

Inculcating Suppression

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“[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.”¹

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1. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS’ NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

INTRODUCTION

In 1966, students at the University of North Carolina at Chapel Hill (UNC) used a low stone wall, which demarcates the northern campus boundary,² to protest the state's suppression of speech through a speaker ban law.³ Passed in the specter of the southern Red Scare with less than twenty minutes of deliberation,⁴ the North Carolina law prohibited any known Communist, anyone "known to advocate the overthrow of the Constitution," or anyone who had pled the Fifth Amendment "in refusing to answer any question, with respect to Communist or subversive connections[] or activities" from speaking at any state-supported college or university.⁵ After the UNC Board of Trustees cited the ban in denying speaking invitations to the executive director of the National Committee to Abolish the House Un-American Activities Committee, Frank Wilkinson, and the director of American Institute for Marxist Studies, Herbert Aptheker,⁶ university students assembled at the northern campus wall to demonstrate their vehement opposition to the law.⁷

Through the coordinated efforts of Student Body President Paul Dickson III and other student activists,⁸ Wilkinson delivered a speech on March 2, 1966, on the city sidewalk divided from his audience of 1,200 people only by the rock wall.⁹ The location of Wilkinson's speech was a strategic choice by

2. See UNIV. OF N.C. AT CHAPEL HILL, TASK FORCE ON LANDSCAPE HERITAGE & PLANT DIVERSITY 1-9 (2d ed. 2005), <https://facilities.unc.edu/files/2015/12/HeritageLandscape.pdf> (discussing the campus walls).

3. See WILLIAM D. SNIDER, LIGHT ON THE HILL: A HISTORY OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL 277 (1992) (discussing student resistance to the North Carolina Speaker Ban).

4. See JEFF WOODS, BLACK STRUGGLE, RED SCARE: SEGREGATION AND ANTI-COMMUNISM IN THE SOUTH, 1948-1968, at 5 (2004) (connecting the southern Red Scare and the speaker ban); Gene R. Nichol, *Bill Aycock and the North Carolina Speaker Ban Law*, 79 N.C. L. REV. 1725, 1725 (2001) (describing the paucity of deliberation before the law's passage).

5. Act of June 26, 1963, ch. 1207, § 1, 1963 N.C. Sess. Laws 1688-89, *amended by* Act of Nov. 17, 1965, ch. 1, § 1, 1965 N.C. Ex. Sess. Laws 5, *repealed by* Act of July 6, 1995, ch. 379, § 17, 1995 N.C. Sess. Laws 933, 942 (codified at N.C. GEN. STAT. § 116-199 (2016)). The law was amended on November 17, 1965, to provide that the board of trustees of each state college or university "shall adopt and publish regulations governing the use of [their institutional] facilities . . . for speaking" by any known Communist, anyone "known to advocate the overthrow of the Constitution," or anyone who had pled the Fifth Amendment "in refusing to answer any question, with respect to Communist or subversive connections, or activities." Act of Nov. 17, 1965, ch. 1, § 1, 1965 N.C. Ex. Sess. Laws 5, *repealed by* Act of July 6, 1995, ch. 379, § 17, 1995 N.C. Sess. Laws 933, 942 (codified at N.C. GEN. STAT. § 116-199 (2016)).

6. *Dickson v. Sitterson*, 280 F. Supp. 486, 488, 492 (M.D.N.C. 1968); see WILLIAM J. BILLINGSLEY, COMMUNISTS ON CAMPUS: RACE, POLITICS, AND THE PUBLIC UNIVERSITY IN SIXTIES NORTH CAROLINA 180 (1999).

7. WILLIAM A. LINK, WILLIAM FRIDAY: POWER, PURPOSE, AND AMERICAN HIGHER EDUCATION 138-39 (1995).

8. See CJ Farris, *Speaker Ban Remembered, Activism Persists*, DAILY TAR HEEL (Jan. 21, 2016, 12:14 AM), <http://www.dailytarheel.com/article/2016/01/speaker-ban-remembered> [<https://perma.cc/P7VE-FJRS>] (discussing the actions taken by student activists, including Dickson, to fight the speaker ban).

9. LINK, *supra* note 7, at 138; *Dickson*, 280 F. Supp. at 494.

Dickson,¹⁰ a champion of the First Amendment, not communism.¹¹ In Dickson's view, the campus wall, deemed the "wall of repression," demonstrated the absurdity of the law.¹² A week later, Dickson escorted Aptheker to the same spot and, emphasizing the significant harm to the university that had been inflicted by UNC's enforcement of the speaker ban,¹³ introduced Aptheker to a crowd of more than 1,000 students.¹⁴ By the end of that month, Dickson and other student leaders filed their lawsuit against the UNC Board of Trustees, challenging the ban.¹⁵

In its disposition of the case, the federal district court acknowledged the rights of state university boards of trustees to set the parameters for campus speakers, so long as they are in accordance with the federal Constitution.¹⁶ However, the court also found that "[u]niversity students should not be insulated from the ideas of extremists."¹⁷ Building on these findings, the court held that the speaker ban was unconstitutionally vague and violated the Fourteenth Amendment's Due Process Clause, as people of common intelligence had to guess at the statute's meaning and application.¹⁸ Consequently, the court determined that the "unbroken line of Supreme Court decisions respecting the necessity for clear, narrow and objective standards controlling the licensing of First Amendment rights [made] the conclusion . . . inescapable" that the speaker ban violated the Constitution.¹⁹ As explained by author William D. Snider, "[t]he students themselves . . . [were] the unquenchable force in abolishing the Speaker Ban" through their protest of the government's speech suppression,²⁰ even though many of those UNC students did not agree with the ideology of the banned speakers.²¹

On the same campus less than fifty years later, students, rather than the state, actively suppressed the speech of a campus speaker with whom they did not agree. Dickson and his counterparts protested the government's suppression of speech—speech that they themselves did not agree with—because they felt a need to enhance the academic freedom of the university. In comparison, these latter-day students embraced a speech-suppressive approach of protest to terminate the speech of an individual whose beliefs the crowd vigorously opposed.

10. See LINK, *supra* note 7, at 137 (discussing Dickson's selection of the location to prepare for litigation).

11. Farris, *supra* note 8 (discussing Dickson's motivation in facilitating the protest speeches).

12. LINK, *supra* note 7, at 137.

13. *Id.* at 139 (discussing Dickson's introduction of Aptheker).

14. *Dickson*, 280 F. Supp. at 495.

15. *Id.* at 496.

16. *Id.* at 497.

17. *Id.*

18. See *id.* at 498–99.

19. *Id.* at 499.

20. SNIDER, *supra* note 3, at 277.

21. See, e.g., *supra* note 11 and accompanying text (identifying Dickson's disagreement with a banned speaker's core ideology).

On April 14, 2009, former U.S. Representative Tom Tancredo, who had been invited to present his opposition to the proposed DREAM Act, was forced to end his speech as a result of student protest.²² Initially, Tancredo's speech was delayed by the display in the lecture hall of a "banner that read 'No dialogue with hate.'"²³ When Tancredo eventually entered the room, more than 100 students jeered, booed, and yelled profanities in disagreement with his anti-illegal immigration stance.²⁴ The building shook with the chanting and feet-stomping of the hundreds more students who were outside.²⁵ About fifteen minutes into the speech, students held a large banner directly in front of Tancredo to stifle his speech.²⁶ Then, a classroom window was broken from the outside by a rock-throwing protester; campus police began to use pepper spray and brandished tasers; and Tancredo left the building followed by an insult-screaming student who "carr[ied] a cardboard sign that read, 'NO HATE SPEECH AT UNC.'"²⁷ In reflecting on the event, another student stated, "I don't think Tom Tancredo has a right to speak on a campus. He doesn't have a right to speak anywhere."²⁸

These divergent protests at UNC are paradigmatic examples of how suppression of speech and the nature of student protests have transformed at colleges and universities. On the same campus where students less than fifty years ago used a dividing wall to amplify controversial speech that had been silenced by the government via legislation, students now used dividing banners to silence controversial speech via a student-initiated shout-down. These examples raise a distinct question as to what precisely has changed in students' treatment of differential ideological speech at institutions of higher education over the last half-century.

One clear, emerging trend is the suppression of controversial speech by students themselves, which stands in marked contrast to the seminal student-driven speech movements at colleges and universities in the 1960s.²⁹ This student speech suppression becomes antithetical to the principles of free speech and deliberative

22. See *Tancredo Shut Down; Police Tangle with Protesters*, CAROLINA ALUMNI REV. (Apr. 16, 2009), <https://alumni.unc.edu/news/tancredo-shut-down-police-tangle-with-protesters/> [https://perma.cc/XQ97-PN4X] (describing the protest); Sam Wardle, *At UNC, Student Protesters Crash Tom Tancredo's Party*, INDY WEEK (Apr. 15, 2009), <https://www.indyweek.com/indyweek/at-unc-student-protesters-crash-tom-tancredos-party/Content?oid=1214989> [https://perma.cc/E2XL-C9ZM] (describing the event).

23. *Tancredo Shut Down; Police Tangle with Protesters*, *supra* note 22.

24. See Wardle, *supra* note 22.

25. *Id.*

26. *Tancredo Shut Down; Police Tangle with Protesters*, *supra* note 22.

27. Wardle, *supra* note 22.

28. Bruce Mildwulf, *UNC Student Protestors Walk Out of Tancredo Speech*, WRAL.COM (Apr. 27, 2010), <http://www.wral.com/unc-student-protestors-walk-out-of-tancredo-speech/7490626/> [https://perma.cc/C5XG-CN5Y].

29. See Todd Gitlin, *Perspective, Conservatives Say Campus Speech is Under Threat. That's Been True for Most of History*, WASH. POST (Aug. 11, 2017), https://www.washingtonpost.com/outlook/conservatives-say-campus-speech-is-under-threat-thats-been-true-for-most-of-history/2017/08/11/6aa959fa-7c4b-11e7-9d08-b79f191668ed_story.html?utm_term=.1c2f85edb27c [https://perma.cc/RL3R-FFR9] ("Of course, students helped to free campus speech in the '60s, ushering in perhaps the closest that American higher education has come to a golden age of speech. Campuses tolerated some of the most loathsome speakers without riotous responses.").

democracy when its sole thrust is to quash and eliminate the voices of opposing perspectives rather than to vigorously engage or criticize them.³⁰ Although such individual student speech suppression, without governmental support or obedience, is not state action that gives rise to a constitutional violation,³¹ neither is it safeguarded speech in its own right.³² This student speech suppression merits special examination given that its devaluation of the exchange of conflicting ideas runs contrary to the ideals of teaching and learning in higher education and to the core democratic value of robust discourse.³³

Although the identification of this phenomenon is relatively straightforward, the inquiry as to the cause and remedy for this seismic shift in campus speech dynamics is much more complex.³⁴ This Article posits that the increase in student suppression of speech at colleges and universities is a product of the distorted democratic-values inculcation to which students have been exposed via state disciplinary censorship and student speech-suppressive pedagogy in primary and secondary schools, resulting from the devolution of the Supreme Court's student speech jurisprudence. Although the Court has consistently identified democratic-values inculcation as a core mission of public schools,³⁵ its current student speech jurisprudence twists the true meaning of this inculcation by identifying student speech suppression as a democratic value. Following this judicial endorsement,³⁶

30. See generally Jane S. Schacter, *Metadecocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 647–48 (1995) (arguing that the vigorous debate of “numerous and diverse values” is a central component of democratic self-governance).

31. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (“[S]tate action requires both an alleged constitutional deprivation ‘caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,’ and that ‘the party charged with the deprivation must be a person who may fairly be said to be a state actor.’” (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982))).

32. See Howard Gillman & Erwin Chemerinsky, *Does Disruption Violate Free Speech?*, CHRON. HIGHER EDUC. (Oct. 17, 2017), <https://www.chronicle.com/article/Does-Disruption-Violate-Free/241470> [<https://perma.cc/687H-BZST>] (“Simply put, the right to speak does not include a right to use speech to keep others from speaking.”).

33. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (identifying robust discourse as an essential component of American democracy); Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 99 (1996) (identifying “a central mission of higher education[] [as] to nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated”).

34. Compare Thomas Gibbs Gee, “*Enemies or Allies?*”: *In Defense of Judges*, 66 TEX. L. REV. 1617, 1617 (1988) (arguing that “leftist bigotry” is “the most serious challenge to academic freedom and to the all but indistinguishable first amendment right of free speech” on college and university campuses), with Nadine Strossen, *Students’ Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 458 (1998) (arguing that young people will not likely respect others’ rights if their own rights are not respected).

35. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (determining that education is “required in the performance of our most basic public responsibilities” and “is the very foundation of good citizenship”).

36. See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1055–56 (2008) (highlighting the Supreme Court’s erosion of student speech rights and its continued willingness to affirm and “expand the power of school officials to punish student expression”).

American K–12 schools have increasingly infringed upon the First Amendment rights of students.³⁷

These disciplinary and curricular lessons of censorship have been effective in their harmful inculcation, transforming students into speech suppressors themselves. Evidence of this transformation has emerged in the growing incidence of college and university students silencing the speech of others with opposing viewpoints on the asserted perspective that such suppression jibes with core democratic values.³⁸ However, this stifling of speech by students erodes the free exchange of ideas that is central to a productive collegiate environment, and its tendency to foreclose any mention of contrary ideology contributes to the continued degradation of the nation's democratic processes.

To be clear, that states through their school systems are imparting democratic-values inculcation to students should be no surprise, given the inextricable link between the democratic process and education.³⁹ Education instills students with knowledge of U.S. governmental processes and provides the necessary tools for political dialogue.⁴⁰ Arguably, “the dominant factor affecting political consciousness and participation” is education.⁴¹ However, the state's transmission of this values inculcation has become a perverse lesson that student speech suppression is a democratic good.

To avoid permanent damage to how students are educated in civic engagement, the current deleterious inculcation of speech suppression in American schoolchildren must end. This will require a reversal of the Supreme Court's rights-restrictive student speech jurisprudence. It will also require that public schools reclaim true democratic-values inculcation by instilling students with liberal values of rights recognition and by fostering open discourse of conflicting ideas.⁴² Since the Founding, this education has been deemed necessary “to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom

37. See David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 182 (2002) (identifying public schools' diminution of student speech rights).

