Court voted 5-4 to uphold the constitutionality of corporal punishment in the schools and held that no process need be provided prior to

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<sup>56</sup> 478 U.S. 675 (1986).

<sup>57</sup> Marshall was at the center of the Court in 1967 and 1968 (the year the Court heard the *Tinker* arguments). Epstein et al. forthcoming, 1303.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> White’s record was far from consistent. He began his term in 1961 as a centrist and moved from the center to the right over his career. By his retirement in 1991, he had moved substantially to the right. Martin and Quinn 2005, 148.

<sup>61</sup> Arum 2003, 60. Arum argues that *Tinker* marks the beginning of this period and *Goss* the end. See note 14 for a discussion of the gradual shift from a liberal pro-student majority to a conservative pro-school majority on the Court.

inflicting such punishment.<sup>62</sup> By that year, Justice Marshall had gone from being at the ideological center of the Court at the time of *Tinker* to being the second most liberal justice (after Justice Brennan).<sup>63</sup> In 1982, Marshall, by then the Court's most liberal justice, voted with the dissent in a case in which the Court voted 6-3 to overrule a lower court's finding that a school's disciplinary policy was unconstitutional.<sup>64</sup> Three years later, in the case of *New Jersey v. TLO*,<sup>65</sup> the Court held that schools do not need to have "probable cause" prior to conducting a search of a student's possessions.

In the next year, 1986, the Court heard arguments in the *Fraser* case. The facts of this case are important for evaluating the decision from the perspective of citizenship and civic education.

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government.<sup>66</sup>

The justices differed in the ways they chose to characterize Fraser's speech. In his majority opinion ruling in favor of the school, Chief Justice Warren Burger (joined by four justices),

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<sup>62</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977). The shift from the 5-4 pro-student vote in *Goss* to the 5-4 pro-school outcome of *Ingraham* was not due to the replacement of Justice Douglas with Justice Stevens in 1975 (since Stevens voted for the student in *Ingraham* just as Douglas did in *Goss*). Rather, Justice Stewart, who voted for the student in *Goss*, voted to uphold corporal punishment in *Ingraham*. Such a switch makes sense in light of Epstein et al's analysis, which characterizes Justice Stewart as a consistent moderate on the Court who often was seen as a "swing-vote" (30).

<sup>63</sup> Martin and Quinn 2005, 148.

<sup>64</sup> *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966 (1982). While this shift from the center to the far left by Marshall is striking, it is likely only partially the result of a shift of the Court to the right. Another cause for the shift is a shift in Marshall's voting pattern from the center of the political spectrum to the left. However, a general gradual shift to the right is also supported by the fact that over the same period, Justice White, whose voting pattern was more stable than Marshall's, also shifted from his position as the third most conservative justice at the time of *Tinker*, to the fourth most liberal at the time of *Ingraham* (Martin and Quinn 2005, 148).

<sup>65</sup> 469 U.S. 325 (1985).

<sup>66</sup> 478 U.S. 675 (1986), 677.

creates a vivid image of a speech that was “lewd”<sup>67</sup> and filled with references to “an elaborate, graphic, and explicit sexual metaphor.”<sup>68</sup>

The **pervasive sexual innuendo** in Fraser's speech was **plainly offensive** to both teachers and students - indeed to any mature person. By **glorifying male sexuality**, and in its verbal content, the speech was **acutely insulting** to teenage girl students. The speech could well be **seriously damaging** to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.<sup>69</sup>

Based on this characterization of Fraser's speech, and the reaction of students listening to it (“some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech”<sup>70</sup>), the majority held “that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”<sup>71</sup> For Burger, the fact that this “lewd” and “offensive” speech was made *in school* before an audience of “children” distinguished Fraser's speech from the speech in the case of *Cohen v. California*, 403 U.S. 15 (1971), in which “a sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens.”<sup>72</sup> In cases where the speech is sexually explicit and the audience may include children, the Court “recognize[s] the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children - especially in a captive audience - from exposure to sexually explicit, indecent, or lewd speech.”<sup>73</sup>

While Burger notes “the marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of [Fraser's] speech,”<sup>74</sup> and mentions that a teacher

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<sup>67</sup> Ibid.

