Stripped of Meaning: The Supreme court and the Government as Educator

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I. INTRODUCTION

A casual consumer of the most widely-read newspapers in the United States might be surprised to learn that public school administrators and officials can constitutionally conduct "strip searches" of public school students. Surprised, that is, because in the Summer of 2009 the Supreme Court handed down its decision in Safford Unified School District v. Redding,1 ostensibly an "unalloyed victory" for Savana Redding.2 As a thirteen year-old Arizona middle school honors student, Redding had been forced by school administrators to partially expose her breasts and pubic area in a fruitless search for ibuprofen pills that was instigated after another student accused her of distributing and possessing the pills on campus in violation of district policy.3 Sensationalized for months as the "strip search case," most news accounts predictably led by focusing on the Court's ruling 8-1 that school administrators had violated Redding's Fourth Amendment rights.4 The "common sense prevails" meme surrounding Safford's "unexpected" Fourth Amendment ruling,5 however, obscured

3. 129 S. Ct. at 2638.
5. Bob Egelko, Girl's Strip Search Ruled Unconstitutional, S.F. CHRON., June 26, 2009, at A8. The sophomoric "towel-snapping" attitude of some Justices at oral argument suggested that the Court would rule in favor of Safford Unified. See, e.g., Dahlia Lithwick, Ginsburg Rides Again, SLATE (June 25, 2009), http://www.slate.com/id/2220927/entry/2221415; see also Dahlia Lithwick, Search Me: The Supreme Court is Neither Hot nor Bothered by Strip Searches, SLATE (Apr. 21, 2009), http://www.slate.com/id/2216608 (noting sarcastically that the entry for Safford in the "Supreme Court Concordance of Not Getting It" will read "Court compares strip
two equally important holdings. First, on closer examination, the majority opinion "appeared to leave the door open to searches in some circumstances," by creating an amorphous standard that focused on school administrators' subjective beliefs about the "danger," "power," "quantity," or location of suspected contraband. Thus, at the same time that the Court appeared to "bolster[] students' privacy rights" by striking down one strip search, it carved out an ill-defined safe-harbor exception for others.

Second, the Court held 7-2 that the school administrators who searched Redding were entitled to qualified immunity and could not be held personally liable for their actions. Although the Court preserved Redding's claims against Safford Unified and remanded the case back to the trial court to determine the district's liability, the majority pronounced the existing student strip search caselaw as so muddled that Safford Unified administrators were excused for mistakenly believing that strip searching Savana Redding was justified under the circumstances. This, almost twenty-five years after Justice Stevens observed in *T.L.O.*, the first school search case to reach the Supreme Court, that if "[o]ne thing is clear under any [school search] standard[,]" it is that strip searches "have no place in the school house." In the end, the *Safford* Court

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6. Egelko, supra note 5.
8. Egelko, supra note 5.
9. See, e.g., Francisco M. Negron, *Opposing View: Ruling Missed Opportunity*, USA TODAY, June 26, 2009, at A12 (criticizing the Court for "missing an opportunity to provide clearer guidance to school officials").
11. Id. at 2644.
paradoxically appeared to ratify common sense on the one hand and reject it on the other.\textsuperscript{13}

But such has been the story of the Supreme Court's public school caselaw, a story that in large part traces the rise of mass public schooling. It is no coincidence that one of the earliest public education-related cases to reach the Court—decided in the same year that Horace Mann died—allowed states financial flexibility in expanding the availability of public common schools.\textsuperscript{14} As the bureaucratization and growth of public schooling increased,\textsuperscript{15} so did the Court's number of cases arising out of the school context. Prior to the 1950s, the Court rarely heard education-related cases;\textsuperscript{16} today, not a term goes by without the Court deciding several cases that impact schools. And, as American society and its expectations of schooling have evolved, the Court has played a key role in shaping the public school environment. Occasionally, the Court has staked out bold positions defying then-prevailing “common sense” and society eventually followed, as in the school desegregation cases and in student conscience.\textsuperscript{17} At other times, the Court has blessed long-standing institutional practices, such as peer-grading,\textsuperscript{18} or emerging trends in education reform, like vouchers.\textsuperscript{19}

\textsuperscript{13} The Justices were explicitly of two minds concerning qualified immunity. Although Justice Stevens felt that \textit{Safford} was “a case where clearly established law [met] clearly outrageous conduct,” Justice Souter, writing for the majority, observed that “[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason . . . that ‘[t]he easiest cases don’t even arise.”’ \textit{Compare Safford, 129 S. Ct. at 2614 (Stevens, J., concurring in part and dissenting in part), with 129 S. Ct. at 2643.}

\textsuperscript{14} Springfield v. Quick, 63 U.S. 56 (1859) (preserving the ability of states to allocate among towns, on the basis of need, funds raised for public schools established on Congressionally-set-aside lands).

\textsuperscript{15} See \textsc{David B. Tyack, The One Best System: A History of American Urban Education} (1974); see also \textsc{Diane Ravitch, Left Back: A Century of Battles Over School Reform} (2000).

\textsuperscript{16} See \textsc{Perry A. Zirkel, A Digest of Supreme Court Cases Affecting Education} (5th ed. 2009).

\textsuperscript{17} \textit{See, e.g., Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down “separate but equal” schooling); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (rejecting a requirement that students pledge allegiance to the U.S. flag or face discipline).}


Yet, the Court’s impact on public education extends well beyond its holdings and their direct and most visible effects. For when the Court hears education-related matters it does more than decide “cases and controversies.”20 It continues the process of defining “the role of government as educator, as compared with the role of government as sovereign.”21 And, just as a teacher constructs his “teaching persona,”22 the Court bases its conception of the Government as Educator on its ideas about students, schools, and pedagogy. This continually-evolving conception of the Government as Educator guides the Court in its decisionmaking, which in turn contributes to society’s expectations for and understanding of public schools. Accordingly, the Court’s beliefs about schooling have profound implications—beyond those most evident from legal doctrine—for the evolution of public schools.

This Article analyzes the Court’s K-12 student speech and school search lines of caselaw in an attempt to flesh out the Court’s evolving conception of the Government as Educator and evaluate what effects it has on public schools. In doing so, the Article metaphorically analogizes different conceptions of the Government as Educator to the two primary pedagogical approaches to student instruction, student- and teacher-centered. The Article then argues that the Court’s robust embrace of schools’ values-inculcation function has led it to develop an expansive conception of the Government as Educator’s role, one based heavily on educators’ values, that promotes the “educationalizing of social problems,”23 appends a new component to the “Real Schools” paradigm,24 and ensures

22. David F. Labaree, Limits on the Impact of Education Reform: The Case of Progressivism and U.S. Schools, 1900–1950, 18 (2007) (unpublished paper presented at “The Century of the School: Continuity and Innovation During the First Half of the 20th Century” Conference, Monte Verità, Ascona, Switzerland, September, 2007) (on file with author); see also LARRY CUBAN, HOW TEACHERS TAUGHT 255–56 (2d ed. 1993) (“What teachers know about the subjects they teach and how they use that knowledge with students, the beliefs they have about how children learn and develop, and the social attitudes they bring to their classroom shape how they teach.”).
24. Mary Haywood Metz, Real School: A Universal Drama Amid Disparate Experience, in EDUCATION POLITICS FOR THE NEW CENTURY 75–91 (Douglas E. Mitchell
that students' political socialization in schools varies depending on location.

The end result suggests that the school administrators who strip-searched Savana Redding did so less out of a flawed understanding of legal doctrine than a failure to question an institutional culture—fostered in part by the Court's explication of the Government as Educator—that increasingly promotes the idea that "Real Schools" combat social problems.

II. THE GOVERNMENT AS EDUCATOR

Out of all the Supreme Court's school-related cases, the phrase "government as educator" has appeared in only one. In then-Justice Rehnquist's dissent in Board of Education v. Pico, he observed that "[w]hen it acts as an educator, at least at the [K-12] level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people."25 Although the phrase might have been new to the Supreme Court Reporter, the concept was not; the Government as Educator's philosophical roots can be traced to the education-for-civic-virtue and values-transmission arguments made for and against the early common schools.26

From the perspective of today's citizens, who have overwhelmingly experienced education as a state enterprise, governmental authority over education during the earliest years of the Republic might appear surprisingly weak. This resulted in part from early debates on the propriety of government control over education between Jeffersonian "democratic localists," who rejected state-run education as an illegitimate attempt to "impose social change" from the top down, and "paternalistic voluntarists" and "bureaucrats," who

25. Pico, 457 U.S. at 909 (Rehnquist, J., dissenting). Justice Rehnquist's explanation of the Government as Educator's role will be used throughout the Article.

26. See Horace Mann, Twelfth Annual Report (1848), in THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 79, 89-97 (Lawrence A. Cremin ed., 1957) ("However elevated the moral character of a constituency may be; however well informed in matters of general science or history, yet, they must, if citizens of a Republic, understand something of the true nature and functions of the government under which they live"); see also Pico, 457 U.S. at 914 (Rehnquist, J., dissenting) (noting that public schools "fulfill the vital role of . . . 'inculcating fundamental values necessary to the maintenance of a democratic political system'" (citing Ambach v. Norwick, 441 U.S. 68, 77 (1979))).
“saw [government] precisely as the educator of the people.”

The state-run approach not only “triumphed” as a matter of organizational form, but also as a legitimate method of values transmission. So much so that over a century later Justice Rehnquist, elaborating on the role of Government as Educator, opined that “[t]he idea that [public school] students have a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.”

Yet, recognizing that the Government as Educator instills values only raises the question of which values it may legitimately promote. For a time, this potential landmine went relatively undisturbed, buried by a general social consensus on what constituted “good citizenship.” Indeed, the characteristics of good citizenship were apparently so obvious to the early-20th century Pierce v. Society of Sisters the Court recognized, without elaboration, certain core areas of state authority in education, including the right to require “that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.” When that consensus began to unravel, however, schools and legislatures were increasingly confronted with the thorny task of fleshing out the Government as Educator’s values-inculcating curriculum. And, it was only a matter of time until those dissatisfied with that curriculum took their cases to court.

