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All Those Like You: Identity Aggression and Student Speech

Ari Ezra Waldman

New York Law School

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I. INTRODUCTION

According to recent studies, approximately eighty-nine percent of students have heard the word “gay” used frequently in school in a negative way and more than seventy-two percent reported hearing other homophobic remarks (for example, “dyke” or “faggot”) in school and online.¹ Casual use of antigay rhetoric does not make it any less devastating. This verbal aggression, including saying “that’s so gay”² in a critical way and wearing t-shirts

* Paul F. Lazarsfeld Fellow and Ph.D. candidate, Columbia University, Department of Sociology; Adjunct Professor of Law, Brooklyn Law School; J.D., Harvard Law School; A.B., *magna cum laude*, Harvard College. A version of this paper was delivered at the Missouri Law Review Symposium on Cyberbullying on February 9, 2012, and at a lecture at New York University School of Law in Fall 2012. Thanks to Professors Douglas Abrams and Christina Wells of the University of Missouri School of Law and the entire Missouri Law Review, particularly Ian Larson, for organizing the Cyberbullying symposium and inviting me to speak. Special thanks to co-panelists Professors Barry McDonald and Lyrissa Lidsky for their keen insights.

1. JOSEPH G. KOSCIW ET AL., GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 16, 26 (2010), http://glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf [hereinafter GLSEN 2009].

2. See e.g., Sylvia Wood, *What Kids Hear on the School Playground: “You’re so Gay!”*, MSNBC (Jan. 18, 2012), http://usnews.msnbc.msn.com/_news/2012/01/18/10182679-what-kids-hear-on-the-school-playground-youre-so-gay.

that read, “Be Happy, Not Gay,”³ starts early⁴ and follows gay, lesbian, bisexual, transgender, and questioning (LGBT)⁵ students from elementary through high school, and from school into cyberspace. For example, despite Facebook’s best efforts to silence hate in accordance with its Statement of Rights and Responsibilities,⁶ the popular online social network has had its share of antigay hate groups: “Keep Queers Out of America,” “STOP AIDS!!!! KILL GAYS AN [sic] NIGGERS!!!!!!!!!!,” “people who hate fags,” “GAY ? news flash : we fuckin’ hate you !,” and “Kill All Gays,” to name just a few.⁷

This hate does not always target a particular individual and, therefore, does not look like the traditional face-to-face aggression⁸ that plagues schools and pushes teens to suicide.⁹ But the prevalence of this behavior, the ease with which it condemns an entire identity group, and its effects – particularly on those who hear it, on those who identify as gay, and on the school as a whole – merit disciplinary consideration from the school. Elsewhere, I have discussed the affirmative steps schools can take to improve school climate

3. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 670 (7th Cir. 2008).

4. GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, PLAYGROUNDS AND PREJUDICE: ELEMENTARY SCHOOL CLIMATE IN THE UNITED STATES xvi (2012), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2027-1.pdf (reporting on bullying and gender issues in the elementary school setting).

5. The abbreviation LGBT includes “lesbian, gay, bisexual, transgender” individuals; however, I will use the acronym to refer to those sexual minorities as well as those youths questioning their sexual orientation.

6. *Facebook Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Sept. 1, 2012). For example, paragraph 3, section 7 requires users to commit that they “will not post content that: is hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.” *Id.*

7. David Badash, *Facebook or Hate Book?*, THE NEW CIVIL RIGHTS MOVEMENT (Mar. 9, 2010) [hereinafter Badash, *Facebook or Hate Book?*], <http://thenewcivilrightsmovement.com/facebook-or-hate-book/discrimination/2010/03/09/8699>. Some of these sites were quickly taken down, but not before garnering large followings. *Id.*; David Badash, *Facebook or Hate Book? Facebook Shuts Down Anti-Gay Hate Groups!*, THE NEW CIVIL RIGHTS MOVEMENT (Mar. 9, 2010), <http://thenewcivilrightsmovement.com/facebook-or-hate-book-facebook-shuts-down-anti-gay-hate-groups/successes/2010/03/09/8828>.

8. I use the term “aggression” to capture both single-incident attacks and repeated bullying in accordance with my argument for distinguishing between the two for the purposes of the First Amendment, as set forth in previous scholarship. See Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705 (2012) [hereinafter Waldman, *Hostile Educational Environments*].

9. See, e.g., RYAN’S STORY, www.ryanpatrickhalligan.org (last visited Sept. 1, 2012); see also *Nabozny v. Podlesny*, 92 F.3d 446, 451–52 (7th Cir. 1996).

and prevent these attacks from happening in the first place.¹⁰ I have also argued that determining a school's disciplinary authority over cyberattacks requires us to distinguish between single incident peer-to-peer aggression and repeated bullying.¹¹ In this Article, I tackle a special subset of face-to-face aggressors and cyberaggressors – the identity-based aggressor – and argue that identity harassment is a unique and peculiarly harmful form of social aggression and, therefore, school discipline of identity-based aggressors is consistent with student First Amendment rights.

Identity-based aggressors highlight a quality intrinsic to someone's personhood¹² and demean it, deprive it of value, and use it as a weapon. They attack women,¹³ racial minorities,¹⁴ religious minorities,¹⁵ and other traditionally victimized groups. And, as such, they attack not only their particular victims but also their victims' communities. Identity-based aggressors commit a constitutional evil not only because their behavior interferes with victims' access to education, their liberty to express who they are, and their right to participate in our body politic, but also because aggressors perpetuate the legitimacy of a malodorous social stigma attached to any given minority.¹⁶ They may not create, but undoubtedly foster the continued encumbrance of minority identity with social and political burdens that keep minorities at risk of discrimination, social marginalization, and the tacit acquiescence to harm that comes with being different. And, although any of those effects may merit lawful school discipline under the "substantial disruption" standard of *Tinker v. Des Moines Independent School District*,¹⁷ most federal courts con-

10. Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 387 (2012) [hereinafter Waldman, *Tormented*].

11. See generally Waldman, *Hostile Educational Environments*, *supra* note 8.

12. I am purposely avoiding the term "immutable," which, though the current *raison d'être* of legal suspect classifications, see, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 887-88 (Iowa 2009) (collecting cases), is neither a necessary nor an internally coherent way of determining the reach of constitutional protection for a specific group. See, e.g., DAVID A.J. RICHARDS, *FREE SPEECH AND THE POLITICS OF IDENTITY* 76-105 (1999).

13. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63-67 (2009) [hereinafter Citron, *Cyber Civil Rights*].

14. See, e.g., *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246 (11th Cir. 2003) (per curiam); *Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267, 1275 (11th Cir. 2000).

15. Corilyn Shropshire, *Facebook Wrestles with Anti-Semitism*, HOUSTON CHRONICLE (May 15, 2009), http://www.chron.com/CDA/archives/archive.mpl/2009_4739992/facebook-wrestles-with-anti-semitism-social-site-t.html.

16. Although this Article focuses only on identity-based bullying in schools, I do not discount the possibility that identity-based harassment outside the school may also be a constitutional evil under certain circumstances, say, when such harassment is associated with the workplace. See, e.g., Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 663-64 (2012).

17. 393 U.S. 503, 514 (1969).

fronted with peer-to-peer aggression cases miss the consistent rationale for restricting student speech that underlies *Tinker* and its three supposed exceptions carved out in *Bethel School District v. Fraser*,¹⁸ *Hazelwood School District v. Kuhlmeier*,¹⁹ and *Morse v. Frederick*.²⁰

Many courts tend to consider single incidents of identity-based aggression insufficiently disruptive to restrict under *Tinker*, and sufficiently distinct from lewd speech, official speech, and drug-related speech to restrict under *Fraser*, *Kuhlmeier*, and *Morse*, respectively.²¹ But that viewpoint misses the forest for the trees. If *Fraser*, *Kuhlmeier*, and *Morse* depart from *Tinker* for special types of student speech, they do not depart from the underlying, broader rationale that the reason we restrict certain student speech is because of the effects that speech has on something – on the teacher or her ability to teach; on the administrator or her ability to function in her official capacity; on the school, or its reputation, success, standards of classroom discipline, or curricular mission; and, of course, on classroom discipline. This is what I will refer to as the “effects test.” And, a broadly defined effects test makes sense, especially when those effects conflict with both modern liberal educational values that see schools as pristine “marketplaces of ideas” and classical Aristotelian values that see schools as training grounds for civic participation and perfection. Identity-based aggression is an affront to both because it takes the personal effects of peer-to-peer harassment and compounds it, metastasizing its impact over broad populations and creating an environment where teachers cannot teach, students cannot learn, and free speech means nothing. Therefore, under any measure, a school may lawfully restrict it.

This Article answers two categories of questions, one social and another legal. The first series of questions is about the sociology of identity aggression and it seeks to determine whether there is a difference between, say, calling someone a “faggot” and calling someone a “dork.” If there is a difference, to what extent is there empirical evidence that suggests that one is more harmful to the victim, to his community, and to his school? The legal problem flows directly from the relative harm posed by identity aggression: it is too simplistic to see the Court’s student speech jurisprudence like a pie with discrete bites taken out. Rather, the consistency lays in the common core of

18. 478 U.S. 675, 685 (1986) (holding that schools can censor a student’s lewd speech at an assembly even when the speech does not contribute to a substantial disruption).

19. 484 U.S. 260, 270-72 (1988) (finding that speech that bears the imprimatur of the school, like an official newspaper created as part of a journalism curriculum, may be censored without meeting the *Tinker* standard).

20. 551 U.S. 393, 397 (2007) (holding that a school can restrict speech that can reasonably be construed as encouraging illegal drug use).

21. See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216-17 (3d. Cir. 2001) (finding school anti-harassment policy was too broad where it covered speech that intended to cause a disruption; plaintiffs were students who wanted to speak against homosexuality).

concern – namely, the school’s ability to teach its curriculum. If that is true, and if calling someone a “faggot” has demonstrably more negative effects on that core of concern, then regulating identity aggression in schools should be a simple matter. To this end, this Article proposes a normative way of understanding the Supreme Court’s student speech jurisprudence based on an effects test, which is the consistent rationale underlying the Court’s student speech cases. School discipline of identity-based aggressors is consistent with that effects test and retains fidelity to the liberal and classical values running through American public education. Part II defines identity-based aggression in greater detail as attacks on an intrinsic personal characteristic that is salient to a person’s or group’s identity. This definition relies on current psychological evidence and my own sociological studies. In Part III, I describe the unique harms of identity-based aggression by comparing them to traditional face-to-face aggression. I argue that identity-based aggression devalues personhood, which in turn wreaks particular devastation on a school’s and community’s social fabric. This damage is exponentially compounded when the identity-based aggression occurs online. Part IV situates those harms within the Supreme Court’s student speech doctrine. *Tinker* and its supposed exceptions are linked by a consistent effects test that bases the constitutionality of school discipline of student speech on some measure of the speech’s effects on the school environment. To this end, I argue that the Court’s student speech jurisprudence since *Tinker* should not be seen, as is the conventional wisdom, as a single test and three exceptions, but rather as an imperfect elucidation of one flexible balancing test that assesses the value of the speech versus its impact on the school’s ability to teach. Because identity-based aggression irreparably damages the school by harming its reputation and its ability to teach, restricting identity-based aggression makes sense within this framework. Finally, Part V shows how this proposal is consistent with both the liberal and classical educational values that run through *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*, further suggesting the proposal’s mainstream appeal.

II. IDENTITY-BASED AGGRESSION AS AN ATTACK ON PERSONHOOD

Identity-based harassment is not a new concept, but recent media,²² legislative,²³ executive,²⁴ and judicial²⁵ attention on bullying in schools and its

22. See, e.g., Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 30, 2010), http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?_r=1.