<sup>68</sup> Id., 678.

<sup>69</sup> Id., 683. Emphasis added.

<sup>70</sup> Id., 678.

<sup>71</sup> Id., 685.

<sup>72</sup> Id., 682. In the *Cohen* case, Cohen wore a jacket with the words “fuck the draft” on the back.

<sup>73</sup> Id., 684.

<sup>74</sup> Id., 680.

“found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class,” the majority opinion does not seem to apply the *Tinker* approach of asking whether the speech “materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of others.”<sup>75</sup> Rather, it seems to hold that “lewd” speech may be restricted regardless of whether or not it is “disruptive.” In contrast, Justice Brennan, concurring in the *Fraser* judgment, disagrees with the majority’s characterization of the speech as “lewd” and “obscene” and applies the *Tinker* standard, concluding that the school’s actions were justified under the standard “in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse”<sup>76</sup> and the school’s interest in ensuring that the school assembly “proceed[ed] in an orderly manner.”<sup>77</sup> Justice Marshall also applies *Tinker* in his dissent but concludes that “the School District failed to demonstrate that respondent’s remarks were indeed disruptive.”<sup>78</sup> However, neither the opinion of Brennan nor the opinion of Marshall provides in-depth discussion of citizenship.

While Chief Justice Burger spends considerable time in his opinion emphasizing the potentially “seriously damaging” lewd and offensive character of Fraser’s speech, the full text of the speech shows that its sexual nature lay not in its use of particular obscenities or explicit references to sex but in the double entendre of the words Fraser used.

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds. Jeff is a man who will go to the very end—even the climax, for

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<sup>75</sup> 393 U.S. 503 (1969), 513.

<sup>76</sup> 478 U.S. 675 (1986), 687.

<sup>77</sup> *Id.*, 689.

<sup>78</sup> *Id.*, 690.



each and every one of you. So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.<sup>79</sup>

While it is difficult to argue that Burger is wrong in finding the speech “lewd” (lewdness arguably lies in the ear of the beholder), I would argue that the force behind the majority opinion’s decision lies more in Burger’s perspective on the nature of “good citizenship” and the role of the schools in creating “good citizens” than in the “lewdness” of the speech. The overarching theme in his perspective on citizenship is *civility*.

The role and purpose of the American public school system were well described by two historians, who stated: “[P]ublic education must **prepare pupils for citizenship** in the Republic. . . . It must inculcate **the habits and manners of civility as values in themselves** conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” These fundamental values of “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these “fundamental values” must also take into account **consideration of the sensibilities of others**, and, in the case of a school, **the sensibilities of fellow students**. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in **teaching students the boundaries of socially appropriate behavior**. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.<sup>80</sup>

For Burger, the need to develop citizens who practice civility stems from the needs of the democratic system: “the ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.”<sup>81</sup> And schools are a natural place for the State to seek to inculcate civility and other values essential to democratic citizenship. “Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and

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<sup>79</sup> Id., 687.

<sup>80</sup> Id., 681. Emphasis added.

<sup>81</sup> Id., 683.

offensive terms in public discourse....The inculcation of these values is truly the ‘work of the schools.’”<sup>82</sup> Burger further explains the connection between restricting “lewd” speech in schools and the need for schools to foster “civility”:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a **civilized** social order. Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of **civil discourse** and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of **civil, mature conduct** cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.<sup>83</sup>

Perhaps more striking is the sweeping, exclusive power that Burger grants schools in deciding what is and is not an “appropriate form of civil discourse”: “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”<sup>84</sup>

Thus, the majority decision in *Fraser* leaves us with a very different vision of both citizenship and the relationship between schools and students than the vision left by the majority opinion in *Tinker*. The *Fraser* majority’s vision of “civil” citizens respecting and living in harmony with each other and the social order stands in stark contrast with *Tinker*’s vision of “leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues.”<sup>85</sup> Accordingly, these different visions of citizenship lead the *Fraser* majority and the *Tinker* majority to embrace different visions of civic education. While these visions may not be inherently contradictory, the majority opinion in *Fraser*, coupled with

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid. Emphasis added.

<sup>84</sup> Ibid.