38. See Nina Burleigh, *The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation That Hates Speech*, NEWSWEEK (May 26, 2016, 6:08 AM), <http://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html> [<https://perma.cc/7GJH-9MEY>] (discussing the rise in college and university campus student shout-downs of speakers); Gillman & Chemerinsky, *supra* note 32 (discussing how college and university student speech suppressors have justified their actions with the mantle of free expression).

39. See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916) (discussing the relationship between political engagement and schools); William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 505 (1989) (discussing the foundational role of education in the American democratic system since the origins of the nation).

40. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113–15 (1973) (Marshall, J., dissenting) (discussing education's ability to prepare students for democratic participation).

41. *Id.* at 113.

42. See CATHERINE J. ROSS, *LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS* 6 (2015) (“Schools have a unique opportunity and obligation to demonstrate the importance of fundamental constitutional values as an integral part of preparing students to participate in a robust, pluralist democracy. And the best way of transmitting values is by modeling them—showing how the principles that govern us work in action.”).

and independence.”⁴³ This type of education is also required to sustain the expansive exchange of conflicting viewpoints that allows American colleges and universities to flourish as bastions of academic freedom,⁴⁴ sites of robust “intellectual awakening,”⁴⁵ and training grounds for democracy.⁴⁶

In support of this argument, Part I will highlight the Supreme Court’s determination that democratic-values inculcation is a fundamental objective of American public schools. It will discuss the ideal educational environment that should result from true democratic-values inculcation, in which the government preserves student speech rights and prepares citizens for vigorous and civil political debates. From there, Part I will outline how the Court’s student speech jurisprudence has undercut these notions of true democratic-values inculcation. Specifically, it will explore how the Supreme Court’s rights-restrictive First Amendment jurisprudence in the K–12 context, with its primacy on school officials’ control and disciplinary authority, has established the foundation for schools to normalize restrictive perspectives on speech.

Part II will then argue that this speech-suppressive inculcation has been effective and that the transformation of students from the suppressed in K–12 schools to the suppressors on American college and university campuses is a direct consequence of the social and political values of censorship that are taught daily in American schools. To support this claim, Part II will demonstrate that the Supreme Court’s rights-restrictive student speech jurisprudence has normalized student speech suppression insofar as schools have inculcated such suppression in students as a core school value. Part II will illustrate how public schools have used this judicial ideology, in an educational environment of increasing student rights constrictions, to reinforce notions of student censorship, as a social democratic good. It will then determine the extent to which this distorted inculcative pedagogy has been effective, by examining how students on college and university campuses have replicated speech-suppressive measures to stifle the kind of robust discourse that should instead be flourishing in American higher education.

Part III will provide a solution to stem the tide of state speech suppression in public schools and of student speech suppression at colleges and universities. It will advocate for a reclamation of true democratic-values inculcation in American education, which promotes rights recognition, tolerance, and open discourse. This can be achieved on two fronts. First, the Supreme Court must cease its slouching endorsement of student speech suppression as a part of democratic-values inculcation. Instead, the Court should affirm that a necessary democratic

43. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (noting that Thomas Jefferson had determined this proposition early in American history).

44. *See Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 835 (1995) (emphasizing the importance of the university setting as having “a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition”).

45. *Id.* at 836.

46. *See* PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 113 (2013) (characterizing colleges and universities as “laboratories for democracy” given that they are spaces that “contribute to democratic discourse”).

value is the preservation, not the vitiation, of student speech rights. Second, the state via its public schools must realign notions of democratic-values inculcation with the safeguarding of student speech rights. Part III will conclude that these two necessary components of a true democratic-values inculcation by the nation's highest court and its public schools will remediate the phenomenon of college and university student speech suppression and will stop such phenomenon from indelibly marring American public discourse.

Finally, the Conclusion will cement the need to terminate state distorted democratic-values inculcation to avoid public educational institutions becoming "enclaves of totalitarianism."⁴⁷ Tolerance for ideological diversity is a core democratic value that needs instruction in public schools and on college campuses. Our country and our courts should require no less for the educational preparation of children and young adults for civic engagement and participation.⁴⁸

I. INCULCATING: THE SUPREME COURT'S ENDORSEMENT OF STATE SUPPRESSION OF STUDENT SPEECH IN K-12 SCHOOLS

The Supreme Court has repeatedly emphasized that public education is paramount in preparing children for civic engagement in a democratic system⁴⁹ and has deemed education an essential component in the maintenance of "the fabric of society."⁵⁰ Because education is viewed as necessary for the preservation of our democracy,⁵¹ the provision and administration of public schools is at the zenith of the State's functions.⁵² American public schools are charged with the

47. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

48. See Rory Lancman, *Protecting Speech from Private Abridgement: Introducing the Tort of Suppression*, 25 SW. U. L. REV. 223, 225 (1996) (discussing "the value and importance of discourse among citizens as the paradigmatic exercise of free speech by a self-governing people").

49. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (noting the Court's repeated acknowledgment of education's pivotal role in "preparing students for work and citizenship"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 n.8 (1986) (Stevens, J., dissenting) (outlining the Court's frequent emphasis on the core "role of public schools in our national life"); *Rendell-Baker v. Kohn*, 457 U.S. 830, 848 n. 2 (1982) (Marshall, J., dissenting) (discussing the Court's repeated recognition of "the unique role that education plays in American society"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (providing that the "theme [of] expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

50. *Grutter*, 539 U.S. at 331. Given the Court's repeated emphasis on the vital role that public schools play in the maintenance of American democracy, it is ironic that it has also determined that education is not a fundamental right guaranteed by the United States Constitution. See *Rodriguez*, 411 U.S. at 35 (holding that public education is not a constitutional right).

51. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("[T]he public schools [are] a most vital civic institution for the preservation of a democratic system of government." (quoting *Abington Sch. Dist. v. Schemp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring))).

52. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (discussing how the provision of public education is an apex function of the State).

promotion of civic virtues and cultural values.⁵³ In fulfilling this charge, public schools have become the primary vehicle for teaching these necessary values for the preservation of the country's social order to our nation's young people.⁵⁴ Consequently, the Supreme Court has firmly established that a primary objective of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."⁵⁵

This educational inculcation of core democratic and social values is reflective of the unique function that public schools serve to provide a training ground for instilling the duties of American citizenship.⁵⁶ Such inculcation happens through the delivery of educational curricula within the classroom,⁵⁷ through the basic promotion of civic values in the classroom regardless of the subject being taught,⁵⁸ and through the role-modeling functions of teachers, administrators, and other school officials.⁵⁹ State and local school entities and officials set examples that shape student attitudes on the political process, government, and the responsibilities of citizenship.⁶⁰ As such, public education values inculcation "fulfills a most fundamental obligation of government to its constituency."⁶¹

The ideal goal of public K–12 schools, then, should be the creation of a positively assimilative environment, which instills all students of all backgrounds with a common civic and rights-recognitive heritage.⁶² Public schools have the unique ability to accomplish this goal as they are "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous

53. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring) (plurality opinion) (discussing the "essential socializing function" of public schools to convey these values); *Brown*, 347 U.S. at 493 ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] to adjust normally to his [or her] environment.").

54. See Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 819 (2006) (arguing public schools have a compelling interest in instilling cultural values as it is the mission of American public education to do so).

55. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

56. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (identifying how public education prepares America's youth "for the duties of citizenship in our democratic Republic"); *Ambach*, 441 U.S. at 76 (articulating the Court's longstanding recognition of "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests").

57. See *Bernal v. Fainter*, 467 U.S. 216, 225 (1984) (discussing "the wide discretion typically enjoyed by public school teachers when they present materials that educate youth respecting the information and values necessary for the maintenance of a democratic political system").

58. See *Ambach*, 441 U.S. at 79–80 (noting the propriety of a state requiring teachers to promote civic virtues in all classes).

59. See *id.* at 78–79 (discussing the influential role-modeling effect that teachers have in shaping student perceptions and values).

60. *Id.* at 78 (discussing the critical role that teachers play "in developing students' attitude toward government and understanding of the role of citizens in our society").

61. *Id.* at 76 (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

62. See *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan, J., concurring) (articulating the ideal for American public education (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 241–42 (1963) (Brennan, J., concurring))).

democratic people.”⁶³ As an essential part of this mission, public schools should inculcate students with the knowledge that they, too, have constitutional rights and that the state should safeguard those rights.⁶⁴ This inculcation should also instruct students that the courts that review state actions affecting students’ constitutional rights should preserve and protect those rights.⁶⁵ With respect to speech rights, K–12 schools should “prepare students for a citizen’s responsibility to participate in political debates, or at least to listen to and evaluate them, and to do so vigorously as well as civilly.”⁶⁶ This type of “uninhibited, robust, and wide-open” discourse and debate is a foundational principle of American deliberative democracy to which the nation is profoundly committed.⁶⁷

Although American public education should provide this inculcation of democratic values in “an atmosphere free of parochial, divisive, or separatist influences of any sort,”⁶⁸ the Supreme Court has established a dissonant student speech jurisprudence that instead fosters the inverse of this values pedagogy.⁶⁹ Although having initially recognized student speech rights,⁷⁰ the Court has since created a rights-restrictive environment that upholds as constitutional the consistent suppression of the voices of American schoolchildren,⁷¹ while still attempting to maintain the gossamer that students retain their core First Amendment rights within the schoolhouse gate.⁷² Through the evolution of its K–12 student speech jurisprudence, the Court has affirmed the state’s expansive power to censor students’ expressive activities,⁷³ and American schools have followed suit by

63. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216–17 (1948) (Frankfurter, J., concurring).

64. See Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 826 (2009) (arguing that “protecting freedom of speech advances a core goal of school education: teaching students about the Constitution and their rights”).

65. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1653–54 (1986) (arguing that courts must protect students’ constitutional rights as part of their interpretation of the inculcative process).

66. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 120 (2008).

67. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

68. *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan, J., concurring) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 241–42 (1963) (Brennan, J., concurring)).

69. See Kristi L. Bowman, *Public School Students’ Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 222 (2007) (“Constitutional law governing student speech disputes is becoming notoriously unpredictable.”); Chemerinsky, *supra* note 64, at 826 (emphasizing the dissonance that has been created by the Court in public schools by touting the existence of student speech rights while providing “virtually no protection” of those rights).

70. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

71. See Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1578 (“The First Amendment right to speak free of state suppression has been only partially and patronizingly extended to children and youth.”).

72. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 528 (2000) (tracking the Supreme Court’s jurisprudence as a devolution of students’ First Amendment rights).

73. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 281 (1988) (Brennan, J., dissenting) (discussing the Court’s creation of a “taxonomy of school censorship” and criticizing the Court’s decision that would allow vast censorship of students).

inculcating student speech suppression as a positive moral and civic virtue.⁷⁴ Therefore, the “official dogma of ‘community values’” transmitted to public school students is that it is right and proper to quash completely any dissenting voices that are deemed to be controversial, challenging, or contrary to state orthodoxy.⁷⁵ To track the progression of the Court’s affirmation of student speech suppression, a detailed discussion of its student speech jurisprudence, with a focus on its inculcation analysis, is necessary.

A. *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

In its 1969 seminal student speech case, the Supreme Court ultimately found in a rights-protective way for the student litigants.⁷⁶ In *Tinker*, two high school students and one junior high school student wore black armbands to their schools in symbolic protest of the hostilities in Vietnam.⁷⁷ Aware of these planned protests, school officials had adopted a policy prohibiting students from wearing the armbands in the school and providing for suspensions of students who refused to remove them.⁷⁸ The students were all suspended when they refused to remove their armbands when asked to do so by school officials.⁷⁹ The district court “upheld the constitutionality of the school authorities’ action on the ground that it was reasonable in order to prevent disturbance of school discipline.”⁸⁰ On appeal, the Eighth Circuit, sitting en banc, was equally divided, resulting in the affirmation of the lower court’s decision without opinion.⁸¹

At the outset of its decision, the Supreme Court articulated its famous dicta on the nature of student speech rights: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁸² The Court also found that students are constitutional persons who possess fundamental speech rights and who “may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”⁸³ Building on this

74. See, e.g., Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 282 (2012) (arguing that school officials have seized upon the Court’s restrictive pronouncements in its student speech jurisprudence “to justify silencing or punishing student speakers, especially those who took issue with school policies or the conduct of teachers or administrators[.] . . . putting student-critics and effective education for citizenship at risk”).

75. *Hazelwood*, 484 U.S. at 278 (Brennan, J., dissenting) (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion)).

76. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (finding that a school’s suppression of student speech constituted a First Amendment violation).

77. *Id.* at 504; see also Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2337 (2004) (noting that the armbands “were inherently expressive within their social, cultural, and historical contexts”).

78. *Tinker*, 393 U.S. at 504.

79. *Id.*

80. *Id.* at 504–05.

81. *Id.* at 505.

82. *Id.* at 506.

83. *Id.* at 511.

approach, the Court rejected the perspective that the state has the power to foster only homogeneity in its schools.⁸⁴

The Court determined that the wearing of these armbands was close to “pure speech,” which merits comprehensive First Amendment protection.⁸⁵ From this determination, the Court established a seemingly high bar for constitutional state suppression of student speech:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.⁸⁶

In its application of this standard, the Court determined that there was no “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.”⁸⁷ Instead, the Court viewed this speech as “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance” that did not interfere “with the schools’ work” or collide “with the rights of other students to be secure and to be let alone.”⁸⁸ The Court determined that the schools’ “undifferentiated fear or apprehension of disturbance [was] not enough to overcome the right to freedom of expression.”⁸⁹ Consequently, because the record was devoid of “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred,” the Court held that the students’ speech rights were violated.⁹⁰ Of the entire body of Supreme Court student speech jurisprudence, *Tinker* is the only decision that supports a First Amendment rights-recognitive perspective for schoolchildren.⁹¹

84. *See id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

85. *Id.* at 505–06.

86. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

87. *Id.*

88. *Id.* at 508.

89. *Id.*

90. *Id.* at 514.

91. *See* Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 260 (2014) (emphasizing the student speech rights-recognitive approach of *Tinker* utilized by Justice Sandra Day O’Connor in her dissent in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 681 (1995), which had not been incorporated by the Court in its post-*Tinker* student speech jurisprudence); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 638 (2002) (discussing how each of the post-*Tinker* student speech rights cases “vindicated the power of the school over the rights of the student”).