23. Forty-nine states have enacted some form of anti-bullying legislation, see BULLY POLICE USA, <http://www.bullypolice.org/> (last visited Sept. 2, 2012), with New Jersey’s and Massachusetts’s considered the strongest. Emily Bazelon, *Bullies Beware*, SLATE (Apr. 30, 2010), <http://www.slate.com/id/2252543/>; Matt Friedman, *N.J. Gov. Christie Approves Toughest Anti-Bullying Law in the Country*, NJ.COM

attendant suicides has highlighted a wide gap in the current understanding of the nature, effects, and implication of such aggression.²⁶ For the purposes of this Article, I synthesized current law and social science research and supplemented the work of others with my own surveys of students and identified the best definition of identity-based aggression as *aggression based on a core, identifying characteristic that is essential to someone's conception of personhood*. This formulation has at least three advantages. First, it is consistent with sociological and psychological studies about aggression and harassment in schools and mirrors current student understanding. Second, it parallels federal law's understanding of the concept, thus making a First Amendment analysis applicable in context. Third, by eschewing artificially formal requirements like immutability, this definition accurately reflects the underlying rationale for legal protections for traditionally disadvantaged or unpopular groups.

The Department of Children, Schools, and Families (DCSF) in the United Kingdom's Department for Education has been studying identity-based aggression for years,²⁷ and experts at the University of London's Unit for School and Family Studies recently released a comprehensive study with recommendations for how public schools can address racist, sexist, homophobic, transphobic, and other types of identity-based harassment.²⁸ From these studies, a definitional pattern emerges: the characteristic attacked by an identity-based aggressor is at the center of a minority's group identity.²⁹

(Jan. 7, 2011), http://www.nj.com/news/index.ssf/2011/01/nj_gov_christie_approves_tough.html.

24. See, e.g., Arne Duncan, Sec'y of Educ., *We Will Not Fail our Children* (Sept. 21, 2011), available at <http://www.ed.gov/news/speeches/we-will-not-fail-our-children>.

25. See, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011), cert. denied, 132 S. Ct. 1095 (2012); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

26. Warren Blumenfeld at the University of Iowa is one of the few social scientists researching cyberbullying of gay school children, but even his work has so far declined to establish a single definition for identity-based bullying. See Warren J. Blumenfeld & R.M. Cooper, *LGBT and Allied Youth Responses to Cyberbullying: Policy Implications*, 3 INT'L J. CRITICAL PEDAGOGY 114, 118-19 (2010), http://www.freireproject.org/images/2321/IJCPv3_7.pdf.

27. The DCSF published its most recent series of reports based on broad sample sets in British schools since 2006. ROSIE GREEN ET AL., DEP'T FOR EDUC., *CHARACTERISTICS OF BULLYING VICTIMS IN SCHOOLS* (2010), <http://www.education.gov.uk/publications/eOrderingDownload/DFE-RB001.pdf>.

28. See generally NEIL TIPPETT ET AL., EQUALITY AND HUMAN RIGHTS COMMISSION, *PREVENTION AND RESPONSE TO IDENTITY-BASED BULLYING AMONG LOCAL AUTHORITIES IN ENGLAND, SCOTLAND AND WALES* (2010), http://www.equalityhumanrights.com/uploaded_files/research/64_identity_based_bullying.pdf.

29. See, e.g., *id.* at 18.

Someone's race, ethnicity, culture, faith, disability, sexual orientation, gender, or gender expression can provide fodder for identity-based aggression because these attributes are so closely identified with an individual's sense of belonging;³⁰ whereas, a particular political view, an avowed dislike for Madonna's music, or a hatred of football are not, thus distinguishing between core characteristics and personal opinions.

All types of identity-based aggression have a similar origin: the desire to perpetuate a perceived dominance of one group over another. For example, racist aggression excludes, marginalizes, denigrates, and devalues victims because of their color, ethnicity, or culture.³¹ Antigay aggression, or what some social scientists call "homophobic bullying," is aggression based on real or perceived sexual orientation or nonconformity to sexual behavioral norms.³² Similarly, sexist aggression is aggression "based on sexist attitudes that, when expressed, demean, intimidate or harm another person because of their sex or gender."³³ These types of aggression – racist, homophobic, and sexist aggression – result from the same underlying assumption that a given minority is of less value than, or subordinate to, a traditional majority or advantaged group. Once again, this definition distinguishes core characteristics from personal opinions: those Americans who dislike football may be a minority,³⁴ but the football-loving population does not perceive them as weak, unworthy, or valueless.

A definition that focuses on core, identifying characteristics essential to personhood also conforms to our current legal understanding of identity-based aggression. For example, in *Harper v. Poway Unified School District*,³⁵ the Ninth Circuit defined identity-based harassment as "[s]peech that attacks . . . students who are members of minority groups that have historically been oppressed . . . and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security."³⁶ And, in *Nuxoll*

30. *Id.* at 18, 25, 32, 38, 43.

31. *Id.* at 18.

32. *Id.* at 32. (citing DEPT. FOR EDUC., PREVENTING AND RESPONDING TO HOMOPHOBIC BULLYING IN SCHOOLS (2007)).

33. *Id.* at 38 (citing DEPT. FOR EDUC., GUIDANCE FOR SCHOOLS ON PREVENTING AND RESPONDING TO SEXIST, SEXUAL AND TRANSPHOBIC BULLYING 5 (2009)).

34. Jeffrey M. Jones, *More Americans Are Fans of Pro Football Than Any Other Sport*, GALLUP (Apr. 20, 2001), <http://www.gallup.com/poll/1786/more-americans-fans-pro-football-than-any-other-sport.aspx>.

35. 445 F.3d 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007). This case, discussed at length *infra* notes 130-38 and accompanying text, concerned school discipline of a student who wore a t-shirt to school that read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front, and "HOMOSEXUALITY IS SHAMEFUL" on the back. *Id.* at 1171.

36. *Id.* at 1178. The court found that public school students have a right to be free of "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation" while in school. *Id.*

ex rel. Nuxoll v. Indian Prairie School District #204,³⁷ the Seventh Circuit had no qualms with the school's harassment policy that prohibited "(1) derogatory comments on (2) unalterable to otherwise deeply rooted personal characteristics"³⁸ because traits like race, sex, and sexual orientation "are major components of ... personal identity" and hurtful comments about such characteristics "can strike a person at the core of [one's] being."³⁹ Both courts found that what is unique about profound identifying traits is the capacity of harassment on the basis of those traits to irreparably damage the victim, his associated group, and the school as a whole. This idea also makes sense in the context of our broader civil rights jurisprudence about racial and sexual minorities in schools. To condemn blacks and gays with racist or bigoted expressions or t-shirts "is to say, necessarily, that [blacks,] gays and lesbians are shameful" and are inferior,⁴⁰ and as the Supreme Court recognized in *Brown v. Board of Education*,⁴¹ a "sense of inferiority affects the motivation of a child to learn."⁴²

The same is true even if the aggressor claims he is only criticizing gay conduct or a "gay lifestyle," not gays as a class. After all, the distinction between condemning a group and criticizing the uniquely identifying behaviors of its members is, as the Court has stated many times, artificial and false. In *Bray v. Alexandria Women's Health Clinic*, for example, the Court found that a "tax on wearing yarmulkes is a tax on Jews."⁴³ And, in *Lawrence v. Texas*,⁴⁴ the Court saw anti-sodomy statutes as mere proxies for condemnation of gays as a class, noting that when "homosexual conduct is made criminal ..., [the] declaration in and of itself is an invitation to subject homosexual persons to discrimination."⁴⁵ More recently, the Ninth Circuit saw Proposition 8's restriction on marriage recognition for gays in the same way:

It will not do to say that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people. . . . [T]he elimination of the right to use the official designation of "marriage" for the relationships of commit-

37. 523 F.3d 668 (7th Cir. 2008). Discussed in depth *infra* notes 178-81 and accompanying text, this case involved a student who wore a t-shirt with the slogan, "Be Happy, Not Gay," to school. *Id.* at 670.

38. *Id.* at 671 (emphasis in original removed).

39. *Id.*

40. *Harper*, 445 F.3d at 1181.

41. 347 U.S. 483 (1954).

42. *Id.* at 494 (internal quotation marks omitted).

43. 506 U.S. 263, 270 (1993).

44. 539 U.S. 558 (2003).

45. *Id.* at 575. See also *id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

ted same-sex couples send[s] a message that gays and lesbians are of lesser worth as a class – that they enjoy a lesser societal status.⁴⁶

These examples suggest that Justice Ginsburg was right in *Christian Legal Society v. Martinez*⁴⁷ when she said that the Court does not make the artificial distinction “between status and conduct,”⁴⁸ and, more importantly, that the federal courts have recognized the profound connection between a person’s sexual orientation and his conception of personhood. State restrictions on his right to live a free and unencumbered life as a gay person, whether through anti-sodomy laws or bans on marriage recognition for gays, are not just affronts to him, but also to all those like him because homosexuality is a core, identifying characteristic.

Current law not only recognizes core, identifying characteristics that are essential to someone’s conception of personhood, it also understands the distinction between attacks on those traits and statements of opinion on other less defining characteristics that make up the totality of a person’s identity. A t-shirt that states, “Homosexuality is Shameful” or “Be Ashamed, Our School Embraced What God Has Condemned,”⁴⁹ is qualitatively different than one that states, “Young Democrats Suck” or “Madonna Sucks.” The latter slogans may not be polite or civil, but they cannot be sufficiently damaging to an individual, a group, or a school because they do not attack an identifying characteristic. Conservative critics would interject, noting that what is salient or defining to one person may not be so important to another; the oft-used phrase, “I am not defined by my...” followed by a particular infirmity, sexuality, or disability comes to mind. What is more, sexual orientation has long been subject to debate over its immutability, a factor traditionally seen as important in the race context,⁵⁰ such that some could legitimately believe that antigay aggression could not be as harmful as racist aggression because the fixed immutability of race is what makes it a defining, core characteristic. However, that reasoning misses the point. What makes characteristics like race, gender, or sexual orientation core, defining characteristics that merit protection from attack is neither their salience alone nor their immutability, but rather the burden society places on those groups as holders of certain traits.

This theory highlights the third, and most important, reason why our definition of identity-based aggression makes sense: it is consistent with the fact that federal law creates protected classes based on some identifying characteristics and not others because of the burden society places on certain

46. *Perry v. Brown*, 671 F.3d 1052, 1093 (9th Cir. 2012).

47. 130 S. Ct. 2971 (2010).

48. *Id.* at 2990 (“Our decisions have declined to distinguish between status and conduct in this context.”).

49. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

50. See RICHARDS, *supra* note 12, at 37.

groups based on their identity.⁵¹ The standard for determining a suspect or quasi-suspect class, for example, is well known: we consider (1) a history of discrimination, (2) whether the group's distinguishing characteristic affects its members' ability to contribute to society, (3) the group's defining characteristic, and (4) whether the group could realize its equal rights through the political process alone.⁵² But, these are not hard and fast rules to be applied formally; their purpose is to find examples where state action reflects prejudice or mere disapproval of an unpopular group rather than a rational connection to a legitimate goal.⁵³ Suspect classes cannot be majorities or historically advantaged groups because such groups can never, and have never been, victimized in the voting booth; they cannot be holders of passing opinions about politics, society, music, or any other non-important characteristic; nor can they be minorities in name only, without social stigma attached. Although some like to abbreviate the third requirement to "immutability," that would be incorrect⁵⁴ and, in any event, it is not the most important factor.⁵⁵ Also ir-

51. *See id.* at 36-37.

52. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012), *appeal docketed*, No. 12-15409 (9th Cir. Feb. 28, 2012); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 427-28 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 887-88 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 606-07 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 974 (Wash. 2006).

53. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) ("Several formulations might explain our treatment of certain classifications as 'suspect.' Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.") (internal citations omitted).

54. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (finding that the prong of suspectness inquiry is satisfied when the identifying trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]"); *In re Marriage Cases*, 183 P.3d at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.").

55. *Kerrigan*, 957 A.2d at 427 ("It bears emphasis, however, that the United States Supreme Court has placed far greater weight – indeed, it invariably has placed

relevant is that women make up more than fifty percent of the population, that some traditionalists cling to the discredited view that homosexuality is a choice, and that minorities exercise their political power through lobbying groups. Those facts do not make women, gays, or blacks any less disadvantaged as groups.

There is more to being a suspect class than being a minority; suspect status is minority status caused by prejudice, popular disapproval, or historical disapprobation of the group's particular defining characteristic. As Professor David Richards explains, suspect classes are not regarded as victims of prejudice neither because they are fewer in number nor incapable of changing their identity, but rather "because the prejudice itself assigns intrinsically unreasonable weight to and burdens on identifications that define one's moral personality."⁵⁶

Race, gender, and sexual orientation are encumbered by an extrinsic and "impersonal script"⁵⁷ that makes them core, defining characteristics of particular minorities in American society. In other words, irrational and debilitating stereotypes that have ballooned from personally held prejudices to governing social construct turn the stereotyped victims into suspect classes. Prejudiced southern whites perceived black people as indolent, thus requiring a strict slavery or caste system, and that historical disapprobation imbued being black in America with an automatic handicap.⁵⁸ A norm of masculinity has long associated womanhood with emotion and weakness, thus justifying defined "male" and "female" roles in society and levying an automatic disadvantage on anyone, male or female, who deviates from those social norms.⁵⁹ And, homophobic heterosexuals perceive gay men as feminine and weak (or lesbians as masculine and angry), thus encumbering all gay persons with the stigma of nonconformity.⁶⁰

dispositive weight – on the first two factors, that is, whether the group has been the subject of long-standing and invidious discrimination and whether the group's distinguishing characteristic bears no relation to the ability of the group members to perform or function in society. In circumstances in which a group has been subject to such discrimination and its distinguishing characteristic does not bear any relation to such ability, the court inevitably has employed heightened scrutiny in reviewing statutory classifications targeting those groups.”).

56. RICHARDS, *supra* note 12, at 41.

57. *Id.* at 77.

58. See, e.g., Lee Sigelman & Steven A. Tuch, *Metastereotypes: Blacks' Perceptions of Whites' Stereotypes of Blacks*, 61 PUB. OPINION Q. 87, 88-89 (1997).

59. See, e.g., JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 77-108 (2010); SHAUNTI FELDHAHN, *THE MALE FACTOR: THE UNWRITTEN RULES, MISPERCEPTIONS, AND SECRET BELIEFS OF MEN IN THE WORKPLACE* 86 (2009).

60. See Francisco J. Sánchez et al., *Reported Effects of Masculine Ideals on Gay Men*, 10 PSYCHOL. MEN & MASCULINITY 73, 74 (2009).

The Oregon Court of Appeals took this position in *Tanner v. Oregon Health Sciences University*,⁶¹ where the court recognized that minorities should be protected based on their suspect status because of the societal burdens placed upon them.⁶² In *Tanner*, the court upheld the right of a state university's gay employee to extend her health benefits to her domestic partner,⁶³ in part, because it considered gays to be a suspect class.⁶⁴ It was not because of any one factor or the immutability of Ms. Tanner's sexual orientation; rather, the court based its reasoning on the burdens society places on gays and lesbians as a class:

[T]he focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.⁶⁵

A core, identifying characteristic may be immutable, but it need not be; it may be a deeply held conception of the self. It is also more than that. Identity-based aggressors find a core, identifying characteristic that has been imbued with social stigma and use that stigma as a sword against their victim's safety and identity. In this way, our definition conforms to the underlying rationale for Constitutional protections for minority groups.

III. IDENTITY-BASED AGGRESSION AND TRADITIONAL PEER-TO-PEER AGGRESSION COMPARED

That identity-based aggression shares some common ground with traditional peer-to-peer aggression is unsurprising; the former is a subset of the latter.⁶⁶ Although the two forms of aggression mirror the accepted definition among social scientists, and although both are made worse when the aggression occurs online, identity-based aggression gives rise to unique and particularly devastating harms beyond the effects of other types of aggression. These outsized effects – on the victim's community, the school environment, and society as a whole – help make school discipline of identity-based aggression consistent with First Amendment principles and educational values.

61. 971 P.2d 435 (Or. Ct. App. 1998).

62. *Id.* at 447.

63. *Id.* at 437.

64. *Id.* at 447.

65. *Id.* at 446.

66. Identity-based aggression can also run from teacher-to-student or student-to-teacher, but that is a further subset within the identity-based aggression class. This Article focuses only on peer-to-peer identity-based aggression in schools.

A. Definitional Similarities

The *Journal of the American Medical Association* (JAMA) defines traditional bullying as aggression that (1) “occurs repeatedly over time,” (2) is “intended to harm or disturb,” and (3) flows from “an imbalance of power, with a more powerful person or group attacking a less powerful one.”⁶⁷ The asymmetry of power is traditionally physical (e.g., an athletic student versus a less-physically developed victim) or psychological (e.g., high self-esteem versus low self-esteem).⁶⁸ The bullying can occur “verbal[ly] (i.e., name calling, threats, taunting, “malicious teasing”), physical[ly] (e.g., hitting, kicking, . . . taking personal belongings), or psychological[ly] (e.g., spreading rumors, engaging in social exclusion . . .).”⁶⁹ JAMA’s definition is consistent with that from the Department of Justice, which describes bullying as “involv[ing] a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful.”⁷⁰

My definitions of identity-based aggression and traditional peer-to-peer aggression maintain fidelity with JAMA’s definition. Though true bullying requires repetition, both identity-based and traditional aggression can come in single-incident – what I have called “attacks” or “cyberattacks” when they occur online⁷¹ – or in a repeated form. An aggressor can mock a victim’s weight or appearance once or do so repeatedly; she can also upload a single “I Hate” video⁷² to YouTube or use her victim’s Facebook page to repeatedly taunt and abuse her victim.⁷³ Similarly, an identity-based aggressor can wear a Confederate flag t-shirt to school once or send one antigay text; he can also regularly wear racist t-shirts, create racist Facebook groups to taunt racial minorities, or verbally and physically abuse him for years.

67. Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 J. AM. MED. ASS’N 2094, 2094 (2001),

<http://pdba.georgetown.edu/Security/citizenssecurity/eeuu/documents/bullying.pdf>.

68. *Id.*

69. *Id.*

70. NELS ERICSON, U.S. DEP’T OF JUSTICE, OJJDP FACT SHEET: ADDRESSING THE PROBLEM OF JUVENILE BULLYING 1 (2001), <https://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf>.

71. Waldman, *Hostile Educational Environments*, *supra* note 8, at 709.

72. An “I Hate” video is a video in which one speaker faces a camera and lists all the things he or she hates. In this context, “I Hate” videos are usually all about one victim.

73. Uploading a single “I Hate” video onto YouTube could be considered repeated behavior given the permanence of digital uploads. That is, even though an aggressor created a single video, that video will be available forever, compounding the harm to the victim over the years.

Identity-based and traditional aggressors both intend to harm their victims, and employ similar tactics to obtain this result.⁷⁴ Assaulting or directly insulting a victim may be the paradigmatic types of harm evidencing intent, but aggression is not limited to those injuries. As the definition makes clear, bullying can involve excluding someone from a group or asking peers to vote on the relative “ugliness” or “wimpiness” of a student.⁷⁵ This is called indirect bullying,⁷⁶ and it comes from a similar desire to harm the excluded or victimized individual. Pranks at the expense of a victim for the purposes of humiliating the victim or entertaining an aggressor’s peers also seem to fit the definition of bullying, even though the bully thought what he was doing was funny. However, it is not clear the same could be said of a prankster who thought his victim would laugh off his humiliation. The distinction between the jovial and the malicious prank may be determined in context through the aggressor’s statements or other behavior or through the third part of the definition of bullying – namely, an imbalance of power.⁷⁷

Indeed, both identity-based and traditional aggressors require an imbalance of power. In the traditional model, a high status student – a popular athlete, for example – can tease another high status student, whereas he is more likely to bully a low status or weaker student who has few friends.⁷⁸ Weakness can be based on any number of asymmetries, with physical strength only representing the most noticeable paradigm. Minority status causes a significant asymmetry in power, especially where the particular minority is the subject of ridicule, bigotry, and hatred outside the school. This asymmetry gives rise to identity-based aggression. It should come as no surprise then that young members of the gay and lesbian community are uniquely susceptible to bullying and its tragic consequences. They are bullied

74. Nansel, *supra* note 67, at 2094.

75. Blumenfeld & Cooper, *supra* note 26, at 119. Or, perhaps, the “Ugly Meter” iPhone application, which uses facial recognition software to tell someone how ugly he or she is, can be fodder for such bullying. See Rosemary Black & Lindsay Goldwert, ‘Ugly Meter’ iPhone App May Be Hurtful to Kids and Fodder for Bullies, N.Y. DAILY NEWS (Oct. 20, 2010), http://articles.nydailynews.com/2010-10-20/entertainment/27078743_1_app-new-iphone-facial-recognition.

76. Dan Olweus, *Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 3 J. CHILD PSYCHOL. & PSYCHIATRY 1171, 1173 (1994).

77. Nansel, *supra* note 67, at 2094.

78. Ken Rigby & Phillip Slee, *Children’s Attitudes Toward Victims*, in UNDERSTANDING AND MANAGING BULLYING 119 (Delwyn Tattum ed., 1993); see also Marilyn Langevin, *Helping Children Deal with Teasing and Bullying: For Parents, Teachers, and Other Adults*, INT’L STUTTERING ASS’N., http://www.stutterisa.org/CDRomProject/teasing/tease_bully.html (last visited Sept. 8, 2012) (stating that one key element of bullying is a power imbalance and that bullying can be a one-time event).

because they are perceived as deviating from the norm;⁷⁹ because they are, in the case of adolescent gay boys, perceived as less likely to be physically strong;⁸⁰ and because antigay bullying is, in some communities, either tacitly or explicitly condoned by antigay bigotry in society at large.

B. The Sociology of Identity-Based Aggression

Given these definitional similarities, the determinants and effects of traditional and identity-based aggression should, at a minimum, overlap. Indeed, current research confirms as much. All aggressors target victims of lower status, whether defined by social and economic status, physical stature, or ethnic, racial, or sexual identity.⁸¹ Yet, despite recent interest in bullying as a social phenomenon, we lack the necessary data on the social determinants of identity-based bullying. My own preliminary survey of high school students at one California school revealed the obvious – that net of other factors, the odds of being a victim of identity harassment increases by more than a multiple of four when that victim identifies as LGBT⁸² – and the not so obvious – that students of all grades, backgrounds, genders, and interests feel that identity harassment is more damaging than any other kind of aggression.⁸³ But, this is only the beginning of some much-needed quantitative re-

79. See, e.g., Anthony R. D'Augelli et al., *Childhood Gender Atypicality, Victimization, and PTSD Among Lesbian, Gay, and Bisexual Youth*, 21 J. INTERPERSONAL VIOLENCE 1462, 1467–69 (2006) (discussing results of a study evidencing that LGB youth, at an early age, felt they were “different from other youth” and were pointed out as being so by their peers).