<sup>85</sup> 393 U.S. 503 (1969), 512. (Citations removed.)

subsequent decisions upholding school restrictions on student speech<sup>86</sup> and limiting student rights in other areas,<sup>87</sup> has created a legal framework that has reasserted schools' authority over students. As summarized by education law scholar Mark Yudof:

Public schools are increasingly viewed by courts today as total institutions, devoted to the socialization of the young and to the inculcation of values and skills. Students are viewed as members of the school community who must adhere to communal norms. Today, children in public schools are viewed less as the bearers of individual rights and more as the repositories of community responsibilities.<sup>88</sup>

Or, as another scholar puts it, somewhat more ominously:

Simply put, in the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate. The judiciary's unquestioning acceptance of the need for deference to school authority leaves relatively little room for protecting students' constitutional rights.<sup>89</sup>

## 2. Applying the Precedent to *Saxe* and *Harper*

Within this context of constricting student rights, conservative Christian students and activists have been seeking an expansion of student speech rights. In a series of cases filed across the country, conservative Christian students have asserted a right to speak negatively in school about homosexuality.<sup>90</sup> For courts deciding these cases, *Tinker* and *Fraser* provide the principles that are to guide the adjudication of such rights claims. This part of the paper focuses on two recent Federal Circuit Court of Appeals cases—*Saxe v. State College Area School District*<sup>91</sup> and *Harper v. Poway Unified School District*<sup>92</sup>—and compares how the two courts ruling in these

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<sup>86</sup> E.g., *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and *Morse v. Frederick*, 551 U.S. \_\_\_\_ (2007).

<sup>87</sup> 469 U.S. 325 (1985).

<sup>88</sup> Yudof 1995, 366. (Citations removed.)

<sup>89</sup> Chemerinsky 1999-2000, 30.

<sup>90</sup> E.g., *Zamecnik v. Indian Prairie School District #204 Board of Education*, 2007 U.S. Dist. LEXIS 94411, filed in the U.S. District Court for the Northern District of Illinois and *Arthurs v. Sampson County Board of Education*, filed in the U.S. District Court for the Eastern District of North Carolina (for a copy of the complaint, see: <http://www.telladf.org/UserDocs/ArthursComplaint.pdf>).

<sup>91</sup> 240 F.3d 200 (2001).

<sup>92</sup> 445 F.3d 1166 (2006).

cases used the Supreme Court precedent discussed above to justify very different outcomes. After discussing the content of the opinions, I compare the visions of citizenship and civic education found in *Saxe* and *Harper* with those found in the Supreme Court precedent. I conclude with the argument that the decision in *Harper* better applies the precedent because the decision frames the conflict over student rights as involving both the rights of students and the learning of citizenship.

### 2.1. The Opinions in *Saxe* and *Harper*

The Third Circuit Court opinion in the first case, *Saxe v. State College Area School District*,<sup>93</sup> is of particular interest because it was written by then Judge, now Supreme Court Justice, Samuel Alito. The facts in this case differ from the facts in *Harper* and the other cases filed on behalf of conservative Christian students, but many of the legal questions are the same. In particular, in both cases the courts consider the power of the schools to limit speech that may be seen to disparage non-heterosexuality. In *Saxe*, two students brought suit alleging that the State College Area School District's Anti-Harassment Policy violated their free speech rights. The District Court from which the case was appealed to the Third Circuit summarized the students' claims:

Plaintiffs identify themselves as Christians and state that they believe that homosexuality is a sin. Further, they believe that they feel compelled by their religion to 'speak out' about the sinful nature and harmful effects of homosexuality and other topics, especially moral issues. Plaintiffs allege that they fear being punished for expressing their religious beliefs, whether verbally, by symbols or acts, or otherwise....<sup>94</sup> Plaintiffs claim that they wish to engage in speech protected by the First Amendment and that their speech has been chilled by the Policy.<sup>95</sup>

According to the District Court, the students' arguments focused on the provisions in the school

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<sup>93</sup> 240 F.3d 200 (2001).

<sup>94</sup> In addition to their free speech claim, the students also claimed that the restrictions infringed their right to free exercise of religion under the First Amendment. Since the Third Circuit did not consider this claim in *Saxe*, the question of free exercise rights is not reviewed in this paper.