28. Id. at 2.
30. This is not to say that all segments of society accepted the consensus. See, e.g., HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES (2005).
31. Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925). Government as Educator values-transmission was a core issue in Pierce, in which the Court struck down an Oregon initiative that effectively abolished private schools. Although one would not learn of it from reading the Court’s opinion, the law had been passed during a time of rising anti-Catholic and nativist sentiment and was promoted by a then-influential Ku Klux Klan. See, e.g., PAULA ABRAMS, CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION 7–14 (2009). In some sense then, Pierce represents an early example of the Court correcting Government-as-Educator malfeasance.
A. Pedagogical Theories

The Supreme Court’s approach towards deciding cases in the student speech and school search context, especially since the late-1970s, has generally been one of deference to the decisions of state and local policymakers, who most often are the human incarnation of the Government as Educator. For roughly a thirty-year period stretching from the middle of the Second World War until the mid-1970s, however, that deference was tempered by a more robust conception of student autonomy and the role students assumed as (compelled) participants in the schooling process. Perhaps taking a cue from its contemporaneously evolving school desegregation jurisprudence, the Court during this period was relatively less reluctant to police the Government as Educator’s relationship with, and authority over, its students. This is not to say that public schools during this period exemplified progressive educational pedagogy or tolerated expansive student autonomy—with few exceptions they were not—but rather to note the Court’s more solicitous treatment of students’ interests during the burgeoning civil rights movement in cases concerning a variety of issues. In each of these two periods—one more solicitous to students’ “rights” than the other—the Court’s conception of the Government as Educator can be compared to one of the two dominant pedagogical “traditions... [that] have shaped classroom instruction: teacher-centered and student-centered.”

During the earlier period, the Court emphasized a more student-centered pedagogical role for the Government as Educator. A student-centered, or “progressive,” pedagogical approach views students as semi-independent individuals who “exercise a substantial degree of responsibility for what is

32. See, e.g., Richard Arum & Dorret Preiss, Law & Disorder, EDUC. NEXT 59, 60 (Fall 2009) (observing the Court’s “post-1975 pattern of sympathy with schools”).

33. The Court’s school desegregation caselaw obviously overruled the decisions of some policymakers and has been the subject of much scholarship. See, e.g., J. HARVIE WILKINSON, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL DESSEGREGATION (1979). From the perspective advocated in this Article, the Court was guided by a “student-centered” conception of the Government as Educator in its desegregation jurisprudence. That discussion, however, is beyond the scope of this Article.

34. Larry Cuban, Hugging the Middle: Teaching in an Era of Testing and Accountability, 1980–2005, 15 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3 (2007); see generally CUBAN, supra note 22.
taught and how it is learned." 35 Student-centered classrooms often utilize group projects and learning activities so that students may acquire knowledge experientially. Educators in student-centered classrooms perform a carefully calibrated balancing act: they must simultaneously maintain control over and incorporate students in various "decisions [that] touch the core of the teacher's authority." 36 Accordingly, for the purposes of this Article, the student-centered Government as Educator takes a "learn by doing" approach to education for citizenship in which students are given greater latitude to practice citizenship in schools.

Since the mid-1970s, however, the Court has emphasized a more teacher-centered role for the Government as Educator. Students enjoy limited autonomy in teacher-centered classrooms; teachers "control[] what is taught, when, and under what conditions" and "transmit knowledge, skills, and values to students." 37 Teacher-centered classrooms tend to feature stereotypical accoutrements such as lectures, textbooks, and desks arranged in rows facing the source of instruction. Students take notes and earn grades based on achievement on series of assignments and evaluative exams. Students have little to no influence over core decisions. If this sounds familiar, it is because teacher-centered pedagogy historically has been the dominant mode of instruction in public schools and remains the approach encountered by most students on a day-to-day basis. 38 Thus, under the teacher-centered Government as Educator, students are told how to be good citizens and expected to conform.

The teacher-centered and student-centered roles outlined above stand at opposite ends of a continuum, but in reality educators increasingly use various iterations of hybridized "teacher-centered progressivism" that fall at points between the two extremes. 39 In some cases, teachers' blending of the two styles stems from genuinely held pedagogical beliefs. At other

35. Cuban, supra note 34, at 3.
36. Cuban, supra note 22, at 271.
37. Cuban, supra note 34, at 3.
38. See, e.g., Cuban, supra note 22; see also David K. Cohen, Teaching Practice: Plus Ça Change . . ., in CONTRIBUTING TO EDUCATIONAL CHANGE 27–84 (Phillip W. Jackson ed., 1988) (examining the failure of student-centered pedagogy to displace teacher-centered instruction).
39. See Cuban, supra note 34, at 20–22.
times, however, the “blending” represents little more than a formalist attempt to imbue a “student-centered patina” to a teacher-centered classroom out of a sense of duty to implement perceived “best practices.”

An examination of the Government as Educator’s development in key student speech and school search cases in light of the two pedagogical “strands” uncovers similar formalism at work in the Court’s current conception of the Government as Educator. Although the Court pays rhetorical homage to the student-centered opinions of yesterday, it has nevertheless adopted a strongly teacher-centered conception of Government as Educator based upon, and highly deferential to, the ever-expanding goals and values of school administrators. As this Article argues below, if the Constitution has been “for all practical purposes turned over to the Supreme Court,” the Court has delegated responsibility for distinguishing the government’s separate roles as educator and sovereign in the student speech and school search contexts to the authorities often most eager to merge them.

B. The Student-Centered Strand

The idea that students should enjoy a sense of autonomy in pedagogical decisionmaking is an historical anomaly. So, too, are conceptions regarding an expanded scope of permissible student expression. As Justice Thomas argued in his concurrence in Morse, student “free-speech” rights were unknown for much of public schools’ early history. Rather,
teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order."  

The rise of "pedagogical progressivism" in the twentieth century, however, challenged this thinking and posited that experiential learning was critical to student development. Although student-centered instruction made little headway in America's classrooms, its lexicon flourished as a rhetorical addition to the "grammar of schooling." By 1918, for example, the "Cardinal Principles Report" argued that students were most productive and motivated to learn when schools took into account students' "dominant interests" and allowed students to explore those interests with limited guidance. This included providing students "the means for developing attitudes and habits important in a democracy," of which "the democratic organization and administration of the school itself as well as the cooperative relations of pupil and teacher" were "indispensable." Whether schools actually allowed students to take an experiential approach to civic education was a different story; after all, despite such rhetoric schools were still by and large "not places for freewheeling debates or exploration of competing ideas." The Court, however, would incorporate this student-centered view of civic education in a groundbreaking decision that questioned popular treatment of perhaps the nation's most visible patriotic symbol.

46. Id. at 412.
47. See, e.g., John Dewey, The Child and the Curriculum, in The School and Society and The Child and the Curriculum 181-209 (Philip W. Jackson ed., 1991) ("Abandon the notion of subject-matter as something fixed and ready-made in itself, outside the child's experience; cease thinking of the child's experience as also something hard and fast; see it as something fluent, embryonic, vital ... ").
48. See, e.g., CUBAN, supra note 22.
49. DAVID TYACK & LARRY CUBAN, TINKERING TOWARDS UTOPIA (1995) (this is the "rhetoric of reform").
51. Id. at 8.
1. Gobitis and Barnette

It seems incongruous with the strongly patriotic aura surrounding the “Greatest Generation” in the nation’s collective memory that during the midst of the Second World War the Court struck down a state-imposed requirement that students recite the Pledge of Allegiance, Board of Education v. Barnette, one of the first cases to expand students’ expressive rights in schools, directly repudiated the Court’s decision in Minersville School District v. Gobitis, which had just three years earlier upheld a similar regulation over the religious-based objections of Jehovah’s Witness students and their families. The contrasting language used by the Court in Gobitis and Barnette highlights the difference between the Court’s teacher-centered and student-centered conceptions of the Government as Educator.

The tropes used to justify the Court’s modern-day deferential treatment of state and local policy judgments can be traced in part to the rhetoric used in Gobitis, where the Court famously refused to play “school board for the country” and disclaimed any desire become an “arena for debating issues of educational policy.” The Gobitis Court viewed the Government as Educator’s role in explicitly teacher-centered terms: school authorities created and disseminated a values curriculum and students listened. Those with different values were expected to leave them at home. Although the Court hinted that it believed the school district’s policy was an ineffective means of promoting patriotic values, it refused on institutional competency grounds to engage in a debate with state and local authorities over the “wisdom” of using the compulsive mechanisms inherent in schools as means to inculcate values. The Court also declined to police the

56. Id. at 598.
57. Id. (“For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best... to give to the least popular sect leave from conformities like those here in issue.”).
58. Id. at 597–98 (reasoning that to strike down the mandatory-pledge requirement “would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence”).
substance of that values instruction; the Government as Educator's decision "that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country" served as sufficient evidence of curricular soundness. 59 Such decisions were not open to challenge by students and their parents except through persuasion and "the remedial channels of the democratic process." 60 Indeed, the Court went so far as to suggest that educational policymakers had "the right to awaken in the child's mind considerations . . . contrary to those implanted by the parent." 61 Provided that school authorities validly enacted a policy, the Court could not grant "exceptional immunity" to those on the losing side of the debate without undermining both the legitimacy of the decisionmaking process and the efficacy of the resulting values curriculum. 62 In pedagogical terms, that would have meant forcing the Government as Educator to cede control of core decisions related to teacher authority. And that the Court was unwilling to do.

But only for a short time. Only three years later, the Court made an about-face and struck down a West Virginia school district's "flag salute" policy that "contain[ed] recitals taken largely from the Court's Gobitis opinion." 63 The Barnette majority largely dispensed with the Gobitis Court's concern for preserving the Government as Educator's teacher-centered authority to prescribe values-based instruction, replacing it instead with a then-novel and rhetorically-sweeping student-centered vision of the Government as Educator. Where Gobitis saw students as classical receptors of teacher-transmitted knowledge, Barnette portrayed students as "conscientious objectors" with "free minds" possessing "the right of self-determination in matters that touch individual opinion and personal attitude." 65

59. Id. at 598–99.
60. Id. at 599.
61. Id.; see also Wisconsin v. Yoder, 406 U.S. 205, 241, 245 (1972) (Douglas, J., dissenting) ("It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.").
62. Gobitis, 310 U.S. at 600.
64. Id. at 644 (Black & Douglas, JJ., concurring).
65. Id. at 631 (majority opinion).
Contra *Gobitis*, the *Barnette* Court had no compunctions about institutional competency and refused to assume the inherent legitimacy of school-imposed civic-values curriculum. In fact, the *Barnette* majority turned this central tenet of *Gobitis* on its head and suggested that small governmental bodies require greater oversight because, by the very nature of representing local constituencies, they necessarily reflect local prejudices that "may feel less sense of responsibility to the Constitution." The Court argued that such monitoring was especially necessary in the case of state and local school authorities, who had historically been tasked with regulating the selection and transmission of civic values. It was, after all, a strange form of education for citizenship that taught "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Barnette* made clear that the Government as Educator could continue to inculcate values and promote civic education, but not through policies that compelled students to hold certain prescribed beliefs or participate in activities and ceremonies in violation of their First Amendment rights. *Barnette*, however, provided little guidance regarding the extent of those rights. It did not suggest, for example, when and to what degree school authorities could engage in behavior that might be characterized as coercive, an issue the Court continues to

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66. *Id.* at 639 (repudiating the idea that the Court's "duty to apply the Bill of Rights to assertions of official authority depend[s] upon our possession of marked competence in the field where the invasion of rights occurs."); *id.* at 635–36 ("The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power . . . .").