Although *Tinker* is oft-cited for its dicta preserving student rights within the schoolhouse gate,⁹² the decision also set the stage for the subsequent erosion of student speech through its establishment of the state schools' control discourse.⁹³ The tension between students' constitutional rights and "the comprehensive authority of the States and of school officials" to maintain order in the schools underlies the entire *Tinker* opinion.⁹⁴ Indeed, *Tinker* instructs students that they have speech rights, but that they also "must respect their obligations to the State,"⁹⁵ which has the clear power "to prescribe and control conduct in the schools."⁹⁶ This aspect of the opinion communicates that "student expression is an outside force intruding into the school [rather] than . . . an integral part of the educational process itself."⁹⁷ Consequently, the *Tinker* control doctrine reaffirms state and local officials' "wide latitude . . . to maintain[] discipline and good order" in the operation of public schools.⁹⁸

Capitalizing on *Tinker*'s discussion of the preeminence of state school control over students, the Court's subsequent student speech jurisprudence has allowed for the restriction of student speech with increasing amounts of discretion granted to school officials.⁹⁹ Post-*Tinker*, the Court adopted the inculcative stance of suppression advanced by Justice Black's dissent in the case.¹⁰⁰ In his dissent, Justice Black emphasized that students, who are in school to be educated and nothing more, do not have extensive First Amendment rights, claiming that "public schools . . . are operated to give students an opportunity to learn, not to talk politics by actual speech, or by 'symbolic' speech."¹⁰¹ This area of the dissent dovetailed with the control doctrine that the *Tinker* majority articulated¹⁰² in that Justice Black argued for the preeminence of school discipline in the civic inculcation of students: "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."¹⁰³ For Justice Black, the case at controversy was one that centered on the

92. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (quoting *Tinker* schoolhouse gate dicta); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (same); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (same).

93. See Cooley, *supra* note 91, at 241 (arguing that "*Tinker*'s ultimate legacy has been how it birthed the modern control standard for school law cases").

94. *Tinker*, 393 U.S. at 507.

95. *Id.* at 511.

96. *Id.* at 507.

97. Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1355 (1976).

98. *Goss v. Lopez*, 419 U.S. 565, 590 (1975) (Powell, J., dissenting).

99. See Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047, 1074 (2009) (arguing that "*Tinker* left open the possibility that a school could suppress speech to prevent interference with any legitimate school function").

100. See Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1279 (1991) (defining Justice Black's inculcative position in his *Tinker* dissent as one that "sought to deny student [F]irst [A]mendment rights in the face of conflicting opinions of school authorities").

101. *Tinker*, 393 U.S. at 523–24 (Black, J., dissenting).

102. See *supra* notes 93–98 and accompanying text.

103. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

extent to which schools should be able to exercise control, and he disclaimed what he viewed as the majority's holding that "the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."¹⁰⁴

In line with Justice Black's inculcative position, the Court has now turned away from respecting students' rights in *Tinker* and has instead forged a harmful judicial ideology that affirms the inculcation of student speech suppression in the name of state control over schoolchildren.¹⁰⁵ In doing so, the Court has used the educational concept of *in loco parentis*, in which the school stands in the place of the parent of the schoolchild,¹⁰⁶ to justify this broad censorship of student speech.¹⁰⁷ As a result, the First Amendment lesson imparted by public schools has become one that endorses speech suppression as a positive civic and social norm that should be replicated.¹⁰⁸

B. *BETHEL SCHOOL DISTRICT NO. 403 V. FRASER*

In its next student speech case seventeen years later, *Bethel School District No. 403 v. Fraser*,¹⁰⁹ the Supreme Court adopted Justice Black's stance of the propriety of the inculcation of public school students with their own suppression.¹¹⁰ In *Fraser*, the plaintiff, a high school senior, was suspended and removed from the list of potential candidates for graduation speakers after he delivered a speech that employed sexual euphemisms before an optional school-sponsored student government assembly.¹¹¹ Applying *Tinker*, the district court and the Ninth Circuit determined that the punishment violated the First Amendment, expressly rejecting "the School District's argument that, incident to its responsibility for the

104. *Id.* at 526.

105. See Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002) (discussing the Court's creation of the First Amendment "problem [which] is, simply, that by means of the public educational process, the state is able to engage in a dangerous form of political, social, or moral thought control that potentially interferes with a citizen's subsequent exercise of individual autonomy").

106. See *Morse v. Frederick*, 551 U.S. 393, 413–14 (2007) (Thomas, J., concurring) (defining the doctrine of *in loco parentis* as a delegation of parental authority to schools for the education and discipline of children and discussing the use of *in loco parentis* by courts that "routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals").

107. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986) (utilizing the *in loco parentis* doctrine to justify its holding); see also Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 970 (2010) (noting that public schools apply *in loco parentis* almost solely as part of their disciplinary enforcement, rather than as a student rights protection mechanism).

108. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029–30 (1996) (identifying the pressure that society places on individuals to follow social norms).

109. 478 U.S. 675 (1986).

110. See Kenneth W. Starr, *From Fraser to Frederick: Bong Hits and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 670 (2009) ("[T]he *Fraser* Court returned to Justice Black's understanding of what goals American schools should serve.").

111. *Fraser*, 478 U.S. at 677–78.

school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity.”¹¹² Both courts found a constitutional rights violation while articulating a pointed concern with the school’s purported “‘unbridled discretion’ to determine what discourse is ‘decent,’” as that “‘would ‘increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.’”¹¹³

On appeal, the Supreme Court first quoted the *Tinker* dicta that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”¹¹⁴ From there, the Court focused on the purpose of American public schools: to prepare youth for democratic citizenship by “inculcat[ing] 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.”¹¹⁵ The *Fraser* Court defined this objective of public schools “as the ‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.’”¹¹⁶ In doing so, the Court defined this inculcation as a core part of schools’ missions.¹¹⁷

However, judicial endorsement of true democratic-values inculcation, whereby the state safeguards fundamental constitutional liberties, was not the ultimate result of the *Fraser* decision.¹¹⁸ Instead, departing from the core rights-recognitive approach of the *Tinker* majority, the Court determined that the state’s need to inculcate restrictive values of “socially appropriate behavior” in students outweighed the exercise of students’ speech rights in the schools.¹¹⁹ In doing so, the Court first paid lip service to the premise that schools’ democratic-values inculcation should include tolerance of divergent views.¹²⁰ However, it immediately hedged that premise with its finding that inculcation should instill notions of how student speech should be circumscribed through moral education.¹²¹ Expressly, the Court determined that:

These fundamental values of “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But

112. *Id.* at 680.

113. *Id.* (quoting *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1363 (9th Cir. 1985)).

114. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

115. *Id.* at 681 (quoting *BEARD & BEARD*, *supra* note 1, at 228).

116. *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

117. See Ari Ezra Waldman, *Triggering Tinker: Student Speech in the Age of Cyberharassment*, 71 U. MIAMI L. REV. 428, 445–46 (2017) (discussing how the Court has “defined a school by its mission—to teach and educate minors in the ways of civil society”).

118. See Justin R. Chapa, Comment, *Stripped of Meaning: The Supreme Court and the Government as Educator*, 2011 B.Y.U. EDUC. & L.J. 127, 148–49 (2011) (criticizing *Fraser*’s transformation of democratic values inculcation into an inculcation for “democratic politeness”).

119. See *Fraser*, 478 U.S. at 681.

120. See *id.*

121. See *id.*; see also John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 47 (2009–2010) (identifying how *Fraser* “firmly underwrote the school’s function as an instrument of moral education”).

these “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.¹²²

On these premises, *Fraser* established a baseline for the Court’s jurisprudence that facilitates schools’ inculcation of student speech suppression as a positive civic norm.¹²³ First, the *Fraser* Court followed the principles of Justice Stewart’s *Tinker* concurrence¹²⁴ by finding “that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings.”¹²⁵ Next, the Court determined that public schools’ purpose is to determine which types of student expression are “inappropriate and subject to sanctions,” according to the schools’ own view of what has educative value.¹²⁶ So, rather than employing *Tinker*’s reasonable forecast of a substantial disruption standard,¹²⁷ the Court afforded far-reaching latitude to schools to suppress speech that they deem “inappropriate” to convey the “essential lessons of civil, mature conduct.”¹²⁸ As a result, the Court carved out a new category of student speech that is not subject to First Amendment protection: “offensively lewd and indecent speech,” as such speech “undermine[s] the school’s basic educational mission” and is “wholly inconsistent with the ‘fundamental values’ of public school education.”¹²⁹ In applying this new standard, the Court held that the school “acted entirely within its permissible authority” in punishing Fraser for his speech as a way to disassociate itself from a notion that the state had “surrender[ed] control of the American public school system to public school students.”¹³⁰

122. *Fraser*, 478 U.S. at 681.

123. See *Roe*, *supra* note 100, at 1283 (footnote omitted) (arguing that the *Fraser* Court “understood the work of the schools as inculcation when it deferred to the school’s decision to suppress student speech believed to be incompatible with the school’s curricular message”); see also Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1350 (2009) (discussing the dangers of framing speech suppression through the lens of social norms).

124. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514–15 (1969) (Stewart, J., concurring) (“I cannot share the Court’s uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.”). This determination also followed the Court’s previous school-search holding in *New Jersey v. T.L.O.* 469 U.S. 325, 340–42 (1985) (holding that students’ Fourth Amendment rights are not coextensive with adults’ Fourth Amendment rights).

125. *Fraser*, 478 U.S. at 682 (citing *T.L.O.*, 469 U.S. at 340–42).

126. *Id.* at 683.

127. See *Tinker*, 393 U.S. at 514.

128. *Fraser*, 478 U.S. at 683.

129. *Id.* at 685–86.

130. *Id.* (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Fraser established the foundational principle that schools' value inculcation should communicate the state's power to suppress student speech, rather than the state's duty to vigorously protect schoolchildren's constitutional rights. This harmful ideology began to turn the tide from a student speech rights-recognitive jurisprudence to a rights-restrictive one.¹³¹ *Fraser* inextricably linked the power of the state to inculcate students for civic participation with the concept that children do not have the same rights that are afforded to other citizens under the Constitution.¹³² *Fraser's* legacy has inflicted significant damage upon students' constitutional rights and has magnified students' understanding of their inferior status in the citizenship hierarchy.¹³³ *Fraser* also conveyed to the state that students should be taught that large swaths of their speech can be suppressed if that speech is not consistent with what schools deem to be their fundamental values.¹³⁴ This sea change has allowed schools to inculcate K–12 students with the message that suppression of any speech that is “inappropriate” comports with the constitutional and civic parameters of our democracy.¹³⁵

C. HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER

The Court's decision two years later in *Hazelwood School District v. Kuhlmeier* expanded its endorsement of the speech-suppressive inculcation of students.¹³⁶ In *Hazelwood*, a high school principal objected to two student-written articles that were slated to appear in the school newspaper.¹³⁷ “One of the stories described three Hazelwood East students' experiences with pregnancy; the other

131. See Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 389 (2007) (labeling *Fraser* “the most speech-restrictive” of the Supreme Court's student-speech cases); Jamin B. Raskin, *The Marshall-Brennan Constitutional Literacy Project: American Legal Education's Ambitious Experiment in Democratic Constitutionalism*, 90 DENV. U. L. REV. 833, 840 (2013) (deeming *Fraser* a “restrictive and regressive decision[]”).

132. See Daniel G. McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523, 561 (1998) (discussing how *Fraser* utilized a more restrictive perspective on offensive student speech as compared to the Court's other First Amendment jurisprudence); Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 181 (2017) (identifying the courts' different constitutional applications for children as compared to adults).

133. See Hudson & Ferguson, *supra* note 37, at 182 (arguing that *Fraser* was the jumping-off point for public schools' curtailments of student speech rights, resulting in these institutions becoming “bastions of hegemony, designed to standardize thought and ostracize dissent”).

134. See, e.g., Catherine J. Ross, “Bitch,” *Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 725 (2016) (arguing that “*Fraser* gives schools almost unlimited discretion to punish the lewd and crude,” which has resulted in “[e]ducators commonly push[ing] the margins of the speech *Fraser* allows them to censor”).

135. See *Fraser*, 478 U.S. at 683 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”); Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 652 (2005) (identifying how *Fraser* communicates that “one of the ‘fundamental values’ that schools should inculcate is the maxim that threatening or offensive public discourse is inappropriate” (quoting *Fraser*, 478 U.S. at 683)).

136. See 484 U.S. 260 (1988); see also Davis & Rosenberg, *supra* note 99, at 1077 (discussing how *Hazelwood* “permit[s] restrictions on student speech for a far greater range of reasons than *Fraser* itself suggested”).

137. *Hazelwood*, 484 U.S. at 263.

discussed the impact of divorce on students at the school.”¹³⁸ The principal was concerned that the pregnant students featured in one article could be identified despite the use of fictitious names and that younger students in the high school should not be exposed to that article’s references to sexual activities and birth control.¹³⁹ The principal was also worried that a named student in the other article spoke negatively of her father’s activities prior to her parents’ divorce.¹⁴⁰

Because of these concerns, the principal directed the journalism teacher to remove the two pages on which the two articles appeared from the planned six-page newspaper.¹⁴¹ These two deleted pages also featured other articles on teenage pregnancy, teenage marriage, runaway children, and juvenile delinquency.¹⁴² Although the principal did not have any concerns with those articles, they were also censored because they appeared on the same pages as the objected-to articles.¹⁴³ Three of the school newspaper students brought suit, claiming that their First Amendment rights had been violated.¹⁴⁴ The district court upheld the constitutionality of the school’s actions.¹⁴⁵ On appeal, the Eighth Circuit applied *Tinker* and found that the students’ First Amendment rights had been violated because the school officials’ censorship in the public forum newspaper¹⁴⁶ was not “necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.”¹⁴⁷

The Supreme Court reversed the Eighth Circuit’s decision.¹⁴⁸ In doing so, it created a new standard that affirmed the right of the school to censor *all* of the excised articles by framing *Fraser*’s values inculcation mission as being part of the pedagogical purpose of the school.¹⁴⁹ The Court first gave a passing glance to *Tinker*’s schoolhouse gate dicta.¹⁵⁰ From there, it immediately winnowed down this acknowledgment of student speech rights by citing *Fraser*’s finding that children do not have coextensive rights with other constitutionally protected people and by cabining any First Amendment rights established in *Tinker* as being

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 264.