<sup>95</sup> 77 F.Supp.2d 621 (1999), 622-623.

policy that defined “harassment.” Harassment under the policy required two things. “First, there must be verbal or physical conduct based on actual or perceived physical characteristics. Second, the conduct must be intended to or actually cause substantial interference with a student's school performance, or must create an intimidating, hostile or offensive environment.”<sup>96</sup>

The District Court upheld the school’s policy, rejecting the students’ claim that the policy was overbroad and thus chilling of protected speech.

We conclude that the Policy properly defines “harassment” as conduct based on a person's physical characteristics which substantially affects school performance or creates a hostile atmosphere. In addition, the Policy adds a gloss that the type of “harassment” which is prohibited is that which already is prohibited by law. The Policy simply gives school officials the ability to take action against unlawful harassment by or against persons subject to their authority. Regardless of the specific constitutional provision on which plaintiffs choose to rely, the Policy does not violate the Constitution of the United States.<sup>97</sup>

The students appealed the district court’s decision and the Third Circuit reversed. In the words of now Justice Alito,

We disagree with the District Court's reasoning. There is no categorical “harassment exception” to the First Amendment's free speech clause. Moreover, the SCASD Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law.... There is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.<sup>98</sup>

In his condemnation of the school’s policy, Justice Alito’s words echo the policy concerns of the majority in *Tinker*.

By prohibiting disparaging speech directed at a person’s “values,” the Policy strikes at the heart of moral and political discourse—the lifeblood

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<sup>96</sup> *Ibid.*, 624.

<sup>97</sup> *Ibid.*, 627.

<sup>98</sup> *Saxe*, 206.

of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about “values” may offend is not cause for its prohibition, but rather the reason for its protection: “a principal ‘function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’”<sup>99</sup>

Justice Alito’s opinion thus strikes down the school’s policy, arguing that in *Tinker*, the Court emphasized that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” In this case, “although SCASD correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.”<sup>100</sup>

Justice Alito’s decision in *Saxe* stands in stark contrast to the opinions issued in the second major appellate case, *Harper v. Poway Unified School District*.<sup>101</sup> In this case, Chase Harper claimed that his First Amendment rights were infringed when he was removed from his high school classroom for wearing the following t-shirt:<sup>102</sup>



(FRONT)



(BACK)

According to Harper’s complaint, he was sent home from school after his principal told him that

<sup>99</sup> Ibid., 210.

<sup>100</sup> Ibid., 217.

<sup>101</sup> As discussed in the introduction, there have been several rulings in the *Harper* case. My discussion focuses on the rulings of the Ninth Circuit that were subsequently vacated as moot by the US Supreme Court. 2007 U.S. LEXIS 2830, 2007.

<sup>102</sup> Photos taken by Deputy Sheriff at Poway High School on the day of the incident (downloaded from [www.adf.org](http://www.adf.org)).

the shirt was inappropriate and that Harper had to “leave his faith in the car” before coming into the school building.<sup>103</sup> The principal informed Harper’s father that Harper had been suspended for wearing a shirt that violated the school’s dress code. The complaint argues that the dress code policy was unconstitutional because it was overbroad and vague and that Harper’s behavior did not “create[] a clear and present danger of imminent commission of unlawful acts on school premises or constitute[] the violation of lawful school regulations or threaten[] substantial disruption of the orderly operation of the school.”<sup>104</sup>

Although the Ninth Circuit has not issued a final ruling on the merits of this case, the opinions issued by the Ninth Circuit thus far<sup>105</sup> provide considerable insight into that court’s position because the Ninth Circuit, in reviewing the denial of Harper’s motion for an injunction, had to determine “whether Harper demonstrated a likelihood of success on the merits as to any or all of his three First Amendment claims.”<sup>106</sup> In making its determination that Harper was not likely to prevail on the merits, the Ninth Circuit, like Justice Alito in his decision holding that the student in *Saxe* did prevail on the merits, relied on language from *Tinker*.