80. See *id.* at 1472 (noting that males who were viewed as less masculine experienced significantly more verbal sexual orientation victimization than other males).

81. See Nansel, *supra* note 67, at 2098.

82. Survey, High Tech High School, San Diego, California (Dec. 3, 2010). I reported this data, along with a summary of the findings, to an assembly of the faculties of the various High Tech High schools in San Diego, California on January 18, 2011. Participants ($n = 366$, 12th grade = 70, 11th grade = 92, 10th grade = 93; 9th grade = 109; 2 did not identify their grade) were high school students between the ages of 14 and 18. Overall, 54 identified as gay, lesbian, bisexual, transgender or were questioning their sexuality. In addition, 180 identified as male (49.1 percent), 181 identified as female (49.5 percent) and 5 did not identify their gender. Using ordinal logit regression analysis, the odds ratio for the relationship between victimization by identity aggression and LGBT identification was 5.23, with a p -value of 0.00, indicating statistical significance.

83. *Id.* Students were asked, “Do you think that bullying someone because of his or her identity, like using words like ‘faggot’ or the n-word is worse or no worse than bullying someone because of any other reason?” More than 87 percent of students answered in the affirmative and there were no statistically significant determinants of that group of students. Topline comparison data also indicated that all demographics of students agreed that identity bullying is worse than other kinds of bullying. These conclusions are not definitive: the sample size is too small and the focus on one avail-

search on identity bullying; I will report my current work, which extends this research, in the coming months.

We do know that bullying victims experience various negative outcomes, ranging from withdrawal from school activities⁸⁴ and increased Internet use to the exclusion of face-to-face interaction with others⁸⁵ and depression.⁸⁶ Even a single attack at school or a single incident of cyberattacking is associated with increased daily anxiety and depression at school.⁸⁷

Identity-based aggression piles on three additional – and devastating – effects that make such behavior even more anathematic to a modern school. First, attacks on core, defining characteristics “silence members of targeted groups”.⁸⁸ Professors Danielle Keats Citron and Helen Norton recount the story of Bonnie Jouhari, a civil rights advocate and mother of a biracial child, who was targeted on a white supremacist website for being a “race traitor.”⁸⁹ The website pictured Ms. Jouhari’s workplace exploding, gave bomb-making instructions, and showed a hooded Klansman holding a noose near the threat that race traitors are “hung from the neck from the nearest tree.”⁹⁰ And, there are students like Jamie Nabozny, a Wisconsin boy who was verbally, emotionally, and physically harassed for being gay for four years until he required hospitalization, attempted suicide, and switched schools.⁹¹ He was hit, spit on, victimized by mock rape, attacked from behind in a restroom, kicked by

able school may have biased the data despite the diversity of the school. My current research focuses on expanding this analysis.

84. NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 47 (2007).

85. *Id.*

86. See Susan M. Swearer et al., “You’re So Gay!”: Do Different Forms of Bullying Matter for Adolescent Males?, 37 SCH. PSYCHOL. REV. 160, 170 (2008) (discussing the negative impact of bullying on young homosexuals, particularly its spurring “constriction” of interpersonal connections).

87. See Adrienne Nishina & Jaana Juvonen, *Daily Reports of Witnessing and Experiencing Peer Harassment in Middle School*, 76 CHILD DEV. 435, 444 (2005) (measuring anxiety, humiliation, school dislike, and anger as negative effects of peer harassment); Michele L. Ybarra et al., *Examining Characteristics and Associated Distress Related to Internet Harassment: Findings From the Second Youth Internet Survey*, 118 PEDIATRICS 1169, 1172 (2006) (reporting that thirty-eight percent of youth were distressed by a single incident of harassment); Michele L. Ybarra, *Linkages Between Depressive Symptomatology and Internet Harassment Among Young Regular Internet Users*, 7 CYBERPSYCHOLOGY & BEHAV. 247, 252 (2004) (discussing depressive symptomatology as “significantly related to the report of online harassment”).

88. Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age*, 91 B.U. L. REV. 1435, 1448 (2011) [hereinafter Citron & Norton, *Intermediaries and Hate Speech*].

89. *Id.* at 1450.

90. *Id.*

91. *Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996).

bullies in the hallways, and constantly berated with homophobic epithets.⁹² Identity-based aggression victims like Ms. Jouhari and Jamie do not just bear physical and emotional wounds, they also retreat from society. Ms. Jouhari and her daughter moved five times to avoid being found by white supremacists⁹³ and Jamie stopped participating in school, then stopped attending school, and finally moved to a neighboring state to avoid his torment.⁹⁴ Homophobic threats targeted Jamie not *qua* Jamie, but *qua* member of the gay community, and, therefore, those threats could silence the entire gay community in Jamie's school. After all, if one of your own is being victimized for a trait you share, you have reason to hide: from who you really are, from others, and from attention.

This cause-and-effect relationship between identity-based aggression and the silencing of the victimized group is well established. Countless commentators, from Richard Delgado and David Yun⁹⁵ to Charles Law-

92. *Id.* at 451. Jamie's classmates regularly referred to him as a "faggot," and physically assaulted him. *Id.* The harassment and the principal's refusal to take any disciplinary action against the offending students made Jamie "petrified" to attend school. *Id.* In eighth grade, Jamie was assaulted in a boys' bathroom, and again, school officials took no action. *Id.* The bullying intensified to the point that a district attorney advised Jamie to take time off from school. *Id.* After the ten days off, the harassment resumed, leading Jamie to attempt suicide. *Id.* at 451-52. After a stint in the hospital, Jamie finished the year at a Catholic school. *Id.* at 452. In ninth grade, he was struck from behind while using a urinal, causing him to fall and allowing another student to urinate on him. *Id.* Continued bullying resulted in another try at suicide, another hospital stay, and a runaway attempt. *Id.* "Students on the bus regularly [spouted] epithets, such as 'fag' and 'queer,'" at Jamie and threw steel nuts and bolts at him. *Id.* While waiting for the school library to open, Jamie was attacked by eight students. *Id.* One student led the charge, kicking Jamie in the stomach for about five or ten minutes while the other students looked on in amusement. *Id.* A few weeks later, Jamie collapsed from internal bleeding. *Id.* By the next year, Jamie left school, enrolled in a school in Minneapolis, and was ultimately diagnosed with post-traumatic stress disorder resulting from years of being bullied. *Id.* Perhaps the most tragic feature of Jamie's story is the inexplicable refusal of any school official to do anything about the harassment and their flagrant endorsement of the behavior. *Id.* (after reporting the attack by the eight boys, the official in charge of discipline "laughed and told [Jamie] that [Jamie] deserved such treatment because he is gay."). See Waldman, *Tormented*, *supra* note 10, at 392-93.

93. Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1450 n.89 (citing DeWayne Wickham, *They Suffer for Doing Right Thing*, USA TODAY, May 16, 2000).

94. *Nabozny*, 92 F.3d at 451-52.

95. See Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation – Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1822-23 (1994), cited in Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1448 n.74.

rence⁹⁶ and Steven Shiffrin,⁹⁷ have documented the connection between racist aggression and a chilling effect on minority speech. Racist speech tends to “preempt[]” minority speech,⁹⁸ either out of fear of reprisal or in response to the subtle damning pressure to fit in, thus creating a “repressive environment”⁹⁹ where only the majority’s voice is heard. That kind of environment is utterly incongruous with academic success and a school’s educational mission. Participating in class is essential for learning,¹⁰⁰ and isolation in the halls, lunchrooms, and on playing fields deprives victims of “personal intercommunication among the students” that “is not only an inevitable part ... of attending school[,]” but also “an important part of the educational process.”¹⁰¹ Identity-based aggression has the unique ability to chill participation by particular victims of harassment and all other students that identify with those victims. In this way, many students silence themselves, causing their grades and test scores to suffer,¹⁰² and ultimately, causing the school and society to suffer.

Second, identity-based aggression conveys a message of unworthiness, stigmatizing an entire group of people as valueless. This message not only encourages others to join in the aggression, but it instills self-hatred within victimized groups who are constantly reminded of their lower social status. Professor Shiffrin provides a non-exhaustive list of harms caused by racist speech that applies universally to antigay, misogynist, transphobic, and other identity-based speech:

[I]t is an assault on the dignity of people of color; it humiliates and causes emotional distress, sometimes with physical manifestations; it helps spread racial prejudice, not only stigmatizing people of color in the eyes of the societally dominant race, but also in the eyes of the victims themselves, inspiring self-hatred, isolation, and

96. Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (1990), cited in Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1448 n.74.

97. Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 86 (1994), cited in Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1448 n.74; see also, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2332 (1989) (“Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.”).

98. Lawrence, *supra* note 96, at 452.

99. Shiffrin, *supra* note 97, at 86.

100. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

101. *Id.* at 512.

102. Kristin E. Voelkl, *School Warmth, Class Participation, and Achievement*, 63 J. EXPERIMENTAL EDUC. 127, 129-130, 135-138 (1995) (synthesizing a long list of studies showing a strong correlation between class participation and academic achievement and concluding, based on the author’s own study, that class participation has a significant impact on academic success).

impairment of the capacity for interpersonal relationships; and, finally, it frequently creates the conditions for violence.¹⁰³

In a society where sexuality, sexual orientation, and nonconformity to sexual norms is a weapon that perpetuates inequality, the antigay aggressor uses his speech to push gays further down the social ladder.

Inspiring self-hatred and encouraging others to join in the identity-based harassment are also anathematic to a productive educational environment. The negative effects that student anxiety, depression, self-hatred, and fear – all results of identity-based aggression – have on academic success are well documented.¹⁰⁴ And, encouraging high rates of truancy, drop outs, and fail-

103. Shiffrin, *supra* note 97, at 86; see also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 144-46, 179 (1982); Lawrence, *supra* note 96, at 453, 468. See generally Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (examining the causes of the perception held by main minorities that the court system is biased); Matsuda, *supra* note 97 (arguing for criminal sanctions for hate speech because of its harmful effects).

104. E.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178-79 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007) (“Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn. The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that ‘academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school.’ One study has found that among teenage victims of anti-gay discrimination, [seventy-five percent] experienced a decline in academic performance, [thirty-nine percent] had truancy problems and [twenty-eight percent] dropped out of school. Another study confirmed that gay students had difficulty concentrating in school and feared for their safety as a result of peer harassment, and that verbal abuse led some gay students to skip school and others to drop out altogether. Indeed, gay teens suffer a school dropout rate over three times the national average. In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students’ health and welfare, but also to their educational performance and their ultimate potential for success in life.”) (internal citations omitted); see MICHAEL BOCHENEK & A. WIDNEY BROWN, HUMAN RTS. WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 49 (2001); Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 76-77 (1994) (describing how abuse by peers causes gay youth to experience social isolation and drop out of school); Maurice R. Dyson & Nicolyn Harris, *Safe Rules or Gays’ Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 187 (2004) (gay teens “face greater risks of . . . dropping out [and] performing poorly in school”); Amy Lovell, “Other Students Always Used to Say, ‘Look at the Dykes’”:

ure cannot be part of any measure of a school's mission. On a wider scale, schools that fail to respond to identity-based aggression¹⁰⁵ or, worse still, fail to recognize racist, sexist, or antigay aggression as identity-based,¹⁰⁶ teach and legitimize racism, sexism, and homophobia, while giving majority students a false sense of entitlement and power.