142. *Id.* at 264 n.1.

143. *Id.*

144. *Id.* at 262.

145. *Id.* at 264.

146. *Id.* at 265.

147. See *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1374 (8th Cir. 1986) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

148. See *Hazelwood*, 484 U.S. at 266.

149. See *id.* at 272–73 (finding “that 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” and applying that standard to the removal of all the censored articles, including those to which the school did not object); Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 CONN. L. REV. 999, 1029–30 (1997) (identifying “the recognition of the value-inculcating aspect of public education” as “a salient feature” of *Hazelwood*).

150. *Hazelwood*, 484 U.S. at 266 (“Students in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” (quoting *Tinker*, 393 U.S. at 506)).

“applied in light of the special characteristics of the school environment.”¹⁵¹ This constrictive approach allowed the *Hazelwood* Court to determine that the state’s action was permissible censorship, because “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ . . . even though the government could not censor similar speech outside the school.”¹⁵² It further reaffirmed school boards’ power to constitutionally suppress “inappropriate” speech in the classroom or in school assembly, just as it did in *Fraser*.¹⁵³

From there, the Supreme Court found that the school newspaper was not a public forum, and, therefore, that it was not subject to the *Tinker* reasonable expectation of substantial and material disruption standard.¹⁵⁴ By classifying the school newspaper this way, the Court allowed for a much broader standard for suppression of the speech, finding that “school officials were entitled to regulate the contents of [the student newspaper] in any reasonable manner.”¹⁵⁵ The Court determined that there was no affirmative First Amendment requirement for schools “to promote particular student speech.”¹⁵⁶ According to the Court, if any student expressive activity “might reasonably be perceived” by “students, parents, [or] members of the public . . . to bear the imprimatur of the school,” then it could be constitutionally suppressed.¹⁵⁷

This permissible censorship extends to an array of student speech under the all-encompassing umbrella of state pedagogy.¹⁵⁸ It includes speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences”;¹⁵⁹ “student speech on potentially sensitive topics”;¹⁶⁰ “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’”;¹⁶¹ or any student speech that would “associate the school with any position other than neutrality on matters of political controversy.”¹⁶² To justify its allowance of schools to suppress such a categorically broad range of student speech, the Court harkened back to its pronouncement in *Brown* regarding the central role that schools play in the inculcation of children with civic and cultural values.¹⁶³ The Court expressly recognized the breadth of this permissible state suppression by acknowledging that,

151. *Id.* at 266 (quoting *Tinker*, 393 U.S. at 506).

152. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

153. *Id.* at 267 (quoting *Fraser*, 478 U.S. at 683).

154. *See id.* at 270.

155. *Id.*

156. *Id.* at 270–71.

157. *Id.* at 271.

158. *See id.*; *see also* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 85 (1996) (connecting *Hazelwood*’s broad allowance of school censorship to *Fraser*’s values inculcation mission).

159. *Hazelwood*, 484 U.S. at 271.

160. *Id.* at 272.

161. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

162. *Id.*

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

[a] school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the ‘real’ world—and may refuse to disseminate student speech that does not meet those standards.¹⁶⁴

As a result, the Court held that “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.”¹⁶⁵ Here, the Court rearticulated its “oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”¹⁶⁶ The Court then provided that its responsibility to intervene in a school’s censorship of student expression would arise only when students’ constitutional rights merit protection, which would be when an act of school suppression “has no valid educational purpose.”¹⁶⁷

In applying this holding, the Court determined that the censorship of one-third of the school newspaper, including the articles to which the principal had no objection, did not merit such constitutional protection.¹⁶⁸ In doing so, it gave no explicit rationale for upholding the constitutionality of the collateral damage censorship, concluding instead that “the principal’s decision to delete two pages of [the student newspaper], rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them.”¹⁶⁹ The Court determined that the censorship did not violate the First Amendment.¹⁷⁰ As a result, the permissible student speech restriction that can now occur pursuant to public schools’ values inculcation and pedagogical prerogatives under *Fraser* and *Hazelwood* is incredibly far-ranging.¹⁷¹

Justice Brennan forcefully argued against the majority’s assessment in his *Hazelwood* dissent,¹⁷² refuting the concept that constitutional suppression of student speech could be sufficiently justified by “mere incompatibility with the school’s pedagogical message.”¹⁷³ His dissent made clear that “[t]he First Amendment permits no such blanket censorship authority.”¹⁷⁴ Justice Brennan

164. *Id.* at 271–72.

165. *Id.* at 273.

166. *Id.*

167. *Id.*

168. *See id.* at 274.

169. *Id.* at 276.

170. *Id.*

171. *See* S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 137 (1995) (noting that the consequence of the *Fraser* and *Hazelwood* holdings is that “school authorities may label [most] speech and then suppress it, without fear of serious judicial oversight”).

172. *See* Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 852 (2016) (detailing Justice Brennan’s emphatic rejection of the *Hazelwood* majority’s holding).

173. 484 U.S. at 280 (Brennan, J., dissenting).

174. *Id.*

emphasized that the values inculcation mission of public schools could not be used to suppress controversial student speech, stating that,

[j]ust as the public on the street corner must, in the interest of fostering “enlightened opinion,” tolerate speech that “tempt[s] [the listener] to throw [the speaker] off the street,” public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.¹⁷⁵

The dissent also challenged the majority’s allocation of “greater control” to the state to censor what it determines to be school-sponsored speech and its abandonment of the rights-respective *Tinker* standard.¹⁷⁶ In criticizing the Court’s abdication of *Tinker*, the dissent raised important points regarding the extraordinary censorship that was upheld as constitutional by the majority opinion.¹⁷⁷ Here, Justice Brennan squarely determined that the inculcation of suppression supported by the Court in *Hazelwood* does not jive with the constitutional democratic-values inculcation with which schools are charged:¹⁷⁸

Where “[t]he separation of legitimate from illegitimate speech calls for more sensitive tools,” the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.¹⁷⁹

Hazelwood presents an unfortunate “civics lesson.”¹⁸⁰ The case advises schools and teaches students that state-deemed “inappropriate, personal, sensitive, [or] unsuitable” student speech can be lawfully suppressed if it is broadly construed to appear in a school-sponsored expressive activity and is related to a pedagogical concern.¹⁸¹ In following this dictate, schools have dramatically expanded the

175. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)).

176. *Id.* at 282 (quoting majority opinion).

177. *See id.* at 290.

178. *See* Nomi Maya Stolzenberg, “*He Drew A Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 657–58 (1993) (arguing that Justice Brennan’s dissent, rather than the *Hazelwood* majority opinion, typifies the true nature of civic republicanism).

179. *Hazelwood*, 484 U.S. at 290 (Brennan, J., dissenting) (citation omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

180. *Id.* at 277, 291.

181. *Id.* at 278 (quoting *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1371 (8th Cir. 1986)); *see also* Davis & Rosenberg, *supra* note 99, at 1090 (“*Hazelwood*’s implication that schools may suppress any student speech they deem unsuitable for children could give great leeway to school administrators to suppress student expression on all sorts of controversial topics, particularly if they disagree with what students are saying.”).

definition and scope of these curricular constructs, resulting in schools practically having absolute discretion to suppress student speech.¹⁸² And federal courts have affirmed these actions under the banner of *Hazelwood*.¹⁸³ Yet, this censorship of student speech actually contravenes public schools' duties to instill in students the necessary information "to contribute to[] civilized society" and to "inculcate [] in tomorrow's leaders the 'fundamental values necessary to the maintenance of a democratic political system.'"¹⁸⁴ Therefore, the legacy of *Hazelwood* is the jurisprudential shift from the presumption of students' rights to engage in free speech in schools to one of upholding the constitutional validity of student speech censorship by the state.¹⁸⁵

D. *MORSE V. FREDERICK*

The Court's decision twenty-one years later in *Morse v. Frederick* cemented its endorsement of the speech-suppressive inculcation of students.¹⁸⁶ In *Morse*, a high school senior displayed a fourteen-foot banner that read "BONG HiTS 4 JESUS" on a public sidewalk during the 2002 Olympic Torch Relay in Juneau, Alaska, while participating in this approved school event.¹⁸⁷ The student refused to comply with the principal's request to take down the banner, and he was suspended for ten days.¹⁸⁸ The principal later explained that her request to remove the banner was "because she thought it encouraged illegal drug use, in violation of established school policy."¹⁸⁹

The student filed a 42 U.S.C. § 1983 lawsuit, alleging a violation of his First Amendment rights.¹⁹⁰ The district court ruled for the school entities, finding that there was no constitutional rights violation.¹⁹¹ The Ninth Circuit reversed the lower court's decision, determining that the speech did not give "rise to a 'risk of substantial disruption'" per *Tinker* and finding that the principal was not entitled

182. See Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 275–76 (1992) (discussing a variety of sweeping school suppression of student speech utilizing the *Hazelwood* dictate as justification that has been upheld as constitutional under that decision's holding).

183. See Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 623 & n.305 (1999) (citing to "several courts, [which] claiming to rely on *Hazelwood*, have drastically increased the scope of 'curriculum' and, as they perceived it, the school's absolute discretion" to suppress student speech).

184. *Hazelwood*, 484 U.S. at 278 (Brennan, J., dissenting) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

185. See Salomone, *supra* note 182, at 318–19 ("*Hazelwood*'s language concerning the mission of schools to inculcate community values, combined with its broad conception of the curriculum, effectively transmutes *Tinker*'s anti-institutional presumption into a presumption of constitutional validity for the school's educational policy decisions.").

186. See 551 U.S. 393, 410 (2007); see also Erwin Chemerinsky, *Isaac Marks Memorial Lecture: Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 728 (2011) (characterizing *Morse* as not being rights-protective).

187. *Morse*, 551 U.S. at 397.

188. *Id.* at 398.

189. *Id.*

190. *Id.* at 399.

191. *Id.*

to qualified immunity as these speech rights were clearly established.¹⁹² The Supreme Court reversed the Ninth Circuit and found that the First Amendment was not violated.¹⁹³

In *Morse*, the Court used the momentum of the rights-restrictive carve-outs of *Fraser* and *Hazelwood* to justify its continued affirmation of the suppression of student speech.¹⁹⁴ At the outset of the decision, the Court cited the *Tinker* schoolhouse dicta¹⁹⁵ and then immediately referenced *Fraser* and *Hazelwood* to emphasize the actual diminution of student speech rights in American public schools.¹⁹⁶ The Court next determined that the banner was displayed at a school-sanctioned activity, as it took place during school hours, was sanctioned by the principal “as an approved social event or class trip,” and was supervised by teachers and administrators.¹⁹⁷ Making the determination that this was a school-sponsored event was key to the Court’s rights-restrictive holding.¹⁹⁸

The Court found that the principal’s view that the banner was a promotion of illegal drug use was reasonable.¹⁹⁹ From there, the Court determined that the principal’s speech restriction was consistent with the First Amendment.²⁰⁰ To arrive at this conclusion, the Court incorporated two foundational principles from *Fraser*: first, students do not have coextensive constitutional rights with adults because their expressive activities occur in the special school environment,²⁰¹ and second, *Tinker*’s analytical framework is not absolute in the interpretation of the constitutionality of student speech rights.²⁰² The Court emphasized *Hazelwood*’s

192. *Id.* at 399–400 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1121–25 (9th Cir. 2006)).

193. *Id.* at 400.

194. *See id.* at 397 (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” as such a holding is consistent with *Fraser* and *Hazelwood*); *see also* Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K–12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 840 (discussing the “carved out exceptions” of the Court’s post-*Tinker* jurisprudence); Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1119 (2010) (providing that *Morse* created a special rule for a “particular categor[y] of disfavored student speech”).

195. *Morse*, 551 U.S. at 396 (“Our cases make clear that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

196. *Id.* at 396–97 (“[W]e have held that ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,’ and that the rights of students ‘must be applied in light of the special characteristics of the school environment.’” (first quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); then quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988))).

197. *Id.* at 400–01.

198. *See* Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions—for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1431 (2011) (“*Morse* extended the *Fraser/Kuhlmeier* rule that schools are specially speech-restricted institutions beyond school-sanctioned speech.”).

199. *See Morse*, 551 U.S. at 401.

200. *Id.* at 403.

201. *Id.* at 404–05.

202. *See id.* at 405 (noting that *Fraser* “certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969))).

confirmation of these principles by citing that case's acknowledgments "that schools may regulate some speech 'even though the government could not censor similar speech outside the school,'" and that "*Tinker* is not the only basis for restricting student speech."²⁰³

From these restrictive principles,²⁰⁴ the Court drew from its Fourth Amendment jurisprudence to emphasize its "schools are different" ideology, which it had consistently used to support the inculcation of the diminished constitutional rights of students.²⁰⁵ As a result, the Court applied its post-*Tinker* rights-restrictive control jurisprudence to hold that the state has the power to define another area of unprotected speech for students, finding that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."²⁰⁶ Here, the Court linked the constitutionality of the suppression of the student speech with the school's mission to inculcate students with the harms of the advocacy of illegal drug use.²⁰⁷ In doing so, the Court acknowledged that it had engaged in viewpoint discrimination that would be unconstitutional in other contexts.²⁰⁸ Thus, the Court's holding permits the state to inculcate students with the understanding that it has the power to suppress student speech in extensive ways that would not be permissible in other contexts of constitutional democracy.²⁰⁹

The *Morse* dissent appropriately categorized the majority's holding as authorizing the suppression of student speech with which the school merely disagreed, as the banner "neither violate[d] a permissible rule nor expressly advocate[d] conduct that is illegal and harmful to students."²¹⁰ In arguing that the majority had erred, Justice Stevens's dissent emphasized how the Court upheld the right of the state to engage in "censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, [which should be] subject to the most rigorous burden of justification" and which is "presumed to be

203. *Id.* at 405–06 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

204. See Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1700 (2009) (discussing how *Morse* was formulated upon the expansive school authority deference established by the Court in *Fraser* and *Hazelwood*).

205. See *Morse*, 551 U.S. at 406 (reciting the Court's Fourth Amendment student rights-restrictive case law).

206. *Id.* at 408 (citations omitted) (quoting *Tinker*, 393 U.S. at 506).