First, a school may regulate student speech that would “impinge upon the rights of other students.” *Tinker*, 393 U.S. at 509. Second, a school may prohibit student speech that would result in “substantial disruption of or material interference with school activities.” *Id.* at 514. Because, as we explain below, the School’s prohibition of the wearing of the demeaning T-shirt is constitutionally permissible under the first of the *Tinker* prongs, we conclude that the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits of his free speech claim.<sup>107</sup>

While the Ninth Circuit agreed with Justice Alito’s claim in *Saxe* that “the precise scope of

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<sup>103</sup> Verified Complaint and Demand for Jury Trial, *Harper v. Poway Unified School District*, 6.

<sup>104</sup> *Ibid.*, 6-7. As in the *Saxe* case, Harper also asserted that the school’s policy violated his Free Exercise rights. Since *Saxe* did not consider the Free Exercise issue on appeal (see note 40), this paper will not include a discussion of the Ninth Circuit’s rejection of Harper’s Free Exercise claim. See *Harper*, 445 F.3d 1166, 1186-1190.

<sup>105</sup> In 2006, a Ninth Circuit panel voted 2-1 to rule against the student’s request for a preliminary junction. The Ninth Circuit also subsequently voted to deny an *en banc* hearing in the case. 455 F.3d 1052, 2006. See notes 1-4.

<sup>106</sup> 445 F.3d 1166 (2006), 1174. Harper’s claimed three provisions in the First Amendment were violated: Free Speech, Free Exercise, and the Establishment Clause.

<sup>107</sup> *Ibid.*, 1177.

*Tinker's* 'interference with the rights of others' language is unclear," the court rejected "Harper's overly narrow reading of the phrase" (i.e., claiming that "interference with the right of others" requires physical confrontation).<sup>108</sup> Rather, the court read *Tinker* as saying that

Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to "be secure and to be let alone." Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.<sup>109</sup>

In addition, the Ninth Circuit uses language from the *Fraser* decision, penned by the conservative 1986 Burger Court,<sup>110</sup> and an earlier decision from the Third Circuit Court of Appeals (the court which issued the *Saxe* opinion) to justify its ruling in favor of the school.

Because minors are subject to mandatory attendance requirements, the [Supreme] Court has emphasized "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children - especially in a captive audience ...." *Fraser*, 478 U.S. at 684. Although name-calling is ordinarily protected outside the school context, "students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F. 3d 243, 264 (3rd Cir. 2002).<sup>111</sup>

In addition to citing the *Fraser* decision for support, the Ninth Circuit also cites the Supreme Court's decision in *Hazelwood Sch. Dist. v. Kuhlmeier*,<sup>112</sup> a case that upheld a school's decision to censor a student newspaper and established the minimal standard of "reasonably related to legitimate pedagogical concerns" for determining the constitutionality of restrictions on student speech that is part of the curriculum or that might be perceived as having the endorsement of the school: "The Supreme Court has declared that 'the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other

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<sup>108</sup> *Ibid.*, 1178.

<sup>109</sup> *Ibid.*

<sup>110</sup> This Court consisted of Rehnquist, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, and Scalia.

<sup>111</sup> *Harper*, 1178.

<sup>112</sup> 484 U.S. 260, 1988.



settings, and must be applied in light of the special characteristics of the school environment.’

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266.”<sup>113</sup>

Two excerpts from his opinion concurring with the Ninth Circuit’s vote to reject Harper’s request for an *en banc* hearing<sup>114</sup> provide further insight into the position of Judge Stephen Reinhardt, author of the first Ninth Circuit opinion in the case.

The dissenters still don't get the message - or *Tinker*! Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply “unpleasant and offensive.” It strikes at the very core of the young student’s dignity and self-worth.<sup>115</sup>

Perhaps some of us are unaware of, or have forgotten, what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school, or perhaps some are simply insensitive to the injury that public scorn and ridicule can cause young minority students. Or maybe some simply find it difficult to comprehend the extent of the injury attacks such as Harper’s cause gay students. Whatever the reason for the dissenters’ blindness, it is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution, and the exercise of that authority by school boards is surely consistent with *Tinker*’s protection of the right of individual students “to be secure and to be let alone.” *Tinker*, 393 U.S. at 508.<sup>116</sup>

When the *Saxe* opinion and the *Harper* opinions are compared, several things are striking. The first is how differently Justice Alito and Judge Reinhardt read *Tinker* and the other speech rights precedent. To support his opinion in *Saxe*, Justice Alito had to show why the speech that the harassment policy restricted was more like the speech in *Tinker* than the speech in *Fraser*. On the one hand, the *Tinker* opinion states that

in order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort

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<sup>113</sup> *Ibid.*, 1176.