The third special effect of identity-based aggression is it "degrade[s] public discourse by skewing society's assessment" of members of victimized groups.¹⁰⁷ As Professors Citron and Norton explain in the hate speech context, racist speech tends to crowd out positive discourse and, by reaffirming or inspiring prejudice, results in discriminatory decisions on employment, housing, and other rights.¹⁰⁸ It causes stigmatization, strengthens the hold that stereotypes have on minorities, and, as discussed *supra*, keeps those groups at the margins of society.¹⁰⁹ These evils – prejudice, stereotyping, and inequality – are not the values public schools should teach, yet failure to discipline or address identity-based aggression turns schools into tacit abettors.

Using the Internet or other digital technologies as tools of identity-based aggression – a subset of what I have called cyberaggression¹¹⁰ – makes these effects exponentially worse in four related ways. First, Professors Citron and Norton remind us that the pseudonymity offered by the Internet "can ... accelerate destructive behavior" because people tend to behave more aggressively when they feel they cannot be observed or caught – a phenomenon that

Protecting Students from Peer Sexual Orientation Harassment, 86 CALIF. L. REV. 617, 625–28 (1998) (summarizing the negative effects on gay students of peer sexual orientation harassment); Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.P.R. 151, 164 (1999); Waldman, *Hostile Educational Environments*, *supra* note 8, at 758–59; Waldman, *Tormented*, *supra* note 10, at 399–402; Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 225 (2005); *Bullying and Gay Youth*, MENTAL HEALTH AM. <http://www.nmha.org/index.cfm?objectid=CA866DCF-1372-4D20-C8EB26EEB30B9982> (last visited Sept. 9, 2012).

105. *E.g.*, *Nabozny v. Podlesny*, 92 F.3d 446, 450–52 (7th Cir. 1996).

106. See Steve Karnowski, *Anoka-Hennepin Gender-Neutral School Policy: Minnesota School Board Ends Policy Blamed for Bullying*, HUFFINGTON POST (Feb. 14, 2012), http://www.huffingtonpost.com/2012/02/14/minn-school-board-ends-po_n_1275843.html; see also Steve Karnowski, *Anoka-Hennepin School District Settles Lawsuits over Gay Bullying, Gender Neutral Policy*, HUFFINGTON POST (Mar. 6, 2012), http://www.huffingtonpost.com/2012/03/06/minn-school-district-sett_n_1323791.html.

107. Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1451.

108. *Id.* (citing Delgado & Yun, *supra* note 95, at 1813).

109. *Id.* (citing R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L.REV. 803, 844–48 (2004)); see also *supra* notes 51–54 and accompanying text.

110. Waldman, *Hostile Educational Environments*, *supra* note 8, at 736–38.

applies to aggressor behavior toward strangers and acquaintances alike.¹¹¹ Therefore, aggressors may be willing to say things online that social norms prevent them from saying face-to-face. Second, simple, easy, and free digital communication eliminates the economic and opportunity costs associated with aggressive behavior.¹¹² Creating a Facebook page that gathers hundreds of supporters for "I HATE GAYS" or "Keep Queers Out of America"¹¹³ is much easier than gathering a posse willing to terrorize an African-American neighborhood or a lesbian couple's residence.¹¹⁴ Third, online aggression is permanent.¹¹⁵ A single racial or homophobic slur at school can be devastating, but it is fleeting; however, a single "I Hate" video or one derogatory comment on a photograph remains online forever, not only because it could be viewed many times, but also because search engine algorithms can find digital information that might have been cached years ago.

Fourth, and perhaps most importantly for gay teens struggling with identity-based aggression, cyberaggression turns what is supposed to be a safe haven into a danger zone. Because gay teenagers are more vulnerable and isolated than their heterosexual peers,¹¹⁶ they rely more on online social net-

111. Citron & Norton, *supra* note 88, at 1447. Professor Citron collected sources documenting this phenomenon in her article, *Cyber Civil Rights*. Citron, *Cyber Civil Rights*, *supra* note 13; see ARNOLD P. GOLDSTEIN, *THE PSYCHOLOGY OF GROUP AGGRESSION* 30, 32 (Clive R. Hollin & Mary McMurran eds., 2002); RALPH H. TURNER & LEWIS M. KILLIAN, *COLLECTIVE BEHAVIOR* 165, 408 (32d ed. 1987); PHILIP G. ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 25 (2007); Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, in NEBRASKA SYMPOSIUM ON MOTIVATION 237, 266-70 (William J. Arnold & David Levin eds., 1969); see also Evan R. Harrington, *The Social Psychology of Hatred*, 3 J. HATE STUDIES 49, 60-61 (2004), <http://web02.gonzaga.edu/againststate/journal3/GHS110.pdf> (discussing the fact that participants dressed in Ku Klux Klan-type outfits gave greater shocks than participants dressed in nurse outfits); Tizra Leader et al., *Without Mercy: The Immediate Impact of Group Size on Lynch Mob Atrocity*, 33 PERSONALITY & SOC. PSYCHOL. BULLETIN 1340, 1342 (2007), http://www.sagepub.com/evansmprstudy/articles/Chapter04_Article02.pdf.

112. Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1447.

113. See Badash, *Facebook or Hate Book?*, *supra* note 7.

114. See Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1447 (citing Kyu Ho Youm, *First Amendment Law: Hate Speech, Equality, and Freedom of Expression*, 51 J. COMM. 406 (2001) (reviewing TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* (1998); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE AND THE MEANINGS OF AMERICA* (1999); JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* (1999) (recounting how white supremacist Don Black admitted that the Internet allowed him to disseminate his views much easier than before))).

115. Citron & Norton, *Intermediaries and Hate Speech*, *supra* note 88, at 1452.

116. See *supra* notes 84-87 and accompanying text.

works to replace non-existent face-to-face communities.¹¹⁷ Facebook, MySpace, and other websites are essential tools for interaction among members of certain population enclaves that are forced underground due to social stigma, religious intolerance, or legal problems.¹¹⁸ Douglas Heckathorn calls these groups “hidden populations,”¹¹⁹ and gay, lesbian, and questioning adolescents are perfect examples of members of these groups.¹²⁰ Adolescents growing up in regions without a significant gay presence or students who choose, for various reasons, to remain closeted, are presumably less likely to self-identify as gay, lesbian, or questioning in their physical, face-to-face communities. Social networking technologies that allow roughly anonymous virtual interaction with like-minded individuals through chat rooms, dating sites, and blogs often are these adolescents’ only source of camaraderie with the only people to whom they can relate. Therefore, these adolescents are not only frequent Internet users,¹²¹ but are also completely reliant upon their Internet use and the virtual community they create for social support, information about their sexuality, and answers to any questions they have about being gay.¹²² Empirical data supports this proposition. As early as 2001, more than eighty-five percent of gay, lesbian, and bisexual adolescents “reported that the Internet had been an important resource for them to connect with LGB peers.”¹²³ Destruction of, or impingement upon, that online social support network through cyberbullying is, therefore, particularly harmful.

117. See Vincent M.B. Silenzio et al., *Connecting the Invisible Dots: Reaching Lesbian, Gay, and Bisexual Adolescents and Young Adults at Risk for Suicide Through Online Social Networks*, 69 SOC. SCI. & MED. 469, 469 (2009); GLSEN 2009, *supra* note 1.

118. See Douglas D. Heckathorn, *Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations*, 49 SOC. PROBS. 11, 11 (2002) (stating that sampling of certain groups is “complicated by privacy concerns based on the stigma associated with membership in the population” and must therefore reach into other alternatives to gather data). One type of hidden population member is one that cannot come forward and identify himself for fear of legal reprisal, like an intravenous drug user. *Id.* As such, it is difficult for social scientists to reach this population for study. *Id.* Professor Heckathorn has pioneered the use of online social networks to reach this type of population.

119. *Id.*

120. See *id.* (referencing injection drug users, homosexual men, and the homeless as examples of hidden populations).

121. Silenzio et al., *supra* note 117, 469 (2009).

122. See Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003) (describing how the Internet has provided isolated gay men and lesbians in otherwise hostile environments “a virtual community that constitutes an emotional lifeline”).

123. Silenzio, *supra* note 117, at 469 (citing LYNNE HILLIER ET AL., AUSTL. RESEARCH CTR. IN SEX, HEALTH AND SOC’Y, ‘IT’S JUST EASIER’: THE INTERNET AS A SAFETY-NET FOR SAME SEX ATTRACTED YOUNG PEOPLE (2001)).

IV. IDENTITY-BASED AGGRESSION AND THE SUPREME COURT'S STUDENT SPEECH JURISPRUDENCE

The severe effects of identity-based aggression on victims, those who identify with them, and the school as a whole are well documented, severe, and undisputed.¹²⁴ But that only gets us so far. We have not yet assessed the sufficiency of these effects as a matter of law; nor, for that matter, have we proven their relevance for determining whether school discipline is consistent with the First Amendment. These are the goals of the remainder of this Article, and I argue that because a close reading of the Supreme Court's student speech cases reveals that a school-focused effects test is the consistent rationale underlying student speech restrictions, the effects of identity-based aggression are both relevant and sufficient to legitimize school discipline of its perpetrators. That is, the Supreme Court has focused its attention on the harms certain types of student speech can have on the school: its ability to teach, its reputation, and its adherence to educational values. And, because identity-based aggression has the unique ability to destroy educational opportunities, to make it impossible for schools to teach their students, and to put schools in the position of enforcing bigotry and hate, schools can restrict such speech consistent with First Amendment values.

Since 2000, most courts addressing identity-based aggression cases, which often involved Confederate flag displays or antigay attacks, have relied on the first part of the *Tinker* test: student speech may be restricted if it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."¹²⁵ The results suggest how little courts understand about identity-based aggression and the *Tinker* standard. For example, some jurisdictions would only approve restrictions on Confederate flag displays if schools demonstrated a link to racial unrest or showed "ample reason" that the display would create racial disturbances for the school.¹²⁶ In a case involving a white student wearing a t-shirt that read, "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!", the court found no justification for disciplining the

124. See *supra* Part III.B.

125. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)). The few courts that have applied *Fraser* to Confederate flag display cases have generally upheld the restrictions, finding that allowing the flag display would interfere with the school's mission to teach tolerance and respect for others. See, e.g., *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (per curiam); *Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267 (11th Cir. 2000).

126. *D.B. ex rel. Brogdon v. Lafon*, No. 06-5982, 217 F. App'x 518, 525 (6th Cir. 2007) (per curiam); see also *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) (permitting a restriction on a Confederate flag display because of evidence of verbal confrontations between white and black students in the past).

student because the student was merely expressing “a potentially offensive political viewpoint” like a “George W. Bush International Terrorist” t-shirt,¹²⁷ and because the school offered no “evidence of any history of violence or disorder in the school or any other circumstances that would justify a reasonable likelihood of disruption.”¹²⁸ These are formalist approaches to *Tinker* and identity-based aggression cases; they require specific evidence to apply to a strict rule on restricting speech. They also ignore any distinction, as discussed above, between an attack on an opinion (albeit a passionate one) and an attack on core, identifying characteristics essential to personhood. These courts place details over meaning, misunderstanding the Supreme Court’s distaste for hard and fast rules when determining the legitimacy of school discipline of student speech.