67. *Id.* at 637 (comparing the "relatively trivial" local compulsory policies at issue in *Barnette* with Congressionally-created voluntary policies and observing that "[t]here are village tyrants as well as village Hampdens").

68. *Id.* ("That [school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

69. *Id.* at 634.

70. *Id.* at 642 (holding that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").
debate. And, despite the decision’s student-centered rhetoric, it failed to outline what limits schools could place on students when they elected to affirmatively express their now-protected consciences.

Yet, the opinion contained the ingredients for a student-centered speech standard. In describing the *Barnette* plaintiffs and their actions, the Court found it significant that the students’ “peaceable and orderly” behavior did “not interfere with or deny rights of others” to participate in the pledge. A quarter-century after *Barnette*, the Warren Court would craft a student speech standard out of these characteristics that ostensibly was so radical that Justice Black accused the Court of “surrender[ing] control of the American public school system to public school students.”

2. Tinker

Given the resurgence of the teacher-centered Government as Educator over the past three decades, it might be an overstatement to say that “[t]he Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District* did for the ideal of expressive freedom in America’s public schools what *Brown v. Board of Education* did for the idea of racial equality.” As a matter of rhetoric, however, this characterization does not miss the mark by far: every school principal who has had to endure a hostile parent meeting can thank Justice Fortas and his majority opinion for the oft-repeated claim that “state-operated schools may not be enclaves of totalitarianism.”

71. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 639, 642 (1992) (Scalia, J., dissenting) (arguing that the Court, in upholding an Establishment Clause challenge against a district’s selecting clergy to deliver nonsectarian prayers at a public school graduation, made no distinction between subtle “psychological coercion” and the “legal sanctions” in *Barnette*); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a district’s reservation of time for student speech, which could include invocations, over a public address system before football games constituted impermissible coercion in violation of the Establishment Clause).


74. Discussed infra Part II.C.


76. *Tinker*, 393 U.S. at 511.
For the bombastic rhetoric of the opinion, the facts giving rise to *Tinker* appear surprisingly quaint when looking back from the perspective of the twenty-first century. In December 1965, in an act of political awareness that teachers today might find refreshing, a group of teenagers and children ranging in age from eight to sixteen joined their parents in an act of protest against the then-nascent Vietnam War by wearing small black armbands emblazoned with the now-ubiquitous peace symbol. Before the students had a chance to wear the armbands to school, Des Moines school authorities “adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.” Although school officials would later try to justify the policy by claiming that they were trying to prevent disruption, the record indicated that “school authorities simply felt that ‘the schools [were] no place for demonstrations.’” When the students attempted to wear the armbands to school, however, they were suspended for what amounted to the time of instruction remaining before the Winter Holidays. A lawsuit ensued. After two lower court victories for the school district, the case finally reached the Supreme Court in late-1968 during a much different political and social climate.

The Court sided with the students, analogizing their armbands to “pure speech” protected by the First Amendment, and famously arguing that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court’s language evinced a much stronger student-centered conception of the Government as Educator than *Barnette*. In *Tinker*, students not only had a right to be free from the coercive imposition of government-sanctioned beliefs, they “could not be confined to the expression of those sentiments that are officially approved”

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77. Or mere parroting of their parents’ political beliefs. See 393 U.S. at 516 (Black, J., dissenting).
78. *Id.* at 504 (majority opinion).
79. *Id.* at 509 n.3. (quoting school officials as saying that “if the students ‘didn’t like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools’”).
80. *Id.* at 506.
81. *Id.* at 507–08.
82. *Id.* at 511 (“In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”).
and were “entitled to freedom of expression of their views.”  

And, lest school officials missed the scope of the Court’s decision, it cited with approval language from a higher-education case that described classrooms as “marketplace[s] of ideas” where students, as potential “leaders,” were “trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” 84 Indeed, “this sort of hazardous freedom,” the Court opined, formed the “basis of our national strength.” 85 It was this rhetoric that prompted Justice Stewart to write a separate one-paragraph concurrence just to clarify that he did not believe in the Court’s apparently “uncritical assumption” that “the First Amendment rights of children are co-extensive with those of adults.” 86

Yet, the Tinker Court’s rhetorical excesses made it easy to miss two important caveats that later Courts would use to cabin the decision’s broad sweep. First, the Court qualified its extension of First Amendment rights by noting that they were “applied in light of the special characteristics of the school environment,” suggesting that whatever the scope of students’ rights, they were not—contrary to Justice Stewart’s fear—the same freedoms adults enjoyed outside of school. Second, borrowing language from a Fifth Circuit case, the Court provided a two-prong standard for student speech. Provided that school administrators do not suppress speech out of a “mere desire to avoid the discomfort and displeasure that always accompany an unpopular viewpoint,” they can restrict student speech that “materially and substantially interfere[es] with the requirements of appropriate discipline in the operation of the school” or “collid[es] with the rights of others.” 89 And, as many mischievous students have learned,

83. Id.
84. Id. at 512 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
85. Id. at 509.
86. Id. at 515 (Stewart, J., concurring).
87. Id. at 506 (majority opinion). This phrase opened the door to schools’ inclusion in the Court’s Fourth Amendment “special needs” doctrine. See New Jersey v. T.L.O., 469 U.S. 325, 341, n.6 (1985) (citing various sources in n.2 of the majority opinion supporting a special needs approach).
88. Id. at 509.
89. Id. at 513 (citing Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)). The Court immediately restated this standard to apply to behavior that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” although
"material and substantial interference" is a nebulous standard that has been largely defined in the eye of the school administrator.

Taken on balance, then, the Tinker Court, albeit in perhaps unnecessarily bombastic language, presents a student-centered conception of the Government as Educator in which students, guided along by cooperative—not authoritarian—educators, actively learn citizenship by acting as proto-citizens in school. Contrary to Justice Black's dissent, Tinker did not itself usher in this "new revolutionary era of permissiveness" in schools. Although it is beyond the scope of this Article, American education was headed down that road long before, and certainly not because, Mary Beth Tinker's peace sign-sporting armband "practically 'wrecked'" her math teacher's lesson. Tinker represented just one aspect of a changing school environment that increasingly allowed student autonomy in areas ranging from curricular choice to classroom participation. At an even larger level, Tinker was of a piece with other contemporaneous social changes that were reflected in schools and school policies. During the same period, for example, the Court considered cases involving the teaching of evolution in public schools, the right to control student picketers, the due process rights of students facing short-term suspensions, the liability of school officials for damages, the many analyses use the different renderings interchangeably. Compare, e.g., Morse v. Frederick, 551 U.S. 393, 403 (2007) with 551 U.S. at 417 (Thomas, J., concurring) and 551 U.S. at 423–24 (Alito, J., concurring) and 551 U.S. at 429 (Breyer, J., concurring in part, dissenting in part) and 551 U.S. at 436–37 (Stevens, J., dissenting). 90. Tinker, 393 U.S. at 518 (Black, J., dissenting).

91. See, e.g., RAVITCH, supra note 15.

92. Tinker, 393 U.S. at 518 (Black, J., dissenting).


94. The growth of rights-consciousness activity increased especially rapidly after the Second World War with the accelerating of the Civil Rights Movement. See generally JAMES T. PATTERSON, GRAND EXPECTATIONS (1996).


96. Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a state law that prohibited teaching evolution because the theory conflicted with the Bible).

97. Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an ordinance that prohibited substantially disruptive noise, but striking down a blanket ordinance proscribing picketing near schools).


99. Wood v. Strickland, 420 U.S. 308 (1975) (requiring good faith efforts to qualify
propriety of corporal punishment, and the rights of undocumented immigrant students to attend public school.

C. The Teacher-Centered Strand’s Renaissance

Few of the Court’s similarly student-centered decisions, however, have incurred the opprobrium heaped upon Tinker by those who, like Justice Thomas, believe that the decision was “without basis in the Constitution” and “extend[ed] [student’s speech rights] well beyond traditional bounds.” Critics of the decision would argue in the following years for a resurgent teacher-centered view of the Government as Educator, claiming that the Court had impermissibly installed itself in that role in place of legislative authorities and school policymakers and deprived them the institutional authority and legitimacy necessary to grapple with the broader social changes of the late-1960s and early-1970s. Justice Black’s warning that Tinker portended the day when students “in all schools will be ready, able, and willing to defy their teachers on practically all orders” seemed in retrospect “prophetic,” as social changes manifested themselves in schools in the form of increased conflict between students and educators, school violence, drug use, student apathy, and the degeneration of longstanding social norms. In some sense, Ingraham v. Wright’s preservation of corporal punishment against an Eighth Amendment challenge in 1977 represented more a repudiation of the perceived failure of student-centered approaches to maintain discipline in schools than a real

for immunity from liability).


103. Goss, 419 U.S. at 590 (Powell, J., dissenting) (“[S]chool authorities must have broad discretionary authority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order.” (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1967) (Harlan, J., dissenting))).