<sup>114</sup> 455 F.3d 1052 (2006).

<sup>115</sup> *Ibid.*, 1053.

<sup>116</sup> *Ibid.*

and unpleasantness that always accompany an unpopular viewpoint.<sup>117</sup>

Justice Alito uses this excerpt to argue that

The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. See *Tinker*, 393 U.S. at 509 (school may not prohibit speech based on the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”).

On the other hand, when Justice Alito mentions the Supreme Court’s pro-school decision in *Fraser*, he does so to point out the narrow holding of that case: “Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language.”<sup>118</sup> However, Alito arguably narrows *Fraser* too much when he ignores the Court’s repeated claim that schools may also restrict “offensive” speech (e.g., “Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”<sup>119</sup>).

In contrast, the Ninth Circuit does not address the above language from *Tinker* that seems to demand more than mere “discomfort and unpleasantness.” Rather, the Ninth Circuit focuses on the following language in *Tinker*:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.... [In this case] school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.<sup>120</sup>

When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfer[ing] with the requirements of

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<sup>117</sup> *Tinker*, 509.

<sup>118</sup> *Saxe*, 214.

<sup>119</sup> *Fraser*, 683.

<sup>120</sup> *Tinker*, 508-509.

appropriate discipline in the operation of the school' and without colliding with the rights of others.<sup>121</sup>

Although these excerpts present arguments *against* censorship by the schools, the Ninth Circuit uses them to make the following assertion: "In *Tinker*, the Supreme Court held that public schools may restrict student speech which 'intrudes upon ... the rights of other students' or 'collides with the rights of other students to be secure and to be let alone.'"<sup>122</sup>

An examination of the *Saxe* and *Harper* opinions also reveals that the Ninth Circuit mostly relies on earlier cases that emphasize the view that student speech rights are less robust than the speech rights of adults. Conversely, Justice Alito mostly relies on cases that either emphasize the existence of student speech rights or argue for the protection of speech rights in general (rather than speech rights of students). These tendencies, coupled with the examples from the previous paragraphs, demonstrate how Justice Alito and the Ninth Circuit were able to rely on the same precedent and yet come up with opposing outcomes.

## 2.2. *Saxe* and *Harper* and Notions of Citizenship

Given that the opinions in *Saxe* and *Harper* deal with similar sets of facts and apply the same set of cases as precedent and yet issue opinions that arguably conflict with each other, does one of the cases better reflect the principles related to citizenship and civic education found in the precedent? In this part of the paper, I argue that the *Harper* decision better reflects those principles because it 1) stresses the distinctness of schools from the rest of the public sphere; 2) recognizes that schools are a place where students both exercise their current citizenship and learn to become citizens with particular qualities; and 3) because of the first two reasons, recognizes that speech in schools is governed by principles that differ from those principles that govern free speech in the broader public sphere.

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<sup>121</sup> *Tinker*, 513.

<sup>122</sup> *Harper*, 1177.

In his ruling in *Saxe*, Justice Alito arguably endorses the liberal justices' notion of liberal democratic citizenship over Chief Justice Burger's vision of "orderly" and "respectful" citizenship. Alito's embrace of liberal democratic citizenship happens through his focus on several concepts from the law of free speech for adult citizens, which also reflects a liberal democratic vision of citizenship. The first concept from the law of free speech for adults relied on by Alito is the notion that the State may not censor speech based on viewpoint.

This sort of content- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny. This point was dramatically illustrated in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992), in which the Supreme Court struck down a municipal hate-speech ordinance prohibiting "fighting words" that aroused "anger, alarm or resentment on the basis of race, color, creed, religion or gender." *Id.* at 377. While recognizing that fighting words generally are unprotected by the First Amendment, the Court nevertheless found that the ordinance unconstitutionally discriminated on the basis of content and viewpoint.<sup>123</sup>

The second concept from adult free speech jurisprudence stressed by Alito is the danger posed when the State creates a "heckler's veto," restricting speech because of the way listeners may react to it.