The Ninth Circuit eschewed the “substantial disruption” quagmire by analyzing one identity-based aggression case under *Tinker*’s second prong: student speech can be restricted if it “inva[des] the rights of others.”¹²⁹ In *Harper*, the court upheld a school’s ban on a student t-shirt that degraded gays (“Homosexuality is Shameful, Be Ashamed, Our School Embraced What God Has Condemned,” on the front, and “Homosexuality is Shameful,” on the back) because this speech – an example of identity-based aggression against gays – collided with the rights of others.¹³⁰ This mode of analysis seemed to avoid the question of effects;¹³¹ the question was about rights, not sociological impact: “[p]ublic school students who may be injured by verbal assaults on the basis of a core, identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks.”¹³² After all, the court noted, *Tinker* recognized the right to “be secure and to be let alone,”¹³³ which must mean freedom from “psychological attacks that cause young people to question their self-worth and their rightful place in society.”¹³⁴ And, because identity-based aggression interferes with this right to be let alone, “the most comprehensive of rights and the right most valued by civilized men,”¹³⁵ such hateful speech could be restricted in accordance with First Amendment principles.¹³⁶

At a minimum, the “rights of others” approach appreciates the gravity of identity-based aggression and arguably considers it a categorical Constitu-

127. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967, 971 (S.D. Ohio 2005).

128. *Id.* at 973.

129. *Tinker*, 393 U.S. at 513.

130. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171, 1178 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

131. *See supra* Part III.B.

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

133. *Id.* (quoting *Tinker*, 393 U.S. at 508).

134. *Id.*

135. *Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000)).

136. *Id.*

tional evil because it is inconsistent with other individual rights. It recognizes that the essence of identity-based aggression is its function as a tool against minorities: the court applied its ruling to protect minority students who “have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior.”¹³⁷ The “rights of others” approach also understands that identity-based aggression will always “damage [those students’] sense of security and interfere with their opportunity to learn.”¹³⁸ But, although *Harper* is consistent with the sociology and psychology of identity-based harm, it may not stand on solid legal ground for one important reason: if we go beyond the formal misapplication of *Tinker* that has characterized so many student speech cases, we see that the harms identified in *Harper* are precisely the harms the Supreme Court has said counsel in favor of speech restrictions. In other words, the *Harper* approach is simply unnecessary.

To understand how this is so, we must determine what it is about certain student speech that tilts the balance in favor of lawful restrictions. This inquiry requires us to go beyond the “substantial disruption” standard and reach for the consistent rationale behind all student speech restrictions. Too many courts and commentators accept the not-incorrect, yet superficial explanation that *Fraser*, *Kuhlmeier*, and *Morse* are exceptions to *Tinker* and thus, incapable of elaborating the contours of the Court’s rationale. They prefer the legal formalism of one test and three exceptions to the practical reality that the Court’s student speech jurisprudence has created a balancing test that tries to respect both modern liberal and classical Aristotelian values in public education.¹³⁹ They miss the consistent rationale linking *Tinker* and its progeny: what matters are effects of the behavior on the school.

The student speech in *Tinker* was notable for the absence of any effect it had on the school, but the majority still tipped its hat – albeit in an exceedingly general way – as to the kinds of effects that mattered. In *Tinker*, a number of students wore black armbands to protest American involvement in the Vietnam War in violation of a recently adopted school policy prohibiting armband protests.¹⁴⁰ Because the protest was “passive” and refrained from “aggressive, disruptive action,” the Court found that silencing this student expression of “direct, primary First Amendment rights” was unlawful.¹⁴¹ But, while the operative fact of *Tinker* is the absence of disruption, it is clear what manner of disruption concerned the Court: “interference, actual or nascent, with the schools’ work.”¹⁴² The armband protest merited Constitutional protection because neither the “work of the schools [n]or any class was dis-

137. *Id.*

138. *Id.*

139. See *infra* Part V.

140. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

141. *Id.* at 508.

142. *Id.*

rupted;"¹⁴³ the protest did not "interrupt[] school activities" or "intrude" into the school's daily affairs.¹⁴⁴ In other words, there needed to be a reasonable forecast of effects that would make it impossible for the school to fulfill its educational function; classroom disorder, interruptions in class, and interference with the school's ability to keep students in class and paying attention are only the most obvious forms of unacceptable disruptions.

Tinker lacks further specifics. But, in holding that a school can restrict a student's lewd speech at a school event, *Bethel School District v. Fraser*, helps clarify the Court's underlying balancing test in student speech cases. *Fraser* involved a student who nominated a fellow student for class president by giving a speech with "an elaborate, graphic, and explicit sexual metaphor,"¹⁴⁵ something that Chief Justice Burger found was inconsistent with the school's educational mission to teach fundamental values necessary for democracy.¹⁴⁶ If the purpose of American public education was to "prepare pupils for citizenship" or teach the "habits and manners of civility,"¹⁴⁷ permitting a student to deliver a graphically lewd speech winking toward a male student's sexual prowess was inconsistent with that mission for a number of reasons: vulgar language has no place in civilized debate, the school would become a model for inappropriate behavior,¹⁴⁸ and the speech itself would damage other young students whom the school must teach and protect.¹⁴⁹ Most scholars take the conventional view that *Fraser* carved out an exception to *Tinker* because, when lewd speech is involved, *Fraser* says that a school need not show evidence of a substantial disruption.¹⁵⁰ And yet, if we consider what actually concerned the Court in *Fraser*, it was still the effects Fraser's speech had on the school, regardless of it reaching some disruptive threshold. That is, it was the effects of the speech and their inconsistency with a school's basic educational mission that brought Chief Justice Burger to this decision. A school could not teach civility, virtue, and tolerance for others' views if it became a model for the opposite values of vulgarity, callousness toward the feelings of others, and lack of order.¹⁵¹

143. *Id.*

144. *Id.* at 514.

145. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986).

146. *Id.* at 683.

147. *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

148. *Id.* at 683.

149. *Id.* at 683-84.

150. *Id.* at 685.

151. The majority noted that, by "glorifying male sexuality . . . the speech was acutely insulting to teenage girl students," and caused young students "on the threshold of awareness of human sexuality" to be "bewildered" and mimic Mr. Fraser's words and body language. *Id.* at 683-84. In context, it does not seem that Chief Justice Burger was concerned about the sexist nature of Mr. Fraser's speech, but the

In holding that schools could determine that vulgar and lewd speech would undermine the schools' basic educational mission, *Fraser* not only indicates that the Court is concerned with effects on the school when balancing the unique school environment with free speech principles, but also broadens the types of effects that merit restriction. *Tinker* addressed protests, and the attendant disruption possible from students getting up in the middle of class, agitating the school population, and inciting a riot.¹⁵² *Fraser* saw more subtle, but no less damaging effects on a school that is put in the position of tacitly approving inappropriate language by allowing Mr. Fraser to go on without punishment. Teaching respectful debate and civic engagement that does not interfere with the school's work has a positive effect on the school, its ability to teach, and its reputation: the school becomes a place of active learning, civility, and debate. Sociologists studying education have proven that.¹⁵³ But, allowing students to use vulgar and lewd language at a school-sponsored event would make it impossible to teach the impropriety of curse words and sexist language in civil society.

The subsequent decision in *Hazelwood School District v. Kuhlmeier* reaffirmed the Court's focus on student speech that handicaps a school's ability to teach its established curriculum. In *Kuhlmeier*, a principal censored two articles in a school newspaper produced as part of a journalism class; one article discussed teen pregnancy, the other addressed an anonymous student's experience with divorce.¹⁵⁴ The principal was concerned that the students could be identified in context, which could lead to embarrassment and ostracism.¹⁵⁵ The Court also was aware that students created this official school paper as part of their journalism class curriculum.¹⁵⁶ The Court concluded that schools cannot be forced into a position of countenancing inappropriate speech that bears the imprimatur of the school, whether inappropriate via bad grammar, vulgarity, or inappropriate for student readers.¹⁵⁷ Otherwise, schools "would be unduly constrained from fulfilling their role" of teaching cultural values, preparing students for professional training, and helping children adapt to the civilized world.¹⁵⁸ To the Court, this kind of student speech could have just as much effect on the school's ability to teach as disciplinary breakdowns associated with group protests, and lewd and vulgar speeches at school assemblies. All three forms of speech distract from the curriculum

effect of tolerating this kind of speech on the school's ability to teach proper civic values. *Id.* at 684.

152. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504-08 (1969).

153. See, e.g., Jonathan Cohen, *Social, Emotional, Ethical, and Academic Education: Creating a Climate for Learning, Participation in Democracy, and Well-Being*, 76 HARV. EDUC. REV. 202, 205-08, 212-13 (2006).

154. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

155. *Id.*

156. See *id.*

157. *Id.* at 271.

158. *Id.* at 272.

and affect the school's reputation, its practical and moral authority, and student academic success.

The same analysis held sway in *Morse v. Frederick*, where the Court permitted a school to discipline a student for speech that could reasonably be construed as promoting illegal drug use.¹⁵⁹ Mr. Frederick unfurled a banner that read, "BONG HiTS 4 JESUS," during a school-approved social event.¹⁶⁰ Though the district superintendant justified the principal's decision to discipline the student on the grounds that the banner was "disruptive to the event," he never specified how.¹⁶¹ Nor did that matter to the Court. The admittedly "silly" banner could be interpreted to encourage illegal drug use, which is anathematic to school and public policy in general.¹⁶² The Court went to great lengths to emphasize the devastating effects of drug use on young children; on the growing drug problem among American youth; and the time, money, and energy Congress, the states, and local schools boards have spent on drug-prevention programs.¹⁶³ This reminder served not only to establish the evils of drugs, but also to highlight the incongruity between drug-related speech and a school.¹⁶⁴ After all, students who "celebrat[e] illegal drug use at a school event, in the presence of school administrators and teachers, ... pose[] a particular challenge for school officials working to protect those entrusted to their care"¹⁶⁵ because, like the school in *Fraser*, any overt or tacit approval of the speech would put the school in the position of teaching lessons contrary to the curriculum, thus handicapping the school's ability to teach.

Therefore, in terms of the kinds of effects that permit school discipline of student speech consistent with the First Amendment, there is little that distinguishes lewd speech (*Fraser*), speech that could bear the imprimatur of the school (*Kuhlmeier*), and drug-related speech (*Morse*) from *Tinker*'s armband protest. All four types of speech could interfere with the school's ability to teach successfully: protests could interrupt class, distract students, and lead to a breakdown in discipline; lewd speech at an assembly similarly breaks down discipline and puts the school in a position of tacitly approving inappropriate language and sexist behavior; student speech associated with class curricula necessarily forces the school to sponsor that speech, which, if inappropriate, would interfere with how classes are taught; and permitting drug-related speech at a school sponsored event ignores stated local, state, and federal policy that schools should teach students not to take illegal drugs. To

159. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

160. *Id.* at 397.

161. *Id.* at 399.

162. *Id.* at 409-10.

163. *Id.* at 407-08.

164. *Id.*

165. *Id.* at 408.

be sure, there are differences among these cases,¹⁶⁶ but the underlying rationale for restricting speech seems to be uniformly clear: student speech can be restricted consistent with the First Amendment when permitting it would force the school to tolerate or endorse speech that does violence to the school's ability to teach its students successfully.

The connection between a given example of student speech and damage to a school's ability to teach successfully is not always direct. *Tinker*-like protest speech has a first-degree connection to the operative harm: a protest is a disruption to the school's ability to teach its students because it may involve students staging walk-outs in the middle of class, sit-ins in the middle of hallways, or cacophonous marches, for example. The silent armband protest in *Tinker* merited Constitutional protection specifically because none of these effects could be reasonably expected. Lewd speech, non-curricular speech, and drug-related speech, however, affect the school more subtly via a second-degree connection; they may cause disciplinary breakdowns, but more importantly, they put the school in a position of tacit approval of behavior that is incongruous with American public education, thus damaging the school's authority to teach the values and lessons it is charged to teach by the state.