105. Tinker, 393 U.S. at 525 (Black, J., dissenting).

106. Morse, 551 U.S. at 421 (Thomas, J., dissenting).

defense of physical punishment as a means of ensuring order.\textsuperscript{108}

Since \textit{Tinker}, the Court has revisited student speech in K-12 schools on three occasions, each time ruling against the student. The Court has also created a line of cases concerning students' Fourth Amendment rights against unreasonable searches, ruling against the student in all but the most recent, \textit{Safford}, which, as described in the Introduction, was not necessarily a victory for students' rights. In these cases, the Court has reemphasized a teacher-centered conception of the Government as Educator, but one that seems focused on inculcating morals, rather than patriotism, and prohibiting, rather than compelling, student activity. Accordingly, the Court's modern teacher-centered Government as Educator promotes a values curriculum of greater potential scope because its tenets are derived from the moral sensibilities of school authorities, which encompass a more expansive array of matters than those associated with traditional patriotism-based approaches.

This does not mean that education-for-citizenship rhetoric has disappeared from the Court's student speech and school search-related opinions. Instead, the inculcation of moral sensibilities has been clothed in the language of education for citizenship. The Court has not abandoned student-centered conceptions of the Government as Educator, but they have been relegated to dissenting opinions.

1. \textit{Student Speech}

Although the timing was almost certainly coincidental, the release of \textit{A Nation at Risk}, a report by the National Committee on Excellence in Education that was sharply critical of the state of American education,\textsuperscript{109} within a year of the film \textit{Fast Times at Ridgemont High} seemingly could not have been planned any better.\textsuperscript{110} \textit{A Nation at Risk}'s dire warning that the "educational foundations of our society [were] being eroded by a

\textsuperscript{108} Ingraham v. Wright, 430 U.S. 651, 681, n.53 (1977) (5-4 decision) (noting that "corporal punishment serves important educational interests" and that the Court's "judgment must be viewed in light of the disciplinary problems commonplace in the schools," which the majority deemed "serious[ly]").

\textsuperscript{109} \textsc{National Committee on Excellence in Education, A Nation at Risk} (1983).

\textsuperscript{110} \textsc{Fast Times at Ridgemont High} (Universal Pictures 1982).
rising tide of mediocrity"\textsuperscript{111} could have been directed at Jeff Spicoli, the habitually-tardy, ordering-pizza-in-class, surfer/stoner-cum-Falstaff of Fast Times.\textsuperscript{112} A Nation at Risk, "uniquely a document of the early 1980s," capitalized on a "heap of public discontent about schooling that had been accumulating since the sixties" and reignited a national debate on the sorry state of American public schools and low student achievement.\textsuperscript{113} Given this environment, it is perhaps unsurprising that two of the earliest cases cutting against the student-centered Government as Educator, Bethel School District v. Fraser and New Jersey v. T.L.O., involved students engaging in stereotypical teenage misbehavior: giving a sexually-suggestive speech at a school assembly and smoking cigarettes in a school bathroom. T.L.O., a search case, will be discussed below.

The facts of Fraser almost seem too innocuous to have gone all the way to the Supreme Court.\textsuperscript{114} In the spring of 1983, a high school senior gave a nominating speech for a friend at a school assembly.\textsuperscript{115} The majority opinion did not excerpt the speech, instead describing it only as "an elaborate, graphic, and explicit sexual metaphor."\textsuperscript{116} Justice Brennan, believing the speech to be far from "lewd" but impermissible for a school setting, included the speech in his concurrence:

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

\begin{itemize}
\item \textsuperscript{111} A Nation at Risk, supra note 109.
\item \textsuperscript{112} Fast Times at Ridgemont High, supra note 110 (describing, for example, a critical moment in U.S. History: "What Jefferson was saying was, 'Hey! You know, we left this England place 'cause it was bogus; so if we don't get some cool rules ourselves—pronto—we'll just be bogus too!'").
\item \textsuperscript{113} Ravitch, A Historic Document, in Our Schools & Our Future 29-30 (Paul E. Peterson ed., 2003).
\item \textsuperscript{114} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
\item \textsuperscript{115} Id. at 677.
\item \textsuperscript{116} Id. at 678.
\end{itemize}
A.S.B. vice-president—he'll never come between you and the best our high school can be.\footnote{117}

School officials suspended Fraser for a few days and revoked his privilege to speak at graduation, although this latter sanction was eventually reconsidered. He nonetheless sued, claiming that the district had violated his civil rights, and won in both lower courts.\footnote{118}

The Supreme Court, however, ruled against Fraser in an opinion that limited the scope of allowable student speech under \textit{Tinker} by cabining off an exception for “sexually explicit, indecent, or lewd speech.”\footnote{119} Although the district made no showing that Fraser’s remarks had disrupted the educational process,\footnote{120} a key part of the \textit{Tinker} analysis, the Court read in an implied corollary to the substantial-disruption prong providing that “the schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech,” even in the absence of a substantial disruption.\footnote{121} And, citing \textit{Tinker} itself, the Court reasoned that once this interest in promoting good conduct was accepted, the school was justified in “inculcating” students with such “shared values of a civilized order.”\footnote{122} On the whole, this was not a terribly controversial conclusion: it did little more than officially deputize school officials in the “War Against Bad Words,” a war that school officials had been fighting for generations without an institution as august as the Supreme Court’s formal recognition.

Yet, the decision’s robust language, harkening back to \textit{Gobitis} and a strongly teacher-centered conception of the Government as Educator, suggested that \textit{Fraser’s} reach might be greater than it first appeared. For one thing, there was the fact that the majority had taken mildly off-color student speech that would pass as a “routine comment” in the halls and locker rooms of many American schools\footnote{123} and pronounced it “sexually

\begin{footnotesize}
\begin{enumerate}
\item[{117}] \textit{Id.} at 687 (Brennan, J., concurring in the judgment).
\item[{118}] \textit{Bethel Sch. Dist. No. 403 v. Fraser}, 755 F.2d 1356 (9th Cir. 1985).
\item[{119}] \textit{Fraser}, 478 U.S. at 684.
\item[{120}] \textit{Id.} at 690 (Marshall, J., dissenting).
\item[{121}] \textit{Id.} at 683.
\item[{122}] \textit{Id.} (citing \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 508 (1967)).
\item[{123}] \textit{Id.} at 696 (Stevens, J., dissenting).
\end{enumerate}
\end{footnotesize}
explicit," “lewd," “indecent," “offensive," and the product of a “confused boy." 124 Such descriptors seemed inapposite given the lack of a substantial disruption,125 but the Court's characterization nonetheless gave school administrators judicial sanction to portray similarly mild student speech in stark terms. This gave school authorities a tactical blueprint to end-around Tinker by allowing them to use characterizations of student actions as a proxy for or predictor of substantial disruption, effectively decreasing the realm in which students could potentially exercise Tinker's “hazardous freedom.”

Outside of the student-speech context, the same tactic surfaces in zero-tolerance student discipline policies that, for example, consider a six-year-old's Cub Scout-approved “camping utensil” containing a fork, knife, and spoon, a dangerous “weapon.” 126

Moreover, the tone of the education-for-citizenship language in the Fraser majority's opinion enlisted the Government as Educator as inculcator of more than just the values of polite conversation. Fraser exhorted school authorities to take up the battle of inculcating the “fundamental values of ‘habits and manners of civility’ essential to a democratic society” and teaching students “the boundaries of socially appropriate behavior.” 127 Again, not entirely objectionable goals in and of themselves. The Court, however, fashioned this mission from two different sources of authority, tailoring it to fit Fraser's facts, and retaining the original sources' strong education-for-citizenship rhetoric,128

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124. Id. at 683–84. Justice Stevens later took pains to note that Fraser was actually “an outstanding young man with a fine academic record.” Id. at 692 (Stevens, J., dissenting).

125. Id. at 694 (Stevens, J., dissenting) (observing that “the school counselor whose testimony the District relies upon, [said] the reaction of the student body ‘was not atypical to a high school auditorium assembly,’” and arguing that “a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process”).


127. Fraser, 478 U.S. at 681.

128. The majority cites an historical work by the Beards for the idea that “[p]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” Id. (citing CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). It then joined this to Ambach v. Norwich's similar description, which saw the “objectives of public education as the ‘inculcation of fundamental values necessary to the maintenance of a democratic political system.’” Id. (citing 411
which in their original contexts were concerned much more with the inculcation of socio-political democratic values than hazy notions of what essentially amounted to democratic politeness. As with the allegedly self-evident concept of “good citizenship” from an earlier era, the Court failed to give definition to these “fundamental values” and “socially appropriate behavior” other than to suggest that they excluded Fraser-like offensive speech. This definitional process, the Fraser Court opined, belonged to the same local educational authorities suspected of near-subversive activities in Barnette.\textsuperscript{129} And, instilling these apparently school-board defined “values is truly the ‘work of the schools.””\textsuperscript{130}

Fraser, however, did more than exhume Gobitis’s school-board deferential rhetoric—it expanded it. Near the end of the Fraser majority’s opinion, the decision suggests that school authorities have the right to “disassociate” from student actions that are “wholly inconsistent with the ‘fundamental values’ of public school education” or serve to “undermine the school’s basic educational mission.”\textsuperscript{131} Indeed, the school district in Morse made exactly this argument nearly twenty years later while attempting to justify a principal’s decision to take down a student banner that she regarded as advocating drug use.\textsuperscript{132} Thus, the Court enhanced school boards’ authority to proscribe student speech behavior far beyond that directly at issue in Fraser; because as school authorities define those fundamental values and educational missions, those values necessarily will shift with prevailing societal assumptions and expectations about schooling. And, as those values become

\textsuperscript{129.} Id. at 683 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”).

\textsuperscript{130.} Id. (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503, 508 (1967)). This is arguably a disingenuous use of the “work of the schools” language in Tinker. The phrase “work of the school” appears only three times in Tinker, and then in contexts that strongly suggest the Tinker Court used the phrase to refer to the normal operation of schools rather than the inculcation of any values. See Tinker, 393 U.S. at 508 (“... this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.”) (“There is no indication that the work of the schools or any class was disrupted.”) (“... our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”).

\textsuperscript{131.} Fraser, 478 U.S. at 685–86.

\textsuperscript{132.} Morse v. Frederick, 551 U.S. 393, 397–98 (2007).
more teacher-centered, students experience correspondingly less-solicitous treatment of their autonomy-related interests. This line of thought runs directly contrary to Tinker's spirit, which envisioned students exercising relatively static constitutional rights as practicing proto-citizens. Instead, it allows school authorities the power to affirmatively define student rights in myriad ways.