207. See Susan S. Bendlin, *Cyberbullying: When Is It "School Speech" and When Is It Beyond the School's Reach?*, 5 NE. U. L.J. 47, 52 (2013) (discussing how *Morse* intentionally tied the school's speech suppression "to its responsibility to educate its students about" the dangers of illegal drug use).

208. See *Morse*, 551 U.S. at 409 (recognizing the viewpoint discrimination central to its holding).

209. See *id.* at 434–35 (Stevens, J., dissenting) (summarizing the majority's holding as one that allows "school[s] to suppress student speech that was never meant to persuade anyone to do anything"); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431 (1996) (discussing the need for the constitutional invalidation of any restriction on speech that has resulted from "hostility toward ideas as such" because that "restriction is irretrievably tainted").

210. *Morse*, 551 U.S. at 435 (Stevens, J., dissenting).

unconstitutional.”²¹¹ As a result, the dissent correctly classified the majority’s analysis as “inimical to the values protected by the First Amendment.”²¹²

Morse provided a sweeping affirmation of the state’s power to inculcate students with their own suppression, allowing schools to quash student speech that does not reflect the viewpoint that school officials want to be expressed.²¹³ This type of broad suppression of student expression based on viewpoint discrimination, without incorporation of the *Tinker* standard, drastically undercuts the free exercise of students’ First Amendment rights.²¹⁴ In *Tinker*, the Court was clear that “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”²¹⁵ In contrast, *Morse* seems to indicate the ability of schools to censor student speech with “no stopping point,” as prognosticated by Justice Stevens’s dissent.²¹⁶ Although the *Morse* majority did not expressly jettison all student speech rights, as advocated by Justice Thomas’s concurrence,²¹⁷ the Court significantly distanced itself from *Tinker*’s rights-recognitive treatment of the speech rights of schoolchildren,²¹⁸ if not dismantled *Tinker*’s protections altogether.²¹⁹

E. CONCLUSION ON THE SUPREME COURT’S ENDORSEMENT OF SCHOOLS’ VALUES INCUICATION

Each of the four student speech cases discussed above affirms that values inculcation is a core mission of the public schools. *Tinker*’s rights-recognitive portions suggest that schools should imbue students with the knowledge that they have a right to engage in the free speech guaranteed to them as “persons’ under our Constitution,” both inside and outside the classroom.²²⁰ These parts of *Tinker* stand for true democratic-values inculcation, because they caution against the teaching of platitudes and require that schools inform their students that “[u]nder

211. *Id.* at 436 (quoting *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828–29 (1995)).

212. *Id.* at 439.

213. *See id.* at 448 (criticizing the majority’s “rule that permits only one point of view to be expressed”).

214. *See Davis & Rosenberg, supra* note 99, at 1093 (discussing the viewpoint discrimination that schools can use per *Morse*).

215. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

216. *Morse*, 551 U.S. at 444 (Stevens, J., dissenting).

217. *See id.* at 418–19 (Thomas, J., concurring) (utilizing an originalist perspective and the historical view of *in loco parentis* to conclude that “the Constitution does not afford students a right to free speech in public schools”); *see also* Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 356 (2010) (discussing how Justice Thomas’s *Morse* concurrence embraces censorship and paternalism).

218. *See Papandrea, supra* note 36, at 1030 (discussing *Morse*’s continuation of “the trend of the Court to move away from the robust vision of student speech rights it embraced in *Tinker*”).

219. *See* Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K–12 Sports*, 78 LA. L. REV. 145, 184–85 (2017) (arguing the Supreme Court has dismantled *Tinker*’s speech-protective holding through its post-*Tinker* jurisprudence).

220. *Tinker*, 393 U.S. at 511–13.

our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact.”²²¹

Nevertheless, K–12 schoolchildren have been inculcated with values quite different from the rights-recognitive values endorsed in *Tinker*, because the Court’s post-*Tinker* student speech jurisprudence has greatly distorted the meaning of democratic-values inculcation. Because of this inculcative distortion, the State has been given a constitutional license to normalize suppression as a civic democratic value.²²² This distortion’s jumping-off point is the Court’s consistent recognition that school entities have the almost unlimited right to manage school affairs.²²³ The Court’s endorsement of the immense power that schools have to control students has predictably resulted in the exercise of such power to circumscribe student dissent on anything deemed by schools to constitute community values,²²⁴ despite such suppression being constitutionally suspect.²²⁵

Essentially, post-*Tinker*, each Supreme Court intervention in student-speech cases has affirmed the power of the schools and the state to suppress the voices of students in increasingly constrictive ways.²²⁶ By deferring to school officials’ actions, the Court has created constitutional theory on democratic-values inculcation from whole cloth, which has resulted in rampant censorship of student speech.²²⁷ Although each of these decisions has given face value to *Tinker*’s dicta

221. *Id.* at 513.

222. See Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN’S L. REV. 365, 365–66 (1995) (discussing the dramatic transformation of *Tinker* by its progeny and identifying the effect of those cases’ inculcative views as student adherence to communal norms that are not protective of constitutional rights).

223. See *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (characterizing school principals’ jobs as “vitally important”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278–79 (1988) (Brennan, J. dissenting) (discussing the Court’s long history in reaffirming the reservation of the “daily operation of school systems’ to the States and their local school boards” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (classifying the “work of the schools” to be the inculcation of state-deemed inappropriate and sanctionable expression (quoting *Tinker*, 393 U.S. at 508)).

224. See Wilborn, *supra* note 171, at 137 (arguing that “the practical effect of the *Fraser/Hazelwood* judicial deference to school officials leaves little real protection for student expression not endorsed by school authorities”).

225. See Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 57–58 (2004) (discussing how the Court’s anchoring of its deference to school officials to the concept of the mission of education allows for the vast suppression of student speech, which would not be constitutional in other contexts).

226. See, e.g., *Hazelwood*, 484 U.S. at 290 (Brennan, J., dissenting) (describing the majority decision’s reference to *Tinker* as “ironic,” as the “opinion . . . denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed”); Homer H. Clarke, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 31 (discussing how the Court has significantly circumscribed schoolchildren’s constitutional rights despite its rhetoric).

227. See Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 33–34 (2012) (identifying the effect of the Supreme Court’s deference to school action in its student speech jurisprudence as censorship).

that students retain their speech rights within the schoolhouse gate,²²⁸ they have all overturned the lower court decisions applying *Tinker*'s material and substantial interference standard and created novel carve-out categories that allow for a continual shrinking of students' First Amendment rights.²²⁹

Fraser instructs that "indecent" and "inappropriate" student speech can and should be suppressed by the state as a matter of values inculcation, although such speech would be fully protected if articulated by other constitutionally protected speakers.²³⁰ *Hazelwood* permits expansive censorship of student speech through the state's "editorial control . . . in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns," even if that student speech is not the actual target of a school's pedagogical objections or inculcative aims.²³¹ *Morse* establishes that schools can inculcate students with the knowledge of the state's power to permissibly engage in viewpoint discrimination to suppress student speech,²³² although outside of K–12 schools, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."²³³

Consequently, these judicial interventions have only served to chip away at the rights that students have to speak, eviscerating any real meaning to the oft-cited *Tinker* dicta preserving student speech rights as a matter of true civic values inculcation.²³⁴ Instead, the Court has adopted *Tinker*'s control doctrine as a

228. See, e.g., *Morse*, 551 U.S. at 396 ("Our cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))); *Hazelwood*, 484 U.S. at 266 ("Students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (quoting *Tinker*, 393 U.S. at 506)); *Fraser*, 478 U.S. at 680 ("This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.*, . . . that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (quoting *Tinker*, 393 U.S. at 506)).

229. See, e.g., *Morse*, 551 U.S. at 399–400, 410 (reversing the Ninth Circuit's decision that found a First Amendment violation of the student's speech rights because the school's actions did not meet the *Tinker* risk of substantial disruption standard); *Hazelwood*, 484 U.S. at 265–66 (reversing the Eighth Circuit's decision that found a constitutional rights violation for the students through the application of the *Tinker* reasonable expectation of a material and substantial disruption standard); *Fraser*, 478 U.S. at 679–80 (reversing the Ninth Circuit's decision that found a constitutional rights violation for the students through the application of the *Tinker* reasonable expectation of a material and substantial disruption standard).

230. See 478 U.S. at 680–81 (carving out a lack of protection for "indecent" student speech that would otherwise be protected under the Constitution).

231. See 484 U.S. at 272–73 (applying its new pedagogical holding to affirm the removal of all the censored articles, including those to which the school did not object).

232. See 551 U.S. at 408 (excluding certain student speech from constitutional protection because of the viewpoint that it presents).

233. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995).

234. See *Wilborn*, *supra* note 171, at 139 (noting how "courts have become very deferential to suppression of student speech by school authorities who can offer *any* reason for their action that is related to some pedagogical objective, however fanciful").

mechanism to support a rights-suppressive education of students by the state.²³⁵ As a result, American schoolchildren have been inculcated with the idea, endorsed by the Court, that the suppression of speech that is deemed inappropriate, objectionable, or out of line with state orthodoxy is a democratic virtue.²³⁶ This distorted values instillation has resulted in a series of deleterious consequences for both individual students and collective society,²³⁷ and these inculcative harms have come to a boiling point as schoolchildren matriculate into colleges and universities.²³⁸

II. INCULCATED: THE TRANSFORMATION FROM STUDENTS SUPPRESSED TO STUDENT SUPPRESSORS AND ITS IMPACT ON COLLEGE AND UNIVERSITY CAMPUSES

Education leaves an indelible mark on individuals and American society.²³⁹ Ideally, K–12 public schools should instill in the nation’s children the foundations for sustained civic participation by inculcating “the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.”²⁴⁰ This form of democratic-values inculcation, which informs students of their First Amendment rights through both pedagogy and practice,²⁴¹ was at the heart of the rights-protective *Tinker* holding.²⁴² However, the Supreme Court’s post-*Tinker* progeny has transformed the definition of school values inculcation

235. See, e.g., James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1413 (2000) (arguing that the commonality of the post-*Tinker* Supreme Court student speech jurisprudence “is the recognition that school officials must be able to curtail student speech in order to protect the curricular activities—that is, the academic function—of schools”).

236. This completely contravenes the “bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

237. Although this Article focuses on how schools’ current values inculcation negatively impacts speech dynamics on college and university campuses, it certainly recognizes that all schoolchildren do not pursue higher education. The duplication of speech-suppressive norms by individuals outside of institutions of higher education is equally harmful to our country, but its examination is outside the scope of this Article.

238. See C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL’Y REV. 343, 351 (1989) (“[T]o shelter children from the marketplace [of ideas] by exposing them only to government-approved ideas may frustrate, if not destroy, a child’s ability to develop as a rational decision maker. Without childhood exposure to a variety of ideas and opinions, and without practice in sifting through competing views to determine what is ‘true’ (or, at least, ‘better’), individuals, upon reaching majority, will be ill-equipped to participate in the marketplace.”).

239. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (providing that the essential importance of education for individuals and society is undoubtable).

240. *New Jersey v. T.L.O.*, 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part).

241. See Nat Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. ST. L.J. 865, 900 (arguing that “in education, the freedom of expression and thought protected by the [F]irst [A]mendment becomes both a right and a process”).

242. See Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories That Inspire Them*, 85 MISS. L.J. 327, 392 (2016) (characterizing *Tinker*’s vision of cultivation of civic virtues as extending the constitutional freedoms of the First Amendment to students to “expose [them] to different ideas, thus helping students become the sort of citizens a liberal state requires”).

to instead include instruction, through both pedagogy and practice, of suppression and censorship.²⁴³ The effect of this speech-restrictive inculcation has become magnified as it has evolved alongside the judicially endorsed constriction of all of students' constitutional rights.²⁴⁴ In following this case law, the state has preyed upon the impressionability of youth and taught that the suppression of speech is a social and democratic good,²⁴⁵ which runs contrary to the actual guarantees of freedom under the Constitution²⁴⁶ and "legitimizes the tactics of oppression."²⁴⁷

This distorted values inculcation has been effective.²⁴⁸ K–12 students have normalized these values and have replicated these normative lessons by engaging in all varieties of a heckler's veto and other stifling measures when they enter colleges and universities.²⁴⁹ When these suppressive actions take place at institutions of higher education that are historically places of robust discourse, dissonance and discord result.²⁵⁰ However, this phenomenon should not be surprising: these students are merely following the inculcative state model to which they have been exposed for the majority of their education.²⁵¹

243. See Chemerinsky, *supra* note 72, at 530 (arguing that the post-*Tinker* jurisprudence has left minimal room for the protection of student speech rights); Daniel Gordon, *America's Constitutional Dad: Justice Kennedy and His Intricate Children*, 44 IDAHO L. REV. 161, 164 (2007) (comparing the differences between *Tinker's* requirements that schools "respect, and not suppress" student speech and its progeny's vast allowances for the restrictions of student speech).

244. See Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 120 (discussing the Court's reliance on its past student rights restrictions to justify the continued constriction of other constitutional rights of schoolchildren); Jon M. Van Dyke, *The Privacy Rights of Public School Students*, 32 U. HAW. L. REV. 305, 305 (2010) (identifying the circumscribed nature of students' constitutional rights).

245. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (discussing the Court's use of the "peculiar vulnerability of children" as a justification for its "conclusion that the constitutional rights of children cannot be equated with those of adults").

246. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring) (recognizing "the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures").

247. John F. Wirenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment*, 20 FORDHAM URB. L.J. 27, 58 (1992) ("The idea that an oppressed minority can be empowered by silencing its oppressors and those who defend the rights of the putative oppressors, legitimizes the tactics of oppression . . .").

248. See Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 742 (2017) (discussing how "many contemporary college students have little comprehension of or devotion to free speech").

249. See Chi Steve Kwok, *A Study in Contradiction: A Look at the Conflicting Assumptions Underlying Standard Arguments for Speech Codes and the Diversity Rationale*, 4 U. PA. J. CONST. L. 493, 496 (2002) (finding that campus speech codes are "regulations [that] amount to a 'heckler's veto' approach to speech regulation that has been repeatedly disapproved by the Supreme Court's First Amendment case law"); R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 178–79 (2017) (identifying the conspicuous appearance of the heckler's veto on numerous university campuses).