This is precisely the effect that tolerating identity-based aggression has on a school. As discussed above, identity-based aggression carries with it all the negative effects of face-to-face aggression – depression, anxiety, withdrawal, difficulty in social situations, suicidal ideation¹⁶⁷ – and piles on additional harms that irreparably harm a school's ability to teach – increased truancy rates, silencing victims and those who identify with them, instilling fear, legitimization of discrimination, and skewing societal views of victimized groups.¹⁶⁸

These effects are especially pronounced when LGBT youth are the victims. As a result of identity-based aggression, more than 61 percent of LGBT students reported that they felt unsafe at school because of their sexual orientation, and 39.9 percent felt unsafe at school because of how they expressed their gender.¹⁶⁹ In three studies between 2000 and 2004, Professor Ian Rivers found that bullying of LGBT students starts earlier than with others, at around ten or eleven years old, and usually continued for at least four to six years.¹⁷⁰ More than seventy percent of respondents reported feigning illness or skipping school to avoid face-to-face abuse, and those respondents were five

166. For one thing, the anti-war protest in *Tinker* is much closer to classic dissenting political speech, which deserves the widest protection in our category-based First Amendment jurisprudence. That explains why the threshold for restricting *Tinker*-like speech, i.e., the "substantial disruption" standard, is higher than the effects threshold in *Fraser*, *Kuhlmeier*, and *Morse*.

167. See *supra* note 104 and accompanying text.

168. See *supra* Part III.B and accompanying text.

169. GLSEN 2009, *supra* note 1, at xvi, 22.

170. Ian Rivers, *Recollections of Bullying at School and Their Long-Term Implications for Lesbians, Gay Men, and Bisexuals*, 25 CRISIS 169, 171 (2004).

times more likely to report having experienced suicidal ideation and to have made suicide attempts than those who reported no absenteeism.¹⁷¹ Another study found that boys who reported being bullied because they were gay experienced negative emotional effects significantly more severe than those who were bullied for other reasons.¹⁷² Gay male victims and boys who are bullied because of perceived homosexuality have more negative views of school, experience higher levels of anxiety and depression into adulthood, perform significantly worse in school, generally restrict their expressions of emotion, and fail to develop interpersonal skills and connections.¹⁷³ Various scholars suggest that the greater harm to gay boys – real or perceived – is based on a social “gender straitjacket” that locks boys into the view that any expression of vulnerability is tantamount to femininity, which, in turn, is recast as evidence of being gay.¹⁷⁴ Consequently, a vicious cycle ensues – gay boys then bully other boys, in part, to burnish their masculine bona fides, leaving heterosexual boys susceptible to antigay bullying and leaving real gay boys to “feel less than whole” not because of their sexual identity but because of a “damaging code” that reinforces their exclusion from the majority of their peers.¹⁷⁵ A school cannot teach reading, writing, or arithmetic, let alone essential skills for civic and professional engagement, if its minority students are feigning illness to avoid school, or feel unsafe every time they raise their hands or walk the halls. A school that tolerates this state of affairs reminds victimized students and those that identify with them that they are unworthy, further damaging their self-esteem and willingness to learn. And, as depression, truancy, and fear rise, test scores, love of learning, and social development fall. These are symptoms of a sick school, and they make it impossible for a school to teach its designated curriculum.

What is more, these connections are not speculative; our law has already recognized them. As far back as *Brown v. Board of Education*, the Supreme Court perceived the connection between discrimination against minority youth, their ability to learn, and a school that fosters educational failure.¹⁷⁶ In a similar vein, the Ninth Circuit in *Harper* proved the devastating impact identity-based aggression has on a school’s ability to teach. The Court cited countless studies showing the connection between antigay harassment, educational failure, and other sick school symptoms.¹⁷⁷ And, in *Nuxoll*, the Seventh Circuit concluded that antigay speech that “will lead to a decline in stu-

171. Ian Rivers, *Social Exclusion, Absenteeism, and Sexual Minority Youth*, 15 SUPPORT FOR LEARNING 13, 15-16 (2000).

172. Swearer et al., *supra* note 86, at 170.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

177. *Harper v. Poway Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

dents' test scores, an upsurge in truancy, or other symptoms of a sick school," would rise to the level of a "substantial disruption" under *Tinker*.¹⁷⁸ Although this Article eschews the formalism of that test in favor of a broader understanding of the rationale underlying all of the Supreme Court's student speech cases, *Nuxoll* nevertheless understood the connections between identity-based aggression and a school's inability to teach. The court not only distinguished between opinions or preferences (choosing Pepsi over Coke) and deeply held, core characteristics like sexual orientation,¹⁷⁹ but also foresaw "a deterioration in the school's ability to educate its students" if antigay aggression turns into a negative comment ping-pong match about homosexuality and religion.¹⁸⁰ It further noted that "students subjected to derogatory comments" about core, identifying characteristics "may find it even harder than usual to concentrate on their studies and perform up to the school's expectations."¹⁸¹ A school that permits identity-based aggression actively harms its students by damaging its ability to teach them and lowering the school's academic performance. The First Amendment should not countenance such results in the school context.

V. CONSISTENCY WITH LIBERAL AND CLASSICAL EDUCATIONAL VALUES

We have seen that many federal courts fail to recognize that identity-based aggression effectuates a group harm capable of damaging a school's ability to teach its students successfully and that this is precisely the type of harm the Court was concerned with in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*. That failure may reflect a combination of unclear Supreme Court guidance; conservative hostility to our burgeoning understanding of racist, sexist, and homophobic speech; and, most importantly, the moral bankruptcy of much of our modern First Amendment jurisprudence.¹⁸² And yet, understanding the connection between identity-based aggression, severe group harm, and school deterioration would respect both the classical Aristotelian and modern liberal values that have come to coexist awkwardly, yet sustainably in our student speech jurisprudence. Aristotle would counsel that speech restrictions on students should be distilled through the lens of the purpose of education – namely, to teach civility and character and to prepare students for future participation and leadership in the community.¹⁸³ Modern liberals would resist

178. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 674 (7th Cir. 2008).

179. *Id.* at 675-76.

180. *Id.* at 672.

181. *Id.* at 671.

182. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 194 (2011).

183. See *infra* notes 194-96 and accompanying text.

such virtue education as incompatible with a pluralistic society and instead argue from a rights-based, rather than a purpose-based perspective: broad student speech freedom fosters educational development through exposure to different ideas.¹⁸⁴ These ideas can be in conflict, but they coexist in the Court's student speech jurisprudence.

A. Classic Aristotelian Values

Aristotle's philosophy is teleological, which is to say that he thinks about the right thing to do or how to structure a political community by reasoning from the purpose, or *telos*, of the thing.¹⁸⁵ And he thinks about education in the same way.¹⁸⁶ For example, Americans think politics should be structured as a fair system to execute the needs of the voting public, and our representative republic is based on a rough form of representative equality.¹⁸⁷ Aristotle started from a different perspective, by asking one question: what is the purpose of politics?¹⁸⁸ To him, politics was not about setting up a framework that values individual rights and does not interfere with citizens' rights to choose their own ends, but rather politics was supposed to create "good citizens and to cultivate character."¹⁸⁹ "[A]ny polis," he wrote, "must devote itself to the end of encouraging goodness Otherwise, . . . law becomes a mere covenant . . . 'a guarantor of men's rights against one another' – instead of being, as it should be, a rule of life such as will make the members of a polis good and just."¹⁹⁰ A *polis* is an association whose goal is nothing less than "the good life, and the institutions of social life are means to that end."¹⁹¹ Under that vision, participation in the *polis*, through leadership, debate, and service is man's highest calling.¹⁹² Only the best, most virtuous people should hold office, not only because they will enact the best policies that achieve the purposes of the city, but because politics exists to honor their civic virtue.¹⁹³

184. See *infra* Part V.B.

185. MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 186 (2009).

186. See *infra* notes 194-96 and accompanying text.

187. Modern liberal societies focus on the primacy of justice in politics through the so-called one-person, one-vote principle. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 558 (1964). According to Chief Justice Warren, "[l]egislators represent people, not trees or acres," and any legislative apportionment scheme other than one-person, one-vote would not "achiev[e] . . . fair and effective representation for all citizens." *Id.* at 562, 565-66.

188. See SANDEL, *supra* note 185, at 192-93.

189. *Id.* at 193.

190. ARISTOTLE, POLITICS, Book III, ch. ix (1280b).

191. *Id.*

192. SANDEL, *supra* note 185, at 193-94.

193. For a summary of this argument, see *id.* at 184-207.

This is how Aristotle thought about education, as well. Schools are essential to train youth for future civic participation in the *polis*, which requires virtue and a respect for government; after all, the “best laws ... will be of no avail unless the young are trained by habit and education in the spirit of the constitution.”¹⁹⁴ The goal of any school should be “to make [men] good and disposed to do what is noble.”¹⁹⁵ Therefore, though some may disagree on the means of teaching the young, the goal must be the education of “virtue” for its eventual channeling into man’s highest and core calling: the *polis*.¹⁹⁶

Early American education took on this decidedly Aristotelian bent: education built civic virtue and stressed the importance of community, both of which were essential for the success of the American experiment. In his essay, “On Education of Youth in America,” Noah Webster stated that education should “not only diffuse a knowledge of the sciences but ... implant in the minds of the American youth the principles of virtue and of liberty and inspire them with just and liberal ideas of government and with an inviolable attachment to their own country.”¹⁹⁷ Benjamin Rush reminded us that “without virtue there can be no liberty,”¹⁹⁸ and both Samuel and John Adams, who agreed about very little, believed that freedom could not exist without civic virtue.¹⁹⁹ Anonymous opponents of the Constitution felt that “free government” required the “body of the people [be] ... virtuous”²⁰⁰ because “virtuous people make just laws, and good laws tend to preserve unchanged a virtuous people.”²⁰¹ To these early American leaders, democracy depended not merely on constitutions or the protection of individual rights, but rather on the moral and civic character of the American people. Therefore, any public education system had to foster and encourage that civic virtue.

The Supreme Court’s student speech jurisprudence has shown an on-again-off-again respect for this Aristotelian tradition. In *Fraser*, for example, the majority based its decision to sanction the disciplinary consequences of Fraser’s lewd speech on the “fundamental values” of American public educa-

194. *Id.* at Book V, ch. vii (1310a).

195. CHRISTOPHER J. LUCAS, OUR WESTERN EDUCATIONAL HERITAGE 88 (1971).

196. ARISTOTLE, *supra* note 190, at Book VIII, ch. i (1337a).

197. Noah Webster, *On The Education of Youth in America*, in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 41, 45 (Frederick Rudolph ed., 1965).

198. Benjamin Rush, *Thoughts Upon The Mode of Education Proper in a Republic*, in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC, *supra* note 197, at 9-10.

199. Letter from Samuel Adams to John Scollay (Dec. 30, 1780), in 4 THE WRITINGS OF SAMUEL ADAMS 236, 238 (Harry Alonzo Cushing ed., 1908); Letter from John Adams to Mercy Warren (April 16, 1776), in 1 THE FOUNDERS’ CONSTITUTION 670 (Philip Kurland & Ralph Lerner eds., 1987).