One other notable shift towards teacher-centeredness in Fraser concerns the Court's depiction of high school students as a captive and vulnerable population. The Fraser Court justified its decision in part based on a case which upheld the right of the FCC to regulate "indecent but not obscene" broadcasts during hours children might listen to the radio because children are a vulnerable population in need of protection. Recently, this argument has resurfaced in at least one student "hate speech" case that relied on Tinker's second prong concerning the "rights of others," and at least one commentator has viewed the same line of argumentation as justifying a "student welfare" standard for regulating student speech. This contrasts with the tone of Tinker, which suggests that schools are not only capable of tolerating offensive language that does not substantially disrupt school operations, but that they are places where students should be able to acclimate themselves to a relatively unregulated and hurly-burly "real world" of discourse on the other side of high school graduation. Taken together, the Court, now with a more conservative membership, had essentially signaled to school officials that values-based education and discipline were once again permissible—and desirable—goals; the student-centered approach to Government as Educator could be tempered.

133. Fraser, 478 U.S. at 684 (citing cases "recogniz[ing] the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech").


The Court continued to cabin *Tinker* in *Hazelwood School District v. Kuhlmeier*.\(^{137}\) Compared to *Fraser*, the facts in *Kuhlmeier* conjured up an image of much greater apparent constitutional significance, at least in the abstract: freedom of the press. In *Kuhlmeier*, a high school principal removed two pages of articles from a school’s student-run newspaper out of various content-related objections. The offending articles discussed divorce, pregnancy, birth control, and teenage sex, and the principal, among other objections, believed that the articles insufficiently protected the confidentiality of some student sources and also contained material unsuitable for some students.\(^{138}\) Several journalism students sued, arguing that the principal’s censorship violated their First Amendment rights.

Again, the Court worked around the *Tinker* standard by largely ignoring it, even though the Eighth Circuit panel below—like the lower courts in *Fraser*—felt compelled to follow a substantial-disruption approach.\(^{139}\) Instead, the Court questioned whether or not the school newspaper was a public forum.\(^{140}\) As the product of the school’s “Journalism II” class, the Court held that the newspaper was not a public forum because students primarily used it for applying lessons learned from the course’s curriculum.\(^{141}\) The Court could have ended the inquiry there and decided the case on narrow grounds: no forum, no First Amendment rights. The Court, however, went on to address the broader issue of “whether the First Amendment requires a school affirmatively to promote particular student speech.”\(^{142}\) That question, according to the Court, “concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public...

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138. *Id.* at 262–65.
139. *Id.* at 264–65; Kuhlmeier v. Hazelwood Sch. Dist, 795 F.2d 1368 (8th Cir. 1986).
140. 484 U.S. at 270 (It is this [forum] standard, rather than our decision in *Tinker*, that governs this case.).
141. *Id.* at 267–70 (ruling that “school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’” (citing Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 47, 47 (1983))).
142. *Id.* at 270–71.
might reasonably perceive to bear the imprimatur of the school.”

This framing virtually ensures that school administrators will have a long list of subjective and apparently curricular-related factors, beyond the Tinker and Fraser standards, at their disposal from which they can easily craft a justifiable excuse for regulating student speech. At one point, the opinion even suggests that educators can regulate student speech made pursuant to curricular activities when the speech leads a school authority to believe that a third party could believe, even erroneously, that the speech reflects the school’s endorsement. These school-authority expanding possibilities are subtly woven into the Kuhlmeier Court’s ultimate holding, which sounds reasonable enough on a first reading: “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” But neither “school-sponsored expressive activities” nor “legitimate pedagogical concerns” serve as a useful protection of student speech when both components are defined by the same educational authorities they ostensibly regulate.

Like Fraser, Kuhlmeier sees the Court taking a case of narrow scope and application, and easily decidable under Tinker, and expanding the teacher-centered Government as Educator’s role to include inculcating moral and ethical values. In Kuhlmeier, this is not only evident from the Court’s laundry list of legitimate pedagogical factors that could justify restricting student speech, but also its broad interpretation of Fraser’s standard. In Kuhlmeier, the Court cites Fraser for the proposition that “a school must also retain the authority to

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143. Id. at 271.
144. Id. at 271–72 (discussing various subjective factors, including speaker and audience maturity, quality of speech and presentation, adequacy of student research, potential bias, topic sensitivity, portrayals of teenage sexuality, and even student speech that might “associate the school with any position other than neutrality on matters of political controversy”).
145. Id. at 271 (“Educators are entitled to exercise greater control over [curricular-related student speech] to assure . . . that the views of the individual speaker are not erroneously attributed to the school.”).
146. Id. at 273.
147. This was, in fact, Justice Brennan’s position. See id. at 277–291 (Brennan, J., dissenting).
148. Id. at 271–72; see also supra, note 128.
refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.' But Fraser had nothing to do with drugs or alcohol—those words appear nowhere in the decision—and Fraser's speech advocated, at most, irresponsible sexual humor. Yet, citing no less a revered opinion than Brown v. Board of Education, the Kuhlmeier Court explicitly conscripts educators into a Government-as-Moral-Educator construct, arguing that schools “must” regulate student speech regarding such issues “[o]therwise, the schools would be unduly constrained from fulfilling their role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”

It would take almost two decades, but the Court would follow Kuhlmeier to its logical conclusion in its most recent student speech case, Morse v. Frederick. Morse gained nationwide attention not only because it was the first student speech case to reach the Court in nearly twenty years, but because the focus of the case was a high school senior’s fourteen-foot banner that read “BONG HiTS 4 JESUS.” Like Fraser, Morse’s background facts featured standard-issue immature teenage behavior. In January 2002, administrators at a high school in Juneau, Alaska, dismissed class for part of the school day to observe the Olympic Torch Relay, which was passing through Juneau en route to the Olympic Winter Games in Salt Lake City. The Relay route caused the Torch to pass down the same street as the high school, where students had lined both sides of the road. As the Torch approached, a group of students revealed the “BONG HiTS 4 JESUS” banner. The school principal suspended one of the students for ten days because “she thought [the banner] encouraged illegal drug use,

149. Id. at 272 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
150. Id. (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
152. Id. at 397. Indeed, Morse is often referred to simply as “Bong Hits.” See, e.g., Sean R. Nuttall, Note, Rethinking the Narrative in Student Speech Cases, 83 N.Y.U. L. Rev. 1282, 1283 (2008) (referring to Morse throughout as “the Bong Hits case” and “Bong Hits”).
153. Morse, 551 U.S. at 397.
in violation of established school policy." 154 The student claimed that the banner was "nonsense meant to attract television cameras." 155

A plurality of the Court ruled that the student did not have a First Amendment right to show a "pro-drug banner" at a school-sponsored event, holding "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." 156 Regardless of what meaning the student assigned to the banner's "cryptic" words, Chief Justice Roberts's plurality opinion argued that the banner made an "undeniable reference to illegal drugs" and as such there was "no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion." 157 And, in a merger of student speech and school search doctrine, the Court argued that schools had an "important" if not "compelling" interest in "deterring drug use by schoolchildren." 158 Combined with evidence of a "serious" national drug problem, 159 Congress's apparent "declaration that part of a school's job is educating students about the dangers of illegal drug use," 160 and the familiar "special characteristics of the school environment," 161 the Morse plurality saw no constitutional barrier to "allow[ing] schools to restrict student expression that they reasonably regard as promoting illegal drug use." 162

Differing opinions on Morse's scope, however, divided the Court. Justice Alito wrote a separate concurrence that rejected the idea that schools can "censor any student speech that interferes with a school's 'educational mission,' " 163 an expansive Fraser-based argument made by the district that went unchallenged in the plurality opinion. Instead, Justice Alito argued that the plurality holding restricted only student

154. Id. The suspension was later reduced to eight days.
155. Id. at 401.
156. Id. at 397.
157. Id. at 401–02.
158. Id. at 407 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).
159. Id. (citing studies).
161. Id. (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
162. Id.
163. Id. at 423 (Alito, J., concurring).
speech that “a reasonable observer would interpret as advocating illegal drug use” and not student speech that could “plausibly be interpreted as commenting on any political or social issue.” Yet, Morse potentially did more than “make good” on Kuhlmeier’s suggestion that regulating drug-related student speech could be justified by the “shared values of a civilized social order.” Justice Alito’s concurrence went on to suggest that the “special characteristic of schools” at play in Morse was that “schools can be places of special danger” that pose a “threat to the physical safety of students.” The special danger in Morse, according to Justice Alito, was student “[s]peech advocating illegal drug use.” Ironically, rather than cabining Morse’s reach, this “physical safety” justification provided potential grounds for expanding school administrators’ authority to regulate student speech.

2. School Searches

Decided between Fraser and Kuhlmeier, T.L.O. applied for the first time the Fourth Amendment to searches of students in public schools. Like its student-speech contemporaries, T.L.O. created a standard that, while reasonable on its surface, would eventually be used to justify a more teacher-centered role for the Government as Educator. Unlike the student speech cases, however, the student-search line of cases is tied together by one overarching theme: the War on Drugs.