250. See R. George Wright, *Campus Speech and the Functions of the University*, 43 J.C. & U.L. 1, 15–17 (2017) (discussing the tensions that result from the competing forces of speech and suppression on college and university campuses).

251. See Robert Shibley, *Current Threats to Free Speech on Campus*, 14 FIRST AMEND. L. REV. 239, 240–41 (2016) ("What is new in the last few years is that today's students, apparently ill- or mis-

A. VALUES INCULCATION OF SPEECH SUPPRESSION IN PUBLIC SCHOOLS

An important lesson conveyed by *Tinker* was that “the state educator’s undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as ‘thought police’ stifling discussion of all but state-approved topics and advocacy of all but the official position.”²⁵² From this perspective, the values inculcation of K–12 schools should empower young people to actively engage in American democracy.²⁵³ Unfortunately, this ideal has not been realized, and public school students are increasingly inculcated with the normative idea that the state has the power to suppress student speech in increasingly expansive ways.²⁵⁴ This has created a social norm among schoolchildren that the right, appropriate, and civic way to deal with objectionable speech is to suppress that speech. This distortive inculcation of rights restrictions and the resulting normalization of such restrictions are particularly pernicious for younger students.²⁵⁵

Given their transitive cognitive development, K–12 schoolchildren are particularly impressionable.²⁵⁶ Local and state school officials inevitably mold young minds with the instruction and values inculcation of the public schools.²⁵⁷ The state wields tremendous authority and coercive power over public school students through these processes, especially because schoolchildren are “susceptib[le] to peer pressure” and desire to emulate school officials as role models.²⁵⁸ “[S]tudents are particularly vulnerable to the inculcation of orthodoxy in the guise of pedagogy”²⁵⁹ This vulnerability is a characteristic that increases the efficacy of coercive forces like that which attend the endorsement of speech suppression by the state and the Supreme Court. It is this vulnerability that has been

educated in the K-12 system about what is required to be an enlightened, liberal thinker, have begun to support censoring their compatriots as well as themselves.”).

252. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 285–86 (1988) (Brennan, J., dissenting).

253. See Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of “Bending” History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 554 (1987) (“An education that makes students aware of, and invites them to participate in, ongoing controversy, cannot fairly be accused of indoctrination. . . . [it] satisfies all legitimate state interests in value inculcation without sacrificing students’ [F]irst [A]mendment rights.”).

254. See AMY GUTMANN, *DEMOCRATIC EDUCATION* 14, 45 (rev. ed. 1999) (arguing that true democratic values education bars “[c]itizens and public officials [from using] democratic processes to destroy democracy” and prevents adults “from using their present deliberative freedom to undermine the future deliberative freedom of children”).

255. See Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 813 (1993) (discussing how public schools’ rights-restrictive messaging results in “distorting the socializing process of public schools and thereby inculcating this stigmatic belief into school children”).

256. See *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (highlighting students’ impressionability); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (emphasizing “the impressionable age of the pupils, in primary schools particularly”).

257. See Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1120 (1990) (arguing that “the cognitive development of children makes value inculcation [by schools] inevitable”).

258. *Edwards*, 482 U.S. at 584.

259. *Cole v. Me. Sch. Admin. Dist. No. 1*, 350 F. Supp. 2d 143, 150 (D. Me. 2004).

tapped into by state and local school entities hewing to the Court's post-*Tinker* line of cases, in which the Court endorsed as constitutional the inculcation of orthodoxy.²⁶⁰ This extant line of student speech caselaw essentially overrules the *Tinker* proposition that "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"²⁶¹ Given children's acute vulnerability,²⁶² it makes sense that many students have now internalized this notion and find suppression of others' speech to be the appropriate method of course.

The orthodoxy that young people are being taught in American schools is that student speech that is inappropriate or objectionable should be suppressed²⁶³ and that such suppression is a social good. Here, the state's inculcation verges on indoctrination,²⁶⁴ as free speech has been deemed a positive social norm in all other areas of our liberal democracy.²⁶⁵ Yet in our public schools, the states— influenced by the Supreme Court's student speech-restrictive jurisprudence— have increasingly failed to scrupulously protect students' constitutional freedoms, resulting in the "strangl[ing of] the free mind at its source and [the] teach[ing of] youth to discount important principles of our government as mere platitudes."²⁶⁶ The states have also allowed the application of *in loco parentis* to take away the fundamental freedoms of students because the Court has found that a school's right to discipline and control students should supersede the constitutional rights afforded to children under the First Amendment.²⁶⁷ In sum, state public schools have not provided the ideal form of fundamental values inculcation that instills in students the necessary competencies to participate knowledgeably

260. See Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 200 (1983) (discussing the Supreme Court's indications that "the enculturation, even indoctrination, of youth [is] a proper function of the public schools").

261. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

262. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (discussing the importance of protecting elementary and secondary public schoolchildren from coercive pressures).

263. See Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L.J. 557, 570 (1994) ("After all, 'inculcation of values,' moral or civic, necessarily entails a degree of orthodoxy in the enterprise of public education."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 818 (2001) (stating the infliction of state orthodoxy occurs "when [the State] dictates what beliefs must and must not be expressed" (emphasis omitted)).

264. See Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 997 (2009) ("Public school students provide the sole example of a captive audience forced to hear state-approved viewpoint-based information."); Roy, *supra* note 135, at 653 (discussing the peril of indoctrination "when a student resists a certain orthodoxy and school officials subsequently attempt to suppress the student's dissent").

265. See generally Steven Alan Childress, *The Empty Concept of Self-Censorship*, 70 TUL. L. REV. 1969 (1996) (discussing the positive normative aspects of speech, as compared to the negative values of censorship).

266. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

267. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 413, 418 (2007) (Thomas, J., concurring) (discussing the Supreme Court's use of *in loco parentis* to "up[old] the right of schools to discipline students, to enforce rules, and to maintain order" to justify the scaling back of *Tinker*).

and responsibly in a civic democracy.²⁶⁸ Instead, the state has adopted the post-*Tinker* jurisprudence that it has “the authority to coerce belief by value inculcation in the public schools”—a position which only allows for “speech [to be] protected so long as the speaker has been conditioned to say only what is acceptable to those in authority.”²⁶⁹

This speech-restrictive educational inculcation is taking place within the schoolhouse environment where, following the Supreme Court’s direction, the state has successively degraded students’ constitutional rights.²⁷⁰ Despite *Tinker*’s pronouncements that students retain their rights as constitutional persons,²⁷¹ the post-*Tinker* jurisprudence has instead established that students are pale shadows of their fellow citizens.²⁷² Indeed, *Fraser*, *Hazelwood*, and *Morse* align with the Court’s “schools are different” jurisprudence in contexts that have stripped away students’ other constitutional rights.²⁷³ So, the rights-restrictive inculcation at the center of student speech suppression has been imported to other areas of the law, resulting in reduced constitutional protections for schoolchildren in realms such as privacy and due process.²⁷⁴

The Court and the state have utilized this inculcative ideology to educate students that they have diminished privacy rights. In *New Jersey v. T.L.O.*, the first decision in a line of cases which have eroded students’ Fourth Amendment rights, the Supreme Court applied *Tinker*’s control discourse to find that the probable cause standard normally applied to searches and seizures did not apply to school officials’ search of a high school student’s purse.²⁷⁵ The Court held that “the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on

268. See Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against “Inclusion,”* 72 WASH. L. REV. 775, 812 (1997) (defining an “ideal education” as one that provides core social and intellectual competencies for citizenship preparation).

269. See van Geel, *supra* note 260, at 254.

270. See Ryan, *supra* note 235, at 1338 (discussing how the Supreme Court’s deference to the government when it acts as an educator has “given education officials greater leeway to bend [speech, privacy, and due process] constitutional rights in order to achieve certain educational goals”).

271. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

272. See Corbin, *supra* note 264, at 997–98 (identifying how the Court has allowed student speech regulations that would not be constitutionally permissible if imposed upon adults); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1164 & n.237 (1996) (arguing that the diminution of student rights supports the proposition that “one is not necessarily born a legal person, but rather becomes one”).

273. See *Vernonia Sch. Dist. 473 v. Acton*, 515 U.S. 646, 656 (1995) (“Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . .”).

274. See, e.g., *id.* at 655 (noting that public schools have “the power and indeed the duty to ‘inculcate the habits and manners of civility’” (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986))); see also Emily Gold Waldman, *Show and Tell?: Students’ Personal Lives, Schools, and Parents*, 47 CONN. L. REV. 699, 710 n.47 (2015) (identifying the ratcheting down of students’ speech, privacy, and due process rights by the Supreme Court).

275. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (“[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”).

probable cause.”²⁷⁶ Instead, the legality of student searches “depend[s] simply on the reasonableness, under all the circumstances, of the search.”²⁷⁷

T.L.O. established that a public school’s “custodial and tutelary [authority permits] a degree of supervision and control that could not be exercised over free adults.”²⁷⁸ Consequently, a student who participates in any competitive extracurricular activity can now, as a condition for that participation, be constitutionally conscripted into a suspicionless drug test through the taking of their bodily fluids by the state.²⁷⁹ Additionally, despite a child’s acute “adolescent vulnerability [that] intensifies the patent intrusiveness of the exposure,”²⁸⁰ student strip searches that violate concepts of dignity²⁸¹ are not per se unreasonable under the Fourth Amendment.²⁸² In *T.L.O.* and its progeny, the Court’s endorsement of the primacy of state power to control students derives from the same *in loco parentis* doctrine that has been used to diminish student speech rights and results in a commensurate lessening of students’ privacy rights.²⁸³

The State, with the Supreme Court’s endorsement, has also inculcated students with the knowledge that they have fewer procedural due process protections.²⁸⁴ In *Goss v. Lopez*, the Court determined that student school suspensions required only the minimal procedural due process requirements of notice and an informal hearing because “further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”²⁸⁵ This case explicitly linked students’ diminished procedural due process rights with the rights-suppressive inculcative model, as these public school restrictions were premised on the contention that “school discipline furthers the educational interests of the suspended student.”²⁸⁶ So, although the Court in *Goss* did determine that some process is due for students who face exclusionary punishment, these procedural requirements are “quite minimal in the school environment.”²⁸⁷

276. *Id.* at 341.

277. *Id.*

278. *Vernonia*, 515 U.S. at 655.

279. *Bd. of Educ. v. Earls*, 536 U.S. 822, 825–26 (2002) (holding that a school policy that “requires all students who participate in competitive extracurricular activities to submit to drug testing” via urinalysis to be constitutional because it “reasonably serves the School District’s important interest in detecting and preventing drug use among its students”).

280. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 375 (2009).

281. *See id.* (noting that the “indignity” of a student strip search “does not, of course, outlaw it”).

282. *See id.* at 377 (declining to find all student strip searches to be per se unreasonable and instead finding that these strip searches require “the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing”).

283. *See Earls*, 536 U.S. at 840 (Breyer, J., concurring) (discussing how the Court’s use of *in loco parentis* captures all K–12 schoolchildren despite the thrust of its legal force applying to the needs of younger students and how it results in the diminution of students’ privacy rights).

284. *See Goss v. Lopez*, 419 U.S. 565, 581–82 (1975) (finding that due process requires only that the teacher “informally discuss the alleged misconduct with the student minutes after it has occurred” for a student who challenges a disciplinary suspension).

285. *Id.* at 583.

286. Catherine Y. Kim, *Policing School Discipline*, 77 *BROOK. L. REV.* 861, 870 (2012).

287. Levin, *supra* note 65, at 1673.

These minimal and unclarified due process requirements have allowed for the proliferation of exclusionary punishments in public schools,²⁸⁸ which inflict significant individual harms and substantial collateral consequences.²⁸⁹

The suppressive inculcative model has also been applied by the state and upheld by the Supreme Court to allow corporal punishment in public schools without basic due process requirements.²⁹⁰ Although public schools do not have an affirmative constitutional “duty to protect” students from corporal punishment by non-state actors in the absence of a custodial or other special relationship,²⁹¹ the Court determined that state corporal punishment of students is constitutionally permissible in *Ingraham v. Wright*.²⁹² Corporal punishment does not even require the due process protections of a preceding notice and a hearing, as “[i]mposing additional administrative safeguards . . . would . . . entail a significant intrusion into an area of primary educational responsibility.”²⁹³ As the Court instructed, “[b]ecause it is rooted in history, the child’s liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations.”²⁹⁴ The *Ingraham* decision provides yet another example of how the Court has given states the tools to inculcate in students that their constitutional rights are limited. In public schools that still allow corporal punishment, the lack of due process rights regarding this type of discipline is just another part of the distorted values inculcation that is currently taking place with the Supreme

288. See, e.g., Khin Mai Aung, *Pitting Our Youth Against Each Other: Moving School Harassment and Bullying Policy from a Zero Tolerance Discipline to Safe School Environment Framework*, 3 U.C. IRVINE L. REV. 885, 893 (2013) (identifying the current “broader general trend toward increasingly punitive ‘zero tolerance’ school disciplinary policies,” which result in suspensions and expulsions); Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 844 (2015) (discussing how *Goss* “failed to articulate due process standards that were rigorous enough to stand the test of practicality”).

289. See Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 4 (2016) (identifying the connection between exclusionary punishment and entry into the juvenile justice system, as well as this punishment’s negative impact on the educational outcomes of non-punished students); Ann C. McGinley, *Title VII at Fifty Years: A Symposium*, 14 NEV. L.J. 661, 670 (2014) (identifying the disproportionate impact of school exclusionary punishment on minority boys); S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 294 (2014) (connecting exclusionary punishment with an increased incidence of dropping out of school); Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color?*, 37 CARDOZO L. REV. 931, 944 (2016) (identifying the potentially life-shattering effects of exclusionary punishments).

290. See Kim, *supra* note 286, at 870–71 (noting that the Court in *Ingraham* “again invoked the perceived educational value of school discipline . . . to reject a constitutional challenge to abuse in the administration of corporal punishment”); Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1557, 1568–69 (2008) (discussing how *Ingraham*’s finding that corporal punishment requires no due process conflicts with even the diminished due process rights established by *Goss*).

291. See *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

292. 430 U.S. 651, 671, 682 (1977) (holding that the Eighth Amendment Cruel and Unusual Punishments Clause does not apply to the infliction of corporal punishment in schools and that existing state remedies were adequate to satisfy the Fourteenth Amendment due process clause).

293. *Id.* at 682.

294. *Id.* at 675.