The Supreme Court has made it clear, however, that the government may not prohibit speech under a "secondary effects" rationale based solely on the emotive impact that its offensive content may have on a listener: "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. . . . The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988)<sup>124</sup>

Finally, Alito refers to a third principle found within the free speech precedent, the idea that the purpose of the right of free speech is to protect speech that is unpopular or considered "offensive" by some. It is this sort of speech, especially when such speech touches on social values or political issues, that is most in danger of censorship.

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<sup>123</sup> *Saxe*, 207.

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As the Supreme Court has emphatically declared, “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).<sup>125</sup>

By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse--the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " *Texas v. Johnson*, 491 U.S. 397, 408-09, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949)).<sup>126</sup>

Thus, on one level, Alito's opinion in *Saxe* seems to follow more closely the reasoning in *Tinker*, which protected student free speech, than *Fraser*, which restricted student free speech.

While Justice Alito's opinion embraces the vision of liberal democratic citizens who participate in the “marketplace of ideas,” his reliance on the law of free speech for adults in *Saxe* is problematic. First, the law of free speech for adults is fundamentally more permissive of speech than the law of free speech for children in schools. As discussed in part one of this paper, the law of free speech for children evolved from a position that first withheld rights to children, then recognized rights for children on the grounds that learning to be a citizen required the exercise of some rights, then limited those rights in *Fraser* on the grounds that learning to be a citizen also required some limits on the speech rights of children. In contrast, Alito's opinion stresses the importance of free speech to the functioning of the marketplace of ideas. The following quote, also cited earlier in this section of the paper, demonstrates Alito's approach:

There is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including

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<sup>125</sup> *Saxe*,

<sup>126</sup> CITE

statements that impugn another's race or national origin or that denigrate religious beliefs.<sup>127</sup>

By relying on the law of free speech for adults rather than for children, Alito applies a legal paradigm that makes it more difficult for the State to justify restrictions on speech. In addition, the approach ignores a fundamental premise of student speech rights law: that student rights are recognized in part or even primarily because of the benefit that extending rights to students has for the learning of citizenship. Tellingly, the notions of teaching and learning are not mentioned in Alito's opinion in *Saxe*. In fact, even the words citizen and citizenship do not appear in the opinion. While the *Tinker* case is cited to support for Alito's opinion, he leaves out the important concept from *Barnette* that underpins *Tinker*:

That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>128</sup>

Justice Alito does acknowledge that the legal principles governing student free speech are somewhat different than the principles of general free speech which he cites to support his argument.

Certainly, preventing discrimination in the workplace--and in the schools--is not only a legitimate, but a compelling, government interest. See, e.g., *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987). And, as some courts and commentators have suggested, speech may be more readily subject to restrictions when a school or workplace audience is "captive" and cannot avoid the objectionable speech. See, e.g., *Aguilar*, 980 P.2d at 871-73 (Werdegar, J., concurring).<sup>129</sup>

However, when he turns to the cases that actually define student speech rights, he does so mainly to argue that "offensive" speech does not fall within the limitations of student speech rights lined out in the decisions. First, he emphasizes *Tinker*'s language that says that avoiding "discomfort

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<sup>127</sup> *Saxe*, 206.

<sup>128</sup> *Barnette*, 637.

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and unpleasantness” is not sufficient grounds for restricting speech. However, here Alito changes “discomfort and unpleasantness” to “offense.”

The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. See *Tinker*, 393 U.S. at 509 (school may not prohibit speech based on the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”).

Characterizing *Tinker* as prohibiting restrictions on speech based on the possibility that someone “might take offense” does not deal with what Alito acknowledges is the holding of *Fraser*: “there is no First Amendment protection for ‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech in school.”<sup>130</sup> To deal with this, Alito first reads the “plainly offensive” language out of *Fraser*: “Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language.”<sup>131</sup> He then replaces the *Fraser* standard with the principle from free speech law for adults that says that offensive speech is entitled to particular first amendment protection.