T.L.O., like Fraser and Morse, started as a case about stereotypical high school misbehavior. T.L.O. was accused of smoking cigarettes in a school bathroom, which she denied, landing her in the office. During questioning, a school administrator searched T.L.O.’s purse, uncovering not only the

164. Id. at 122.
165. Id.
166. Id. at 424–25.
167. Id. at 425.
168. Some lower courts have already seized on this “physical safety” rationale. See, e.g., Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007) (finding that a student’s allegedly creative-writing style diary entries, containing plotlines in which acts of mass violence were committed at school by the student and fictional characters, were not entitled to First Amendment protection because they constituted threats against the school population).
suspected contraband cigarettes, but also drug paraphernalia. A subsequent and more intensive search of the purse turned up marijuana and evidence that T.L.O. had been dealing drugs on campus.\textsuperscript{170} T.L.O. sued to suppress the drug-related evidence, arguing that the school administrator had violated her Fourth Amendment rights against unreasonable searches when he continued to search her purse after finding the cigarettes, which were the only impermissible items that T.L.O. was suspected of carrying.\textsuperscript{171}

The Court held that T.L.O. was entitled to the Fourth Amendment's protection, but upheld the search of her purse on a novel “reasonableness” standard, which, given the “special characteristics” inherent in the school environment, was a lower standard of protection than probable cause.\textsuperscript{172} The reasonableness standard consists of two parts: an inquiry into whether the search was “justified at its inception,” and an examination of the search's scope. Within those two parts, the Court gave further guidance:

Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.\textsuperscript{173}

Although this standard was derived almost from whole cloth,\textsuperscript{174} the Court believed that the reasonableness standard was a less confusing standard for educators because, unlike probable cause or individualized suspicion, it did not come with a complex legal history. Rather, the Court envisioned that the reasonableness standard would allow school authorities to respond quickly and flexibly to myriad situations by using

\begin{itemize}
\item \textsuperscript{170} Id. at 328.
\item \textsuperscript{171} Id. at 329–33.
\item \textsuperscript{172} Id. at 348 (Powell, J., concurring).
\item \textsuperscript{173} Id. at 341–42 (majority opinion).
\item \textsuperscript{174} Id. at 354 (Brennan, J., concurring in part, dissenting in part) (advocating for a probable cause standard).
\end{itemize}
"common sense" while also protecting students from unnecessary and invasive searches.175

Given that school administrators had no guidance from the Court prior to T.L.O., it is unclear whether the decision itself pushed for a more teacher-centered or student-centered role for the Government as Educator. Students likely had varying experiences depending on the personalities of school administrators and cultural norms in individual schools and districts. The new standard, for example, might have increased teacher-centeredness by empowering previously-reluctant school authorities to feel more confident in taking action to protect schools against a perceived increase in "drug use and possession of weapons."176 On the other hand, as Justice Stevens indicated in his separate opinion, there undoubtedly were overbearing school authorities for whom T.L.O. should have served as a student-centered wake-up call.177 Nevertheless, the majority clearly believed that it had fashioned a standard that adequately accounted for the concerns of both students and educators.178

Even under a student-centered reading, however, T.L.O.—like Tinker in the student speech context—contained the seeds of an expansively teacher-centered Government as Educator. As with Fraser, the Court provided little guidance to, but left great discretion in, local school authorities. The majority assumed that the reasonableness standard would "ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools"179 But what is necessary to preserve order depends on the contexts of individual schools and the beliefs of school authorities, as demonstrated by Safford and other cases in which school authorities continued to strip search students long after T.L.O suggested that such searches were unreasonable.180 The reasonableness standard also arguably

175. Id. at 343 (majority opinion).
176. Id. at 352–53 (Blackmun, J., concurring in judgment).
177. Id. at 382 n.25 (Stevens, J., concurring in part, dissenting in part) (citing various strip search cases).
178. Id. at 338 (majority opinion) ("Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy.").
179. Id. at 343.
envisioned searches conducted to ferret out violations of school rules in addition to unlawful activity.\textsuperscript{181} Thus, regardless of the \textit{T.L.O.} Court’s conception of the Government as Educator, in practice the decision left open the teacher-centered possibility that the reasonableness standard would allow the most egregious searchers-of-students to continue their practices unaltered and encourage more circumspect school authorities to begin invasive searches for the first time.

The Court confronted two cases in this latter category in \textit{Vernonia School District v. Acton}\textsuperscript{182} and \textit{Board of Education v. Earls},\textsuperscript{183} which upheld two school districts that conditioned students’ participation in extracurricular activities on their consenting to suspicionless drug tests. Decided in 1995, \textit{Vernonia} blessed the then-emerging movement among school authorities to fight student drug use through the randomized drug testing of students involved in extracurricular athletics. The case concerned such a program instituted by an Oregon school district to combat an “epidemic” of student misbehavior that “was being fueled by alcohol and drug abuse as well as the students’ misperceptions about the drug culture” promoted by student-athlete campus leaders.\textsuperscript{184} The school district reasoned that testing student athletes would cause a trickle-down effect, reducing drug use among students and preventing drug-related athletic injuries.\textsuperscript{185} Under the district’s testing program, ten percent of in-season athletes were randomly selected on a weekly basis for urine tests. Those who tested positive were required to either enter a treatment program or sit out of athletics for at least the remainder of the season.\textsuperscript{186}

Citing the “special needs . . . in the public school context” that gave rise to \textit{T.L.O.}'s reasonableness standard,\textsuperscript{187} the Court

\begin{itemize}
\item \textsuperscript{181} T.L.O., 469 U.S. at 371 (Stevens, J., concurring in part and dissenting in part) (“... I fear that the concerns that motivated the Court’s activism have produced a holding that will permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior.”).
\item \textsuperscript{182} Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
\item \textsuperscript{183} Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).
\item \textsuperscript{184} Vernonia, 515 U.S. at 649 (citation omitted).
\item \textsuperscript{185} Id. at 649-50.
\item \textsuperscript{186} Id. at 650-51.
\item \textsuperscript{187} Id. at 653 (arguing that the reasonableness standard is justified in schools because “the warrant requirement ‘would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,’ and ‘strict adherence to
upheld the drug tests as valid under the Fourth Amendment even though the program did not require "individualized suspicion of wrongdoing." Justice Scalia's majority opinion argued that students had greatly reduced expectations of privacy in schools because they "are (1) children, who (2) have been committed to the temporary custody the State as schoolmaster," a relationship that "is custodial and tutelary, permitting [the State] a degree of supervision and control [over students] that could not be exercised over free adults." Because of this relationship, school authorities were justified in using the "negligibly intrusive collection of urine samples to meet their "important—indeed, perhaps compelling" interest in "[d]etering drug use by our Nation's schoolchildren."" Following Vernonia, school districts across the country began experimenting with student drug testing. Although many districts followed Vernonia's lead and established drug testing policies only for student athletes, some saw the case as justifying drug testing of all students engaged in extracurricular activities, and a few even attempted to implement drug testing for all students. Courts were also divided on whether a district needed to show a history of drug problems before implementing a drug test regime. As uncertainty about Vernonia's reach grew, so did calls for the Court to revisit the issue.

the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools" (citing New Jersey v. T.L.O., 469 U.S. 325, 340, 341 (1985)).

188. Id. (citing T.L.O., 469 U.S. at 342 n.8).
189. Id. at 654.
190. Id. at 655. Scalia also argued that students in general have greatly reduced expectations of privacy because they are subject to vaccination policies, and that student athletes in particular enjoy even less privacy because they engage in "communal undress" for athletic activities and voluntarily agree to greater "regulation" such as mandatory grade requirements and physical exams. Id. at 656–58.
191. Id. at 660–63 (citing studies showing that teens are particularly vulnerable to drug use).
192. See, e.g., Todd v. Rush County Schs., 133 F.3d 984 (7th Cir. 1998) (upholding drug testing of students engaged in non-athletic extracurricular activities).
195. See, e.g., Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1067 (7th
In *Earls*, the Court expanded permissible drug testing to include students involved in non-athletic extracurricular activities in schools with no “major” drug problem.\(^\text{196}\) Citing the existence of a “nationwide epidemic of drug use,” the Court disavowed that *Vernonia*’s principles extended only to districts which a long history of drug-related issues, “refus[ing] to fashion what would in effect be a constitutional quantum of drug use necessary to show a ‘drug problem.’”\(^\text{197}\) As in *Vernonia*, the Court also declined to impose an individualized suspicion standard on school authorities, reasoning that such a standard would unduly burden classroom teachers, who would be forced to be the front line of defense against drug-using students,\(^\text{198}\) and “unfairly target members of unpopular groups.”\(^\text{199}\) Instead, the majority opted to stick with *T.L.O.*’s reasonableness standard and found that the program in *Earls* was “a reasonably effective means” of fighting student drug use.

In its holding, however, the *Earls* majority added a new teacher-centered gloss to the scope of governmental interests at stake in *Vernonia*. Where *Vernonia* mentioned only preventing or deterring drug use,\(^\text{200}\) *Earls* added that districts have a “legitimate concern[] in ... detecting drug use.”\(^\text{201}\) The former

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\(^\text{196}\) Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 843 (2002) (Ginsburg, J., dissenting) (citing the Pottawatomie County Superintendent’s description of the perceived drug problem). The majority opinion, authored by Justice Thomas, did cite instances of drug-related behavior that hardly seem out of the ordinary for a high school of any size as sufficient evidence of a “drug problem.” The Court specifically cited as examples: district teachers seeing some students “who appeared” to be on drugs and overhearing others talking about drug use, finding “marijuana cigarettes” in the school parking lot, “once” discovering “drugs or drug paraphernalia” in a student’s car, and some district parents reporting concern about “the ‘drug situation.’”\(^\text{195}\) at 835.

\(^\text{197}\) Id. at 836.

\(^\text{198}\) It is not clear why the majority believed this to be so, as state statutes often make teachers mandatory reporters for abuse and neglect. \textit{See}, e.g., \textit{CAL. PENAL CODE} § 11165.7 (2009). Drug use, as an indicator of abuse, neglect, or other problems affecting students’ well-being, is already something for which educators are ethically obligated to be on the lookout.

\(^\text{199}\) *Earls*, 536 U.S. at 837.

\(^\text{200}\) *Vernonia* Sch. Dist. 474 v. Acton, 515 U.S. 646, 650, 661 (1995) (“[The drug testing program’s] expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.”).

\(^\text{201}\) *Earls*, 536 U.S. at 838 (italics added).
interest does not require districts to take an active role; districts could deter drug use by passive mechanisms such as increasing drug-prevention education or voluntary on-campus drug counseling programs. These forms potentially preserve a greater role for student autonomy. The latter interest, however, obliges the Government as Educator to affirmatively identify student drug users.

As the previous Part has argued, the Court’s conception of the Government as Educator has evolved to support an expansive teacher-centered role in both the student speech and school search contexts. This evolution is significant because student speech and school search cases force the Court to balance the rights of students directly against the perceived “special needs” of school authorities in a way unlike other areas of school-related law such as school finance, alternative governance, or student religious expression. Put in terms of the pedagogical lens used throughout this Article, student speech and school search cases see the Government as Educator in its most direct interactions with its students. Thus, in articulating these strands of opinions, the Court not only expounds legal doctrine, it helps “inculcate” various values and social expectations related to the operation of the nation’s public schools and the responsibilities of students. As a result, the Court’s conception of the Government as Educator’s proper role and scope of authority influences the public’s ideas about the Government as Educator. This does not mean that the Court always drives education-related public opinion; as observed earlier in this Article, the Court often settles “cases and controversies” resulting from long-percolating educational disputes.