Court's support.²⁹⁵

In this environment of diminishing constitutional rights, the natural reaction is for students to naturalize the cabining of their rights.²⁹⁶ Based on the suppressive-inculcative educational environment, students become socialized “to tolerate and expect similar treatment by government officials outside of schools.”²⁹⁷ Under this inculcative model, students neither learn nor understand the foundational tenets of core democratic values.²⁹⁸ Rights suppression is normalized, resulting in a modeling effect in terms of how young people deal with conflict and adverse ideas during and after their K–12 experiences.²⁹⁹ This modeling effect has been actualized in college and university students who stifle and suppress the speech of others solely because they disagree with their viewpoints. The speech suppression replication occurring on campuses stands in stark contrast to the idealized visions of promoting the transcendent democratic values of academic freedom and robust dialogue.³⁰⁰

B. THE REPLICATION OF SPEECH-SUPPRESSIVE NORMS BY STUDENTS ON COLLEGE AND UNIVERSITY CAMPUSES

Because public schools, with the Supreme Court's help, have been effective in inculcating distorted speech values, college and university students are now emulating these lessons by stifling speech with which they do not agree.³⁰¹ In effect,

295. See John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K–12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 718 & n.41 (2013) (connecting *Ingraham* with the Court's *in loco parentis* doctrine that has been used to justify the inculcation of students with the circumscription of their constitutional rights); Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1229 (2009) (discussing how the Supreme Court's constitutional affirmation of school corporal punishment does not safeguard the basic liberties of schoolchildren); see also Jess Clark, *Where Corporal Punishment Is Still Used in Schools, Its Roots Run Deep*, NPR (Apr. 12, 2017, 6:00 A.M.), <https://www.npr.org/sections/ed/2017/04/12/521944429/where-corporal-punishment-is-still-used-its-roots-go-deep> [<https://perma.cc/CG4N-HV4H>] (identifying the fifteen states that expressly permit corporal punishment, seven states that do not prohibit corporal punishment, and twenty-eight states that prohibit corporal punishment).

296. See Amanda Harmon Cooley, *An Efficacy Examination and Constitutional Critique of School Shaming*, 79 OHIO ST. L.J. 319, 336 (2018) (arguing that students naturalize the cabining of their rights when their rights are consistently violated by school officials).

297. Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 399 (2013).

298. See Michael Kent Curtis, *Be Careful What You Wish for: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 434 (2009) (“Broad suppression of student speech on controversial topics detracts from teaching students democratic values.”).

299. See Maimon Schwarzschild, *Liberalism, Liberal and Illiberal*, 54 SAN DIEGO L. REV. 299, 314 (2017) (“Students who support ‘speech codes’ often seem genuinely to believe that they are advancing social tolerance and harmony.”).

300. See Jim Chen, *Biodiversity and Biotechnology: A Misunderstood Relation*, 2005 MICH. ST. L. REV. 51, 63 (identifying academic freedom on college and university campuses as a “transcendent value” in American democracy (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))); Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 426 n.158 (1996) (“The essential purpose of a university is to facilitate a vigorous exchange of ideas and robust debate.”).

301. See *Disinvitation Database*, FIRE, https://www.thefire.org/resources/disinvitation-database/#home/?view_2_sort=field_6ldesc&view_2_page=9 [<https://perma.cc/D72T-EFVY>] (last visited

suppressed students have become the suppressors by using shout-downs, chant-offs, physical intimidation, and pressure on institutions to withdraw invitations to campus speakers whose beliefs do not align with their ideologies,³⁰² often under the guise of enforcing notions of civility or claiming free speech protections.³⁰³ However, this type of disruptive student speech suppression, which aims solely to quash and eliminate the voices of opposing perspectives, is neither civil nor protected speech in itself.³⁰⁴ Student suppressive actions also clash with traditional notions that institutions of higher education are sacred spaces for academic freedom, expansive discourse, and the continued preparation of students for civic engagement—ideals that should be conveyed by true democratic-values inculcation.³⁰⁵

It is understandable that college and university students have opted to engage in the open suppression of others' speech rights: those students were not adequately provided with true democratic-values inculcation in their K–12 experiences. The transformation of students from suppressed to suppressors is a direct consequence of the state's distorted speech-inculcative model that students have been exposed to for the lion's share of their educational experience; that model, introduced by the *Fraser* Court, equates suppression of student speech with notions of "democratic" values of civility.³⁰⁶ Censorship by higher education students poses a grave danger to open debate, which is key to a successful collegiate environment and fundamental to preserving the constitutional right to engage in free speech.³⁰⁷ Therefore, the replication of speech-suppressive norms by students on college and university campuses must be confronted and remediated.

Across the country, a significant contingent of students on college and university campuses view suppression as their only strategy to contend with ideas with

Dec. 20, 2018) (providing a comprehensive catalogue of instances of student speech suppression on college and university campuses).

302. See Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2016–17 (2017) (identifying these student actions at colleges and universities).

303. See José A. Cabranes, *For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL'Y REV. 345, 357 (2017) (arguing that inappropriate speech suppression has occurred on the Yale campus under the banner of enforcing civility); Kim D. Chanbonpin, *Crisis and Trigger Warnings: Reflections on Legal Education and the Social Value of the Law*, 90 CHI.-KENT L. REV. 615, 623–25 (2015) (discussing the problems related to speech suppression by college and university students' calls for trigger warnings).

304. See Erwin Chemerinsky, *Tobriner Memorial Lecture: Free Speech on Campus*, 69 HASTINGS L.J. 1339, 1350 (2018) (emphasizing how disruptive speech suppression that eliminates the delivery of another's message is not protected by the First Amendment).

305. See W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 2004 (2001) (discussing the First Amendment function of ensuring "the free flow of ideas and information necessary for democratic self-governance" and the vital importance of the inclusion of all voices in this discourse).

306. See *supra* notes 115–22 and accompanying text.

307. See Chemerinsky, *supra* note 304, at 1350 (discussing how a perpetual heckler's veto would be created if disruptive student speech protection were afforded First Amendment protection); Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1574–75 (1998) (identifying "open discourse and tolerance for competing ideas" as "robust traditions" of the university).

which they do not agree.³⁰⁸ In February 2017, the University of California, Berkeley, home of the 1964 Free Speech Movement that “launched the massive sit-ins and protests that would help define a generation of student activism across the country,”³⁰⁹ cancelled the speech of far-right speaker Milo Yiannopoulos after violent protests erupted on campus that involved some students.³¹⁰ One month later, over 100 Middlebury College students shut down a speech on campus by Charles Murray, author of the divisive book *The Bell Curve*, by shouting him down.³¹¹ Upon leaving the building, protestors pushed and shoved Murray and his faculty interviewer, who suffered a concussion from the incident.³¹² Subsequently, an anti-Murray protestor at Columbia University displayed a sign that said “NO FREE SPEECH.”³¹³

In October 2017, a shouting-down protest by the Black Lives Matter chapter of the College of William and Mary prevented a free speech presentation by the executive director of the Virginia American Civil Liberties Union, Claire Guthrie Gastañaga.³¹⁴ One of the protestors’ chants was, “[T]he revolution will not uphold the Constitution!”³¹⁵ Twenty minutes into the protest, a Black Lives Matter representative gave a prepared statement, asking “when is the free speech of the oppressed protected?” as justification for shutting down the presentation.³¹⁶ The prepared statement was followed by the continued chanting of the protestors.³¹⁷ After the speech was canceled because of the protest, students who

308. See Kitrosser, *supra* note 302, at 2010 (examining the incidence of “alarming . . . speech suppression tactics” on college and university campuses, which include “efforts to shout down or physically intimidate campus speakers”).

309. Richard Gonzales, *Berkeley’s Fight for Free Speech Fired Up Student Protest Movement*, NPR (Oct. 5, 2014, 7:57 AM), <https://www.npr.org/2014/10/05/353849567/when-political-speech-was-banned-at-berkeley> [<https://perma.cc/QNY5-UWVR>].

310. See *Berkeley Students Debate Cancellation of Milo Yiannopoulos Speech*, NPR (Feb. 2, 2017, 4:34 PM), <https://www.npr.org/2017/02/02/513105012/berkeley-students-debate-cancellation-of-milo-yiannopoulos-speech> [<https://perma.cc/WYK7-EFTH>] (discussing the protests, the speaker, and the cancellation of the speech); Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html> [<https://nyti.ms/2k1gtFv>] (describing the intensity of the protests).

311. Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html> [<https://nyti.ms/2qY6t3Q>].

312. *Id.*

313. Gitlin, *supra* note 29.

314. See Steven Nelson, *Backlash Spreads Against Black Lives Matter Shutting Down ACLU Free Speech Event*, WASH. EXAMINER (Oct. 7, 2017, 12:01 AM), <http://www.washingtonexaminer.com/backlash-spreads-against-black-lives-matter-shutting-down-aclu-free-speech-event/article/2636825> [<https://perma.cc/33J5-56CW>] (discussing the nature and consequences of the protest).

315. Jonathan Turley, “*Liberalism Is White Supremacy!*”: *Black Lives Matter Protesters Block Speech by ACLU Head at William and Mary*, JONATHAN TURLEY.ORG (Oct. 6, 2017), <https://jonathanturley.org/2017/10/06/liberalism-is-white-supremacy-black-lives-matter-protesters-block-speech-by-aclu-head-at-william-and-mary/> [<https://perma.cc/ES4T-6Y9Z>].

316. See Francesca Truitt, *Black Lives Matter Protests American Civil Liberties Union*, FLAT HAT (Oct. 2, 2017), <http://flathatnews.com/2017/10/02/black-lives-matter-protests-american-civil-liberties-union/?platform=hootsuite> [<https://perma.cc/6A2X-U95A>].

317. *Id.*

attempted to engage with Gastañaga dispersed “when the protesters began circling around them, drowning out Gastañaga and chanting with increased volume.”³¹⁸ This is a significant example of the transformation of suppressed students into speech suppressors, given that these students’ past speech oppression was used to justify the oppression of another’s speech.

There is a growing number of these types of examples on college and university campuses. And despite efforts to portray it as so, speech-suppressive student protestors are not just liberals or progressives.³¹⁹ There are students from every part of the ideological spectrum who stifle free speech.³²⁰ Some data indicate that attempts to disrupt speech at colleges and universities have been more successful when lodged by individuals who fall to the ideological right of the speaker.³²¹ To take an extreme example, in 2014, video game critic Anita Sarkeesian was forced to cancel a speech at Utah State University after the university received an email from a claimed Utah State student that threatened “the deadliest school shooting in American history” if Sarkeesian were allowed to speak on campus.³²² This threat was rooted in a disagreement with Sarkeesian’s feminist views,³²³ stating that “Sarkeesian is everything wrong with the feminist woman, and she is going to die screaming like the craven little whore that she is if you let her come to USU.”³²⁴ All of the examples in this Part demonstrate that free discourse is being threatened at colleges and universities by a vocal minority of students of every political stripe who want to silence the speech of others solely because they do not agree with the speaker’s viewpoint.³²⁵

Given that they have been a captive audience to speech-suppressive values inculcation throughout their formative years as schoolchildren, it should be no

318. *Id.*

319. See Scott Jaschik, *Who Is Blocking Campus Speakers Now?*, INSIDE HIGHER ED. (Sept. 18, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/09/18/incidents-harvard-and-catholic-universities-run-counter-narrative-about-campus> [<https://perma.cc/NR5W-TX3E>] (discussing the malleable dynamics of campus protests of controversial speakers).

320. See *id.* (countering the narrative that only liberal students are working to suppress speech on college and university campuses).

321. See Sean Stevens, *Campus Speaker Disinvitations: Recent Trends (Part 2 of 2)*, HETERODOX ACADEMY (Feb. 7, 2017), <https://heterodoxacademy.org/campus-speaker-disinvitations-recent-trends-part-2-of-2/> [<https://perma.cc/M9DM-DQ7G>] (providing data that disinvitation attempts of college and university speakers are more successful when originated from individuals who lean to the right of the targeted speaker).

322. Ryan Parker, *Anita Sarkeesian Cancels Utah State Speech After Mass-Shooting Threat*, L.A. TIMES (Oct. 14, 2014, 9:13 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-anita-sarkeesian-cancels-utah-speech-20141014-story.html> [<https://perma.cc/99ZF-BZZ3>].

323. See Cimarón Neugebauer, *Terror Threat Against Feminist Anita Sarkeesian at USU*, STANDARD-EXAMINER (Oct. 15, 2014, 6:08 PM), <http://www.standard.net/Police/2014/10/14/Utah-State-University-student-threatens-act-of-terror-if-feminist.html> [<https://perma.cc/9SM7-2ACC>] (discussing the author’s justifications for sending the threat).

324. *Id.*

325. See Anne Neal, Opinion, *Colleges Are Paralyzed by the ‘Heckler’s Veto,’* N.Y. TIMES (May 19, 2014), <https://www.nytimes.com/roomfordebate/2014/05/19/restraint-of-expression-on-college-campuses/colleges-are-paralyzed-by-the-hecklers-veto> [<https://perma.cc/N9KT-2MBF>].

wonder that these college students are emulating the state's example.³²⁶ "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."³²⁷ As argued by Dean Betsy Levin, when the state inculcates its students with their own rights restrictions, "students will not come to an understanding of the value of a democratic, participatory society, but instead will become [an] . . . alienated citizenry that believe[s] that government is arbitrary."³²⁸ Dean Levin's warning has come true; the distorted values of speech suppression are now inculcated in American schoolchildren as the result of the Supreme Court's post-*Tinker* jurisprudence. The metamorphosis has become complete on many college and university campuses, in which students who were consistently suppressed by the state have become suppressors of the speech of others—a transformation in which they claim civic and civil pride.

This student speech suppression is especially harmful to colleges and universities, given the importance of learning and knowledge acquisition in higher education.³²⁹ Colleges and universities should be sites of academic freedom and expansive discourse.³³⁰ In its 1957 *Sweezy v. New Hampshire* decision, the Supreme Court found that "[t]he essentiality of freedom in the community of American universities is almost self-evident."³³¹ Given that colleges and universities should be the "quintessential marketplace of ideas,"³³² tactics by students to stop speech with which they do not agree directly contradict the pedagogical purposes and core missions of institutions of higher education.