Thus, I would argue that because Alito ignores the principles that stem from the Court’s recognition of schools’ needs to teach children citizenship, it is difficult to compare his decision in *Saxe* with the earlier decisions in terms of their view of citizenship. Alito’s opinion relies on principles that articulate how limits on free speech should work for adults, who are seen as fully formed citizens, rather than for children, who are learning how to be citizens. Arguably, by limiting schools’ power to restrict offensive student speech, Alito rejects Chief Justice Burger’s argument that children must learn how to

take into account **consideration of the sensibilities of others**, and, in the case of a school, **the sensibilities of fellow students**. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest

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<sup>131</sup> *Fraser*, 214.

**in teaching students the boundaries of socially appropriate behavior.**<sup>132</sup>

In contrast, the majority opinion in *Harper* is strongly rooted in the cases that are specific to student speech rights rather than the cases dealing with adult speech rights. In particular, the *Harper* opinion focuses on the limitations that are specific to student speech.

The Supreme Court has declared that “the First Amendment rights of students in 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.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266.”<sup>133</sup>

In supporting the school’s limitation on Harper’s speech, Judge Reinhardt makes specific reference to the learning of citizenship. However, he emphasizes the need for schools to place limits on student speech in order to teach citizenship. Thus, he relies greatly on the language in the precedent, including *Tinker* and *Fraser*, that supports such limits.

Part of a school's "basic educational mission" is the inculcation of "fundamental values of habits and manners of civility essential to a democratic society." *Fraser*, 478 U.S. at 681 (internal quotation marks omitted). For this reason, public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred. As we have explained, *supra* pp. 28-29, because a school sponsors a "Day of **Religious** Tolerance," it need not permit its students to wear T-shirts reading, "Jews Are Christ-Killers" or "All Muslims Are Evil Doers." Such expressions would be "wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Similarly, a school that permits a "Day of Racial Tolerance," may restrict a student from displaying a swastika or a Confederate Flag. *See West*, 206 F.3d at 1365-66. In sum, a school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission.<sup>134</sup>

In the dissent in *Harper*, Judge Alex Kozinski directly refers to the idea of teaching children to be citizens who are tolerant of the views of others: “[When Harper wore his shirt],

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<sup>132</sup> *Id.*, 681. Emphasis added.

<sup>133</sup> *Ibid.*, 1176.

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while words were exchanged, the students managed the situation well and without intervention from the school authorities. No doubt, everyone learned an important civics lesson about dealing with others who hold sharply divergent views.” It appears that Kozinski believes the lesson to be taught in cases like *Harper* is that tolerance is to be extended to the intolerant: “Tolerance is a civic virtue, but not one practiced by all members of our society toward all others. This may be unfortunate, but it is a reality we must accept in a pluralistic society.”<sup>135</sup> In a footnote, Kozinski shows that he, like Alito in *Saxe*, conflates the principles undergirding the law of free speech for adults with the principles undergirding the law of free speech for students.

The majority waxes eloquent about the right of schools “to teach civic responsibility and tolerance as part of its basic educational mission,” while suppressing other points of view. But one man's civic responsibility is another man's thought control.

The majority does draw a parallel between limiting student speech and teaching civic responsibility—teaching kids to conduct discourse in a respectful manner in the public sphere. Kozinski implies that the majority actually equates civic responsibility with suppressing other points of view (“thought control”). The majority does not argue that we should teach kids to suppress intolerant views in the public sphere. Rather, the court argues that it is reasonable for a school to suppress some speech in order to teach children that such speech is not properly suited to the public sphere.

While this distinction may seem minor, it gets to the heart of the difference between, on the one hand, Alito's opinion in *Saxe* and Kozinski's dissent in *Harper*, and, on the other hand, the majority opinion in *Harper*. Alito and Kozinski stress the idea that the school is part of the public sphere and speech in schools should thus be afforded first amendment protection. In contrast, the majority in *Harper* stresses the distinctness of schools from the rest of the public

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sphere. Arguably, the majority better reflects the fundamental principles of the student speech rights precedent, in particular the idea that schools are not like the broader public sphere; rather, schools are where students learn to become citizens and, thus, speech in schools is governed by principles that differ from those principles that govern free speech in the broader public sphere.