In student speech and school search cases over the last quarter-century, however, the Court has settled those disputes by favoring the teacher-centered interests of school authorities in securing order and instilling values over students’ interests in experiencing education for citizenship free of unnecessary “measures that diminish constitutional protections.” Moreover, the Court has essentially delegated to school authorities the responsibility for deciding not only whether

202. *Id.* at 855 (Ginsburg, J., dissenting) (“The Government is nowhere more a teacher than when it runs a public school.”).

203. *Id.*
measures are necessary but also if they are permissible. Rather than simply tilting the playing field in favor of school authorities, the Court has allowed them to write the rulebook. In doing so, the Court has left it up to educators to define the Government as Educator, allowing the values of school authorities to substitute for the values historically associated with education for citizenship. But if the “government is the potent, the omnipresent teacher,”204 what does this approach mean for schools and students?

III. CONSEQUENCES

The idea that “school officials should be accorded the widest authority in maintaining discipline and good order in their institutions,”205 in and of itself, probably does not offend the sensibilities of many except the most libertarian-minded. Without some order in schools, the educational process would grind to a halt; schools would indeed come to exemplify Justice Alito’s “places of special danger.” That being said, there is a difference between according the “widest authority absolutely” and the “widest authority necessary”—a difference analogous to that between a teacher-centered and student-centered conception of the Government as Educator. As argued in Part II, the Court’s student speech and school search caselaw has evolved in a more teacher-centered direction over the last three decades. Whether this shift was motivated out of a desire to simply avoid acting as the nation’s school board or a conscious decision to empower school authorities, the Court’s deference to educators’ goals has consequences beyond abstract legal doctrine. Three of these consequences are analyzed below.

A. The Educationalization of the Government as Educator

As the expansion of the reasonableness standard from general school-based searches for contraband to the drug testing of students involved in extracurricular activities demonstrates, allowing educators to define the Government as Educator promotes educational authorities’ ever-expanding

social agenda for the public schools. For a variety of reasons, public schools in the United States today are expected to solve myriad social problems ranging from "ameliorat[ing] race and class inequality" to encouraging "healthy eating... and preservation of natural resources." This "educationalizing" of social problems results in part from a desire to "pursue our social goals in a way that is in line with the individualism at the heart of the liberal ideal, aiming to solve social problems by seeking to change the hearts, minds, and capacities of individual students," and in part because educators tend to share a messianic "vision of saving the world by fixing the child." As a result, "educationalization has consistently pushed education to expand its scope well beyond both what it should do and what it can do," even though the "result is a record of one failure after another."

In this light, student drug testing in public schools, by further extending the War on Drugs into America's classrooms, represents a classic case of educationalizing a social problem. In the context of this Article, more importantly, it also presents a case in which the Court's conception of the Government as Educator has fostered educationalization. Indeed, the growth of the student drug testing movement tracks the Court's decisions in Vernonia and Earls. Prior to Vernonia, only about twenty schools in the entire country engaged in student drug testing; by the time the Court decided Earls in 2002 that number had increased to over a thousand. Studies conducted after Earls indicate that at least fourteen percent of all school districts use some form of student drug testing, and the evidence suggests that the number is "rapidly increasing." Beyond a district-by-district approach, some states have used Vernonia and Earls to justify the creation of statewide steroid

207. Id. at 447.
208. Id. at 448.
209. Id. at 451.
210. Id. at 448.
212. Id.
214. Barrington, supra note 211, at 49.
testing regimes for student athletes, implemented—not coincidentally—in the wake of Congress’s hearings on steroid use in baseball.

The educationalization of the War on Drugs, moreover, did not simply proceed out of *Vernonia* and *Earls*’s holdings, which as a formal matter simply pronounced student drug testing as reasonable under the Fourth Amendment. Rather, as Justice Breyer’s concurrence in *Earls* makes clear, at least some Justices on the Court intended that precise result. In supporting the *Earls* majority’s opinion, Justice Breyer felt compelled to “emphasize several underlying considerations,” which he “understood to be consistent with the Court’s opinion.” Acknowledging that drugs posed a “serious” problem “in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and [society],” Justice Breyer argued that the “government’s emphasis on supply side interdiction” had failed to stop teenage drug use. Solving this problem, according to Justice Breyer, fell to public schools, but not simply because student drug testing attempted to reduce student demand for drugs “by changing the school’s environment” in a way that mitigated peer pressure-induced drug use. He was clear that public schools must shoulder greater responsibility for fighting the War on Drugs because the public had come to expect schools to solve social problems. In other words, conducting drug tests on students is acceptable because society expects schools to educationalize—even if that means using suspicionless

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215. See, e.g., TEX. EDUC. CODE ANN. § 33.091 (Vernon’s 2008). The first version of Texas’s steroid testing program was passed in 2005. See, H.B. 3563, 79th Leg., (Tex. 2005).


218. Id. at 839.

219. Id.

220. Id. at 840 (“[P]ublic school systems must find effective ways to deal with this problem.”).

221. Id. at 840-41.

222. Id. at 840 (“Today’s public expects its schools not simply to teach the fundamentals, but to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services; all in a school environment that is safe and encourages learning.”).
searches or, even after Safford, strip searches. And, educationalization of the War on Drugs has not been confined to the school search context; the Morse plurality opinion cited and quoted extensively from the Court’s school search line of cases. 223

The Court’s teacher-centered deference to educationalization in the student speech and school search contexts cannot be explained away as simply the recognition of social phenomenon outside the Court’s bailiwick or limitations on institutional competency. 224 The Court, after all, has stepped in to referee other disputes concerning local school authorities’ attempts at managing social problems through the public schools. In the context of religious expression, for example, the Court has acted to police the use of public schools as a means to inculcate religious values both at the hands of school authorities 225 and students. 226 The Court also held constitutional the use of school “vouchers” by recognizing, at least in part, their use by underprivileged students and their families as a potential alternative to failing public schools. 227 And, perhaps most famously, the Court itself ordered the educationalization of desegregation, first, paradoxically, in the lightly-regulated realm of higher education 228 and then in the K-12 public schools. 229

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224. See, e.g., Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633, 2640, n.1 (2009) (“[T]he legitimacy of the rule usually goes without saying as it does here. The Court said plainly in [T.L.O.] that standards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed.”).
227. See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Thomas, J., concurring) (“While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society.”).
B. Real Schools and Legitimacy Squared

It may be, then, that some members of the Court have come to expect "real schools" to act in certain ways in the student speech and school search contexts. Justice Breyer suggested as much when he intimated that those schools failing to "adequately to carry out [their] responsibilities" to combat certain social problems "may well see parents send their children to private or parochial school instead."230 If so, the Court has created a Catch-22: If today education is seen as a "legitimating system,"231 so too is the Supreme Court.232 Thus, when the Court upholds certain school-related practices, it gives added legitimacy to processes that already have been legitimized by virtue of being implemented by school authorities. This "legitimacy cycle" not only reduces the probability of successfully challenging such practices in the short-run, it drives societal-expectations regarding the appropriate structure and functions of public schools. In the long-run, these processes become permanent fixtures of schooling.

In education reform literature, the "Real Schools" construct addresses the paradoxical similarity of public schools given greatly varied on-the-ground realities.233 In the classic exposition of the construct, Mary Metz observed several different public schools use what appeared to be a "common script" in matters ranging from curriculum to school management.234 Under the common script, teachers assigned similar work from the same textbooks and taught students in a similar manner, all seemingly without regard to the background differences of their students.235 Underneath this superficial equality of treatment across schools, however, Metz found that educators and administrators greatly "watered

231. See, e.g., John W. Meyer, The Effects of Education as an Institution, 83 AM. J. SOC. 55, 73 (1977) ("Once institutionalized education is seen as a legitimating system—not just a mechanism for allocating fixed opportunities—it can have many net consequences on both allocation and socialization of people being processed, just as on the rest of society.").
233. See, e.g., Metz, supra note 24.
234. Id. at 76.
235. Id. at 76–79.
down" expectations in certain schools. In one majority-minority, high-poverty high school, for example, Metz found that a “formal curriculum as demanding as that in our highest SES schools, including texts and primary readings that were just as difficult, was contradicted by student skills and written work that were infinitely weaker.”

Nonetheless, Metz saw the same common script at work in school after school, a phenomenon she called “Real School”: the replication and reproduction of certain institutional norms that “assured all participants that they were teaching and learning in a Real School” and were “Real Teachers and Real Students.” Besides this symbolic “ritual” purpose, Metz attributed the prevalence of the common script to Americans’ concern for equality; they “want to be able to assume that all schools follow a common template and can be said to be offering the same, commonly understood and commonly valued, high school education.” Educational authorities replicate the common script because society has come to see in its manifestations a “guarantor of equity across schools.” Thus, society looks askance at deviations from the common script and perceives as legitimate those processes that, through custom, practice, or policy, have managed to become the script’s component parts.

The educationalization of social problems presents a potential new component to Metz’s common script: the idea that Real Schools educationalize. To the extent society expects public education as an institution to take on an expanded social mission, educationalization itself correspondingly becomes a legitimate part of school’s structure. This is consonant with organizational theory that suggests large formal organizations like school expand in part by incorporating into their structures the means to address emerging “rationalized

236. Id. at 78-79.
237. Id. at 83. For example, Metz observed an English class filled with students who could not write a simple business letter, but who were also expected to read Dante’s Inferno.
238. Id.
239. Id. at 81.
240. Id. at 84.
241. Id. at 86.
institutional myths. 243 Educational authorities use general societal anxiety about out-of-control students and drug use, for example, to justify the adoption of new forms of social control in schools, such as disciplinary alternative education, zero-tolerance policies, highly-restrictive dress codes, and, of course, drug testing programs. In turn, the accoutrements associated with school expand to include separate alternative campuses, school resource officers, deans of students, and drug testing personnel and practices. These modifications in school's formal structure and mission "demonstrate that it is acting on collectively valued purposes in a proper and adequate manner," legitimizing both school and its new "institutionalized elements." 244 School authorities are thus incentivized to adopt emerging institutional responses as they are legitimized and to continually search for new areas of potential mission expansion, especially as society becomes increasingly conditioned to expect a school-based response to social problems. 245 As a result, the rapid increase in student drug testing programs can be attributed at least in part to school authorities adopting programs out of a sense of obligation—drug testing has become something that Real Schools do. 246 This would help explain the spread of drug testing in Vernonia and Earls; what started as testing in a district with serious drug problems eventually came to be a fixture in a district with almost no problem.