200. Letters of Centinel I. (Oct. 5, 1787), in 1 THE COMPLETE ANTI-FEDERALIST 130, 139 (Herbert J. Storing ed., 1981).

201. Letters from the Federal Farmer VII, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 200, at 214, 266.

tion.²⁰² Schools had to “prepare pupils for citizenship in the Republic” and “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government.”²⁰³ They taught “the shared values of a civilized social order,” not just reading, writing, and arithmetic.²⁰⁴ As such, the First Amendment could not interfere with a school’s determination that Fraser’s speech was incompatible with those goals;²⁰⁵ otherwise, public education would not be fulfilling its essential democratic purpose. Similarly, in *Kuhlmeier*, the Court concluded that the First Amendment could not interfere with a school’s mission to teach important civic responsibilities, like leadership and a responsible press in a democracy.²⁰⁶ And, although Justice Alito’s concurrence in *Morse* attempts to disclaim a school’s “educational mission” as a valid basis for restricting speech,²⁰⁷ it is hard to argue that civic-mindedness and the preparation of students for future participation in a civilized society is absent from the Court’s conception of public schools and student speech.²⁰⁸

Disciplining identity-based aggressors is consistent with this Aristotelian, or “perfectionist” vision of education. A school’s policy against denigrating and harassing students based on core, identifying characteristics of those students would teach civility and mature coexistence in a pluralistic society, an important value necessary for respectful debate and cooperation in a democracy. A modern pluralistic society could not succeed if its citizenry was accustomed to the legitimacy of hate and discrimination, precisely the values learned from identity-based aggression.²⁰⁹ Just like the First Amendment could not prevent schools from concluding that lewd speech or drug-related speech was inconsistent with their goals, free speech principles should not interfere with a school that recognizes the significant social and educational harms wrought by identity-based aggression.

B. Modern Liberal Values

Free speech principles could only interfere with a school recognizing the harms caused by identity-based aggression if we believed in an absolutist liberal or autonomy-based conception of the First Amendment. Therefore, some commentators argue that the classical educational tradition is in constant conflict with more modern liberal perspectives on education based on

202. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

203. *Id.* (quoting CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

204. *Id.* at 683.

205. *Id.* at 685-86.

206. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

207. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

208. *See, e.g., id.* at 403.

209. *See supra* Part III.B and accompanying text.

student rights, freedom, autonomy, and the social good of being exposed to new and different views. While many have argued that Aristotelian and liberal values underlie very different free speech principles,²¹⁰ disciplining identity-based aggressors is consistent with both sets of values.

In the free speech context, liberal principles of autonomy and respect for individuals²¹¹ refer to the respect we give to the individual's right of self-expression without a government proscribing any particular viewpoint or topics for debate.²¹² Much of the Court's free speech rhetoric from the 1970s to today²¹³ emphasizes autonomy, respecting the Kantian and Rawlsian view that the locus of speech rights was the self *qua* self, not as a tool of some greater social good. In *Cohen v. California*,²¹⁴ for example, the Court reversed a conviction of a Los Angeles man who wore a jacket with the words "Fuck the Draft" emblazoned on the back.²¹⁵ What animated that decision was the speaker's autonomy: the right of free expression, the Court stated, "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us" because our "political system" rests on "the premise of individual dignity and choice."²¹⁶ Rather than, say, Justice Brandeis's²¹⁷ and Alexander Hamilton's²¹⁸ belief that free expression served

210. The literature on the "[t]he fundamental conflict in public schools between [the] inculcation of values and a student marketplace of ideas," is extensive. See William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 506 n.4 (1989); Mark Yudoff, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995) (stating that public schools are increasingly "devoted to the socialization of the young and to the inculcation of values and skills"); see also Ari Ezra Waldman, *Aristotle's Internet: Free Speech Values Online*, 8 N.Y.U. J.L. & Liberty (forthcoming 2013).

211. The political and philosophical story underlying the liberal values of autonomy and individual rights is too voluminous to tell here. The tradition, indebted to the enlightenment thinker Immanuel Kant, and neo-Kantians like Rawls and Dworkin, may span varying conceptions of liberalism, but all are based on respect for individuals as ends in themselves. IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood, ed. 2002); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); RAWLS, *POLITICAL LIBERALISM* (1993).

212. See SANDEL, *supra* note 185, at 107.

213. E.g., *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom – the 'unfettered interchange of ideas.'").

214. 403 U.S. 15 (1971).

215. *Id.* at 16, 26.

216. *Id.* at 24.

217. For Brandeis, the purpose of the First Amendment was to ensure that the citizenry could fulfill its responsibility to engage in active public discussion about political matters. Justice Brandeis made this point in his concurrence in *Whitney v. California*, 274 U.S. 357 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444

some communal end, the Court in *Cohen* emphasized a distinctly personal freedom with no attendant good other than the benefit of individual freedom itself.²¹⁹

This respect for autonomy manifests itself in the pure "marketplace of ideas" as a primary First Amendment goal.²²⁰ That is, the First Amendment requires government to act as a neutral arbitrator in the marketplace of ideas,

(1969), where a unanimous Court upheld the conviction of a man who tried to establish a communist party, stating that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.* at 375 (Brandeis, J., concurring). Notably, Justice Brandeis may have been more influenced by classical philosophy than the words of the Framers. See Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 461-64 (1988).

218. In arguing for ratification of the Constitution in *The Federalist No. 1*, Alexander Hamilton cautioned about too much concern for the individual because zeal for individual rights is "a much more certain road to the introduction of despotism" than a "zeal for the firmness and efficiency of government." THE FEDERALIST NO. 1, at 5 (Alexander Hamilton) (Gary Wills ed., 1982). This view was a common one among the Framers. Rogers Smith reminds us that James Madison and Thomas Jefferson saw individual liberties in context, there for the purpose of promoting "'moderation and harmony' and hence 'the preservation of free government.'" ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 94 (1985).

219. See also *Herbert v. Lando*, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting in part) ("Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity. This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect."); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 807 (1978) (White, J., dissenting) ("Ideas which are not a product of individual choice are entitled to less First Amendment protection."); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (to "assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

220. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."); ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 33 (1941) ("The First Amendment protects . . . a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined").

neither distorting the citizenry's discussion of important issues nor favoring certain viewpoints or forms of expression.²²¹ Therefore, rather than training students in civic virtue and political literacy, liberal public education is meant to teach "independence and vigor . . . in this relatively permissive, often disputatious, society."²²² And, though no one doubts that the public school is a unique environment, liberal values of free expression have formed a significant part of the Court's student speech jurisprudence. In *Keyishian v. Board of Regents*,²²³ Justice Brennan called the classroom a "marketplace of ideas."²²⁴ Unlike the Founders and early American thinkers who saw the success of the American experiment dependent upon a virtuous and public service-oriented citizenry educated in shared values,²²⁵ Justice Brennan echoed liberal scholarship that pinned American hopes on "leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues."²²⁶ The former emphasizes civic virtue; the latter reflects the primacy of individual autonomy. In *Tinker*, the Court called student speech a "hazardous freedom" because of the openness that Justice Brennan's marketplace implied;²²⁷ in fact, any dissent is hazardous:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument But our Constitution says we must take this risk.²²⁸

We must take that risk because, under the liberal vision, the First Amendment ensures our exposure to a broad range of ideas, unfiltered

221. This view is widely held. See, e.g., Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 932-933, 939, 945 (1993) (arguing that the First Amendment's core is the idea that the government should not make policy based on the effects of speech); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769, 786 (2001) (arguing that free speech cases ask one thing: whether the government acted with an impermissible anti-speech motive); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 202-07 (1983) (suggesting, in part, that the content neutrality principle is based on the desire for equality among speakers).

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

223. 385 U.S. 589 (1967).

224. *Id.* at 603.

225. See *supra* Part V.B.

226. *Keyishian*, 385 U.S. at 603 (internal quotes omitted).

227. *Tinker*, 393 U.S. at 508.

228. *Id.*

through some extrinsic conception of social good like "virtue" or "patriotism."

Although we could foster a free market through deregulation, i.e., permitting all types of speech, we do not because some restrictions on harmful speech – true threats,²²⁹ fighting words,²³⁰ low value speech,²³¹ for example – enhance the vitality of the marketplace. The same is true with the regulation of identity-based aggression in schools. As discussed above, such behavior is antithetical to a free exchange of ideas because it silences minorities, instills fear, chills the speech of victims and all those who identify with them, and teaches and legitimizes inequality and discrimination.²³² Punishing identity-based harassment, then, would allow traditionally harassed minorities to speak their minds, widening the ideas in the marketplace. After all, free speech means nothing if you cannot speak in the first place.

VI. CONCLUSION

Tolerating identity-based aggression in schools not only ignores the devastating effects such behavior has on its victims, it also ignores far-reaching effects such behavior has on all those who share the same core, identifying characteristics of the victim. Only an absolutist conception of the First Amendment would protect speech that targets students in this way, but that vision is utterly inconsistent with a Supreme Court's student speech jurisprudence. Reflecting both Aristotelian and liberal educational values, that jurisprudence is concerned with the effect certain student speech may have on the school's ability to teach its students successfully.

Critics may argue that the central problem with this approach is that effects can vary and, in certain cases, conduct or expression that may damage the fabric of one school may conform to the accepted social norms of another. This is really two critiques in one. First, it reflects the traditional liberal view that the arms of the state should refrain from making value judgments, allowing their citizens to live the good life as they see fit; second, when the survival of student speech is left to an effects determination made by local faculty and administrators, the results may not always be progressive, inclusive, and tolerant of minorities. A school in a conservative district with a population that overwhelmingly disapproves of gay rights and homosexuality, in general, may consider a Gay Pride t-shirt, a rainbow flag, or a speech in favor

229. *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam).

230. *Cohen v. California*, 403 U.S. 15, 20 (1971); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

231. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 282-83 (1992) (The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting *Chaplinsky*, 315 U.S. at 572)).

232. See *supra* notes 81-123 and accompanying text.

of the freedom to marry wholly inappropriate, vulgar, or even a violation of traditionalists' religious freedom. This is no theoretical possibility: principals have removed students from assemblies for trying to speak on behalf of marriage freedom²³³ and conservatives are pushing for laws that even allow bullies to harass other students in accordance with some perverse interpretation of religious doctrine.²³⁴ In those cases, traditionalists argue that their ability to teach in a supportive environment is undermined by the forced imposition of a disruptive outside culture.

Setting aside the provincialism and closed-mindedness that makes that argument anathematic to education, in general, this is precisely why my theory is necessary. Gay pride t-shirts, rainbow flags, and other similar non-violent symbols or expressions of identity affirmation from other minority groups are qualitatively different than expression that manifests the hate members of a majority have for those minorities. Indeed, they are inverses. And, it is not only theoretically impossible for in-group members to experience the same effects from out-group expressions of identity affirmation as those minorities experience from hate and harassment directed at them. Rigorous sociological and psychological studies prove as much. This suggests that there is ample sociological and legal support for allowing the judiciary to make the objective assessment that identity-based harassment is inconsistent with public education without sweeping identity-affirming expression out with the trash.

233. Tracy Wood, *Administrator Apologizes for Pulling Gay Student from Stage*, VOICE OF OC (Apr. 10, 2012), http://voiceofoc.org/countywide/this_just_in/article_f51f86da-7e9b-11e1-8fda-001a4bcf887a.html.

234. Laura Hibbard, *Michigan's 'Matt's Safe School Law' Allows Bullying with Religious, Moral Reason*, HUFFINGTON POST, (Nov. 4, 2011), http://www.huffingtonpost.com/2011/11/04/michigans-matts-safe-schools-law-allows-bullying_n_1076494.html. The religious exception was ultimately dropped from the bill. *Michigan's 'Matt's Safe School Law,' Anti-Bullying Legislation, Exemption Dropped by Senator*, HUFFINGTON POST (Nov. 17, 2011), http://www.huffingtonpost.com/2011/11/14/matts-safe-school-law-exemption-dropped_n_1093667.html.