The Supreme Court contributes to this augmentation of the common script by supplying "official legitimacy based on legal mandates." 247 This is because highly rational-legal societies

243. Id. at 344-45 ("As rationalizing institutional myths arise in existing domains of activity, extant organizations expand their formal structures so as to become isomorphic with these new myths.").

244. Id. at 349; see also id. at 348 ("School administrators who create new curricula or training programs attempt to validate them as legitimate innovations in educational theory and government requirements. If they are successful, the new procedures can be perpetuated as authoritatively required or at least satisfactory.").

245. Id. at 350 ("Failure to incorporate the proper elements of structure is negligent and irrational; the continued flow of support is threatened and internal dissidents are strengthened. At the same time, these myths present organizations with great opportunities for expansion.").

246. The creation of the Student Drug Testing Institute within the federal Department of Education seems to confirm this. SDTI provides federal grants to school districts to help cover the cost of implementing drug testing regimes. See STUDENT DRUG TESTING INSTITUTE, http://sdti.ed.gov/ (last visited Jan. 28, 2010).

like the United States "are especially prone to give collective (legal) authority to institutions," like the Court, "which legitimate particular organizational structures." This is closely analogous to popular understanding of the Court as "the authoritative constitutional interpreter," whose pronouncements regarding constitutionality effectively serve a legitimizing/delegitimizing function. When the Court upholds a challenged program related to educationalization, then, the Court bestows on school-implemented mechanisms the final bit of legitimacy necessary to modify the common script.

This does not mean that only Court-legitimated programs get added to the script, but it does suggest that Court approval becomes a precondition once a mechanism has been challenged. It is perhaps easier to think of this in terms of necessary and sufficient conditions. To use student drug testing as an example: it is possible that student drug testing could have become a part of the common script without Vernonia or Earls. Once the issue reached the Court, however, its approval became necessary; a contrary holding in either case would have either declared student drug testing as illegitimate or cabined such programs to narrow circumstances. In the context of student speech and school search cases, however, the Court’s highly-deferential stance towards the decisions of school authorities arguably has turned over final responsibility for legitimating challenged organizational structures to actors at the school level.

C. Inequality of Political Socialization: A Patchwork Federalism of Student Autonomy Experiences

As the preceding discussion has argued, school officials have broad discretion to choose between the competing visions of the Government as Educator, which are then implemented through policies falling at various points along the continuum between teacher-centeredness and student-centeredness. School officials, however, make these decisions based on their conceptions of what constitutes acceptable degrees of student autonomy—decisions that are thus likely to vary from place to place. Consequently, students encounter varied treatment of

248. Id.
their autonomy interests at the hands of the Government as Educator when it comes to student speech and school search rights.

Although at first glance this might appear to be no more than a restatement of the commonly accepted conception of education as an inherently local concern, the Court has continually asserted that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”250 And, constitutional rights are not normally things that vary from place to place without exceptional justification; despite their differences, the Bill of Rights applies with equal vigor to a citizen in San Francisco as it does a citizen in rural Mississippi. The Court’s student speech and school search caselaw nonetheless has created a background framework that provides a patina of legitimacy to local school officials’ varied treatment of student autonomy, a construct that would implicate equal protection and due process concerns were it applied to adult citizens.251 Yet, if “[t]he schoolroom is the first opportunity most citizens have to experience the power of government” and “the values they learn there, they take with them in life,”252 one might ponder the political socialization-related consequences of a system that allows government entities to treat citizens—albeit students—


251. This very concern serves as partial justification of the Court’s “special needs” doctrine in general. But, it is worth noting here at least one incongruous feature of schools within the special needs doctrine: in the school context, the ostensibly regulated parties have great discretion in fleshing out the ends and means justified and permitted by the special needs inherent in the regulated environment. Thus, the same special needs that underlay the Tinker Court’s substantial disruption standard evolved to support the more expansive and malleable potential standards based on student welfare and physical safety advanced in Morse. So, too, the expansion of student drug testing from the drug-use laden context of Vernonia, which arguably presented evidence of special need, to Earls, in which school authorities seemingly strained to find evidence of a special-needs-justifying drug problem. Other special needs contexts, by contrast, are more limited in discretion, scope, and application or at least concern issues of greater import than participation in a high school’s marching band. See, e.g., Nat’l Treas. Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (upholding “the suspicionless testing of [customs] employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm”); Skinner v. Ry. Labor Executives’ Ass’n., 489 U.S. 602, 628 (1989) (upholding suspicionless drug testing of railway personnel who “discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences”).

in profoundly different ways depending on where those students happen to go to school.253

To briefly speculate on this inequality of political socialization, consider the experience of an average student in one of two hypothetical school districts, each representing either a stridently student-centered or teacher-centered vision of the Government as Educator. The student-centered district adheres closely to Tinker’s substantial-disruption standard, exercises little or no editorial control over extracurricular activities,254 refuses to subject students to drug tests,255 allows students broad expressive rights including a non-restrictive dress code, and generally conducts searches of students only with individualized suspicion and probable cause.256 On the other hand, the teacher-centered district opts for Fraser’s
educational-mission standard, pervasive regulations and censorship extracurricular activities, engages in widespread drug testing, imposes a highly-restrictive dress code or uniform policy, and frequently subjects students to searches under an aggressive interpretation of \textit{T.L.O.'s} reasonableness standard, perhaps even reserving the right to use “strip searches” under \\textit{Safford}'s safe harbor.

The Court’s teacher-centered conception of the Government as Educator allows the existence of both kinds of school districts, and undoubtedly both types of districts can be found across the United States. It does not involve too much speculation to hypothesize that the students undergoing such radically different experiences grow up to hold different conceptions about what constitutes appropriate government authority, contributing to Americans’ increasing ideological fractionalization. Additionally, from an education-for-citizenship viewpoint, inequality of political socialization risks privileging those students who are allowed greater autonomy to practice citizenship in school vis-à-vis those students encountering more circumscribed autonomy experiences. If public schools promote equality of opportunity rather than equality of outcome, then students’ public school experience should provide an equal opportunity to develop and practice citizenship.

In short, students are likely to be politically socialized to believe in different degrees of acceptable government authority. Students in a highly student-centered district are likely to be politically socialized to a less authoritarian view of government in which the government’s proper role is one that allows or fosters a wide range of expression, permits values-pluralism, and respects expansive conceptions of individual privacy. Under a highly teacher-centered experience, students may be politically socialized to believe that government should act in a more authoritarian capacity, actively regulating or suppressing

\footnote{257. See the discussion of Morse in supra Part II.C.1.}

\footnote{258. This assumes that K–12 schools, in addition to inculcating values, can play a decisive role in the development of effective citizenship-related skills. \textit{But see} Curtis G. Bailey, \textit{Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education}, 2009 B.Y.U. EDUC. & L. J. 1, 29–34 (2009) (arguing that K–12 public schools are primarily about values inculcation and universities are for “democratic skill development”).}

certain forms of expression, engaging in values-promotion and values-imposition, and constricting the sphere of permissible individual privacy. These are all key components of political and ideological identity.

The general acceptance of inequality in political socialization in public schools stands in contrast to intolerance of inequality in other areas,\textsuperscript{260} such as student achievement,\textsuperscript{261} teacher quality,\textsuperscript{262} or per-pupil spending.\textsuperscript{263} Whether this results from education's general susceptibility to arguments grounded in "local control"\textsuperscript{264} or because of assumptions that the Government as Educator must, "unlike government in its role of government-as-sovereign[,] . . . regularly decide some expressions are superior to others,"\textsuperscript{265} the consequences of such inequality are worth exploring. Although an expansive analysis of social attitudes is beyond the scope of this Article, further research should be conducted into the relationship between students' political socialization experiences and later political and ideological beliefs. This line of research will become even more salient as the federal government increases its role in K-12 education, exemplified by No Child Left Behind, the Obama Administration's "Race to the Top" program, and efforts to develop national content area standards, because expanding


\textsuperscript{261} See, e.g., The Black-White Test Score Gap (Christopher Jencks & Meredith Phillips, eds., 1998).


\textsuperscript{264} See, e.g., Denis P. Doyle & Chester Finn, Jr., American Schools and the Future of Local Control, 77 NAT'L AFFAIRS 77, 77 (June 1984) ("No term in the lexicon of American education is more revered than "local control.").

federal authority inevitably will challenge the assumptions behind and content of traditionally localist conceptions of education,\textsuperscript{266} including values-transmission.

\textbf{IV. CONCLUSION}

This Article has argued that in the context of its student speech and school search caselaw, the Supreme Court has adopted a "teacher-centered" conception of the Government as Educator that greatly enhances the authority of school authorities to inculcate values. This vision of the Government as Educator responds to and limits a more student-centered possibility in which students would have a greater opportunity to practice citizenship. As a result of its strong deference to school authorities in the student speech and school search contexts, the Court has failed to exercise a potential check on the educationalization of social problems and, in turn, the expansion of the "Real Schools" construct to include educationalization-related mechanisms.

Furthermore, the Court's teacher-centered approach has profound implications for the political socialization of students. If "the stories we tell our schoolchildren matter" and "set the terms of our constitutional culture,"\textsuperscript{267} what lessons do students learn from their experience in school environments that condition participation in the mock trial team on volunteering a urine sample? If "participation in [the common script] is . . . a ritual that affirms membership in mainstream American life,"\textsuperscript{268} what does it mean for adult citizenship that the script limits student expression to certain values acceptable to school administrators, who often are ready to use nebulous

\textsuperscript{266}. See, e.g., Liu, supra note 259, at 399–406 (2006) (making an argument under the Fourteenth Amendment that "does not assign constitutional weight to the claim that education is an area of 'traditional state concern'" because "[n]ot only has the factual basis for this claim been eroded by recent policy developments culminating in NCLB, but the normative element of the claim stands in tension with the constitutional investiture of authority and responsibility in Congress to secure the essential conditions of opportunity for meaningful national citizenship."); Matt Miller, First, Kill All the School Boards: A Modest Proposal to Fix the Schools, THE ATLANTIC 92 (Jan./Feb. 2008).

\textsuperscript{267} Donnelly, supra note 249, at 999.

\textsuperscript{268} Metz, supra note 24, at 87.
and expansive standards based on inevitably varied and potentially inconsistent conceptions of student welfare?

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