Student speech suppression on colleges and universities is particularly pernicious in view of the key connections between higher education and the continued preparation of the nation's youth for civic and democratic participation.³³³ Higher education is historically and fundamentally linked to the democratic process.³³⁴ The emphasis on civic preparation in higher education is directly related to the

326. See Schwarzschild, *supra* note 299, at 301–02 (characterizing the students' shouting-down phenomenon at universities and colleges as being inapposite to free thought and free speech).

327. *Doe v. Renfrow*, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting from denial of certiorari).

328. Levin, *supra* note 65, at 1654.

329. See Alexander Tthesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1890 (2017) ("The functionality of public universities relies on free and open dialogue for the acquisition of knowledge and development of a politically conscious citizenry.").

330. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (discussing the vital nature of free scholarship and free discourse on college and university campuses).

331. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

332. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 549 (2001).

333. See *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003) (discussing the paramount importance of higher education in "sustaining our political and cultural heritage" and in providing a "training ground for a large number of our Nation's leaders" (first quoting *Plyer v. Doe*, 457 U.S. 202, 221 (1982); then quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950))).

334. See Sarah Fearon-Maradey, *Disenfranchising America's Youth: How Current Voting Laws Are Contrary to the Intent of the Twenty-Sixth Amendment*, 12 U. N.H. L. REV. 289, 309 (2014) (discussing this historic connection).

American values of the preservation of academic freedom and exposure to a vigorous debate of ideas.³³⁵ In *Sweezy*, the Court stressed that “[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”³³⁶ Therefore, as the Court has emphasized, “[t]eachers and students [on college and university campuses] must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”³³⁷ However, the growing incidence of college and university students’ speech-suppressive activities runs contrary to the “marketplace of ideas” notion of higher education that is necessary to the growth of our constitutional democracy.³³⁸

College and university student speech suppression ultimately harms the greater good of the nation.³³⁹ College students’ speech-suppressive tendencies do not start upon their arrival on campus nor do they end when students graduate or leave their institutions. The continuum of speech suppression, which begins in the first days of primary school,³⁴⁰ lays a foundation for the actively suppressive and needlessly combative student attitudes that are seen in confrontations across the country.³⁴¹ The combination of these two distinct educational periods—one as a K–12 student under the control of parents, guardians, and teachers and the other as a college student with a much greater level of independence and autonomy—demonstrates how entrenched these suppressive attitudes can become in students.³⁴²

335. *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (highlighting how colleges and universities must expose their students to a “robust exchange of ideas”); Erica Goldberg & Kelly Sarabyn, *Measuring a “Degree of Deference”: Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 245 (2011) (discussing the Court’s recognition “that the development of knowledge is reliant on dialogue unfettered by ideological restrictions”).

336. *Sweezy*, 354 U.S. at 250.

337. *Keyishian*, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250).

338. See Tthesis, *supra* note 329, at 1890 (“As is the case in public spaces outside the university, the heckler’s veto, which refers to the demand that speech be suppressed to avoid making listeners uncomfortable or angry, does not trump the rights to debate, discuss, and spread information.”).

339. See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1184 (noting that “a thriving marketplace in belief and speech is good for the country”).

340. See Kelley Baker, *Public Schools and the Internet*, 79 NEB. L. REV. 929, 954–55 (2000) (discussing how school officials will suppress any student arguments that students should have expansive speech rights).

341. See George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 930 (1988) (discussing how students will emulate school officials’ actions and noting how “schools teach by what they do as well as by what they say”); Jon M. Philipson, *The Kids Are Not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14 CARDOZO J. CONFLICT RESOL. 81, 85 (2012) (citing the behavior and attitudes of surrounding adults as a cause for aggressive or bullying student behavior).

342. See Tamar R. Birckhead, *Toward A Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1495 (2009) (citing *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979)) (outlining the Supreme

The unfortunate next step of this suppressive entrenchment that has been fostered in students' educational experiences is often to continue in a form of anti-civic engagement via means that stifle the democratic ideals of deliberative dialogue, debate, and compromise in later life.³⁴³ Methods such as shouting down and aggressively confronting people with opposing views erode the possibilities of a functioning political process that allows for reasoned conversation over complex issues.³⁴⁴ It is true that the passion the political left and right activists have for their most deeply held beliefs often stems from ethical, religious, or personal experiences that are understandably difficult to restrain in the face of what they consider to be injustice. However, activists who suppress the speech of others on college and university campuses miss a fundamental point of their higher education if they leave campus unable to present their viewpoints in a manner that demonstrates an understanding of at least the values underlying the positions of their political opponents.³⁴⁵

The rounding off of these values for sloganism, along with needlessly personal attacks on their adversaries, forecloses any opportunity to find common ground. The ever-increasing political divides in the country are now more difficult to bridge given the generations of students who have been state-inculcated into a suppressive mindset which reduces their capacity for constructive political discussions with people holding divergent opinions.³⁴⁶ Because of the dangers that student speech suppression and censorship pose to both institutions of higher

Court's recognition of the role-modeling effect in which school officials exert influence over the perceptions and values of students); Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 9 (1999) (discussing the demise of the *in loco parentis* concept as applied to colleges and universities); J. Ben Shepard, Note, *Forum over Substance: Student Government Elections and First Amendment Problems*, 53 U. LOUISVILLE L. REV. 559, 589 (2016) (discussing the differences between public schools and colleges and noting that the "educational mission of colleges and universities rests, in part, on students' expressive freedom").

343. See Jerry Kang & Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 WASH. & LEE L. REV. 93, 117 (2005) (discussing how opportunities for dialogue "produce the civic engagement, recognized sense of community, and substantive deliberation necessary to a well-functioning democracy").

344. See Robert J. Delahunty, "Constitutional Justice" or "Constitutional Peace"? *The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 18–19 (2008) (arguing that a democratic constitutional system requires the exchange of ideas about constitutional meanings and compromise with other people "whose positions we find abhorrent").

345. See John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33, 78 (1999) ("If the ultimate goal is to find a common ground that people with differing reasonable viewpoints can share, then one must consider each viewpoint and distinguish the reasonable from the unreasonable. One must focus on core political values central to a peaceful democratic society while limiting the scope of contestable comprehensive ideals such as religion and ideology."); James Louis Robart, *Commencement Remarks-Reflections on Being a Lawyer*, 96 OR. L. REV. 11, 16–17 (2017) (discussing the Deweyan principles "that support for free inquiry, tolerance of alternative viewpoints, and preparation for participation as citizens [are] all fundamental to democratic citizenship" (citing DEWEY, *supra* note 39)).

346. See Lisa B. Bingham, *Employer Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 390–91 (1994) (arguing that "it is healthier for our democracy to tolerate disparate viewpoints than to suppress them").

education and to the greater polity,³⁴⁷ these college and university students' speech-suppressive actions and their impetuses must be addressed and reformed.

III. A RECLAMATION OF TRUE DEMOCRATIC-VALUES INCULCATION TO STEM THE TIDE OF STATE SPEECH SUPPRESSION IN PUBLIC SCHOOLS AND OF STUDENT SPEECH SUPPRESSION AT COLLEGES AND UNIVERSITIES

The transformation of students suppressed to student suppressors must be confronted to preserve the true nature of American civic democracy.³⁴⁸ Local and state school entities and courts must no longer act as constitutional bullies that inflict widespread censorship of students³⁴⁹ solely because the students' expression is that "with which they do not wish to contend."³⁵⁰ Primary and secondary schools must reverse their current deleterious inculcation of suppression,³⁵¹ as "[t]he modern public school [is] derived from a philosophy of freedom reflected in the First Amendment."³⁵² Now is the time for schools to engage in a reclamation of true democratic-values inculcation, where students are instilled with liberal values of rights recognition, tolerance, empathy, and open discourse.³⁵³ Public schools should thus institute and implement true democratic-values inculcation—the kind of instruction that validates the actuality of students' constitutional rights, the need for the expansive exchange of conflicting ideas, and the promotion of empathy to be a responsible citizen in a pluralistic society.³⁵⁴ To achieve this goal, both the Supreme Court and the state via its public schools must take action.

347. See Jennifer M. Kinsley, *Chill*, 48 LOY. U. CHI. L.J. 253, 255 (2016) (discussing how fear of censorship can deter the creation of new ideas and thoughts).

348. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 286 (1988) (Brennan, J., dissenting) ("Even in its capacity as educator the State may not assume an Orwellian 'guardianship of the public mind.'" (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

349. See Mark Tushnet, "*Shut Up He Explained*," 95 NW. U. L. REV. 907, 916–19 (2001) (characterizing the Supreme Court as, at times, a conversational bully that shouts down the opposition).

350. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

351. See David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 500–01 (1981) (discussing the Supreme Court's deference to "local educational judgments that have emphasized values of discipline, obedience, and respect for authority as the preeminent values for education to inculcate" in contradiction to the "intellectual free marketplace of ideas approach adopted in *Tinker*").

352. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 214 (1948) (Frankfurter, J., concurring).

353. See William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1103 (1997) (identifying "tolerance, empathy, [and] freedom of speech" as true liberal values that need preservation and inculcation in the United States).

354. See Stern, *supra* note 241, at 899–900 ("If education is vital to good citizenship and socialization, then it should be conducted in a manner that promotes the learning of fundamental values. . . . By cultivating the capacity for and habit of rational thought and expression, schools develop in students the individual autonomy that is a central constitutional value and a crucial attribute of productive citizens in a democratic society." (footnote omitted) (citing *Plyer v. Doe*, 457 U.S. 202, 222 (1982))).

The Supreme Court needs to facilitate this reformation of the state-inculcative model through a reclamation of pure democratic-values inculcation and a rejection of its past distortions of that educative approach. Specifically, the Court should abandon its post-*Tinker* suppression-inculcative model and embrace the form of democratic-values inculcation that is at the heart of *Tinker*'s rights-based holding. Following this inculcative judicial reclamation, public schools can provide the proper citizenship preparation that is necessary for America's youth to enter the collegiate environment with proficient civic competencies.³⁵⁵ This vigilance by both the Court and public schools is necessary to safeguard knowledge acquisition for schoolchildren and students at institutions of higher education and to preserve the core liberal values of our republic.³⁵⁶

There must be a reversal of the current judicially-endorsed educational values inculcation that allows state suppression of student speech to be a proper social norm, as "suppressing speech to enforce conformity to social norms can further entrench the existing retrograde norms."³⁵⁷ Despite many judicial and scholarly pronouncements to the contrary,³⁵⁸ it is a misnomer that public schools' values inculcation must endorse student rights restrictions. Democratic-values inculcation should instead be rights-recognitive, if not rights-expansive.³⁵⁹ As Professor Nomi Maya Stolzenberg argues, a civic republicanism perspective on schools' inculcation of students "only permits the imposition of those values, habits, and manners characteristic of a liberal society: open-mindedness, tolerance of diverse opinions, and the critical-objective mindset that underlies individual freedom of choice."³⁶⁰

355. See R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 118 (2008) (discussing the longstanding classification of promotion of civic competencies as a democratic cultural aim).

356. See Israel Scheffler, *Moral Education and the Democratic Ideal*, in CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION 435, 438 (Steven M. Cahn ed., 1996) (emphasizing the necessity for a democratic system to have an educational process in which all future citizens can "take part in processes of debate, criticism, choice, and co-operative effort upon which the common social structure depends").

357. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 533 (2008).

358. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (claiming that the necessary inculcation of values in students should be that they have no First Amendment right to free speech); Jeffrey J. Pyle, *Socrates, the Schools, and Civility: The Continuing War Between Inculcation and Inquiry*, 26 J.L. & EDUC. 65, 66 (1997) ("The inculcative method thus involves significant amounts of censorship, particularly of unpopular, and therefore minority, viewpoints."); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 95 & n.248 (2008) (noting that the public schools' mission of teaching requires them to not tolerate "advocacy that undermines their pedagogical objectives" and that viewpoint discrimination is an inevitable incident of the schools' values inculcation); Starr, *supra* note 110, at 662 (criticizing *Tinker* as being a departure from the traditional perspective on schools being places of "order, civility, and the inculcation of virtue").

359. See Levin, *supra* note 65, at 1653–54 (arguing that the important interest of public schools' values inculcation can only be accomplished through allocating more weight to students' constitutional rights than the Supreme Court has done because "it is the constitutional values that form the basis of the individual rights that society wishes to inculcate").

360. Stolzenberg, *supra* note 178, at 657.

The state should incorporate this form of civic-republicanism inculcation of values, whereby “the values transmitted are those which will further the maintenance of a civilized social order *and* promote democracy.”³⁶¹ The vehicles of this inculcation must be American public schools because they have been deemed by the Supreme Court to be “the symbol of our democracy and the most pervasive means for promoting our common destiny.”³⁶² This instruction also must be reinforced through the actions, and not just the rhetorical flourishes, of its civic institutions,³⁶³ including the courts.³⁶⁴ As Professor Douglas Laycock cogently argued, the state can no longer “define suppression of dissent as part of its educational mission.”³⁶⁵

To achieve democratic-values inculcation, the dangers of all censorship must be instructed to schoolchildren, rather than inflicted on them as a civic virtue.³⁶⁶ The Supreme Court and K–12 schools must inculcate students with the understanding that speech should not be suppressed just because the listener disagrees with it—even if that audience is the state.³⁶⁷ Because censorship is more perilous than free speech, students must be taught to tolerate divergent speech, even if they despise it.³⁶⁸ Further, to remediate the heckler’s veto issues that are emerging on college and university campuses, public schools should inculcate their students with the perspective of Judge Easterbrook, who wrote in *Carson v. Block* that “[s]houting down’ another speaker is the antithesis of speech.”³⁶⁹ Our “democratic society *depends on* inculcation of democratic values”³⁷⁰ that affirm respect for the preservation of First Amendment rights within and outside the schoolhouse gate.³⁷¹

361. Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 773 (1995) (emphasis added).

362. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

363. See CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 210–11 (2003) (arguing that prosperity results when civic institutions “welcome dissent and promote openness”).

364. See Goldberg & Sarabyn, *supra* note 335, at 244 (discussing the unique positionality of the judiciary to “spread democratic values”).

365. Laycock, *supra* note 66, at 121.

366. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2352 (1989) (arguing that “[a]dmitting one exception [with government censorship] will lead to another, and yet another, until those in power are free to stifle opposition in the name of protecting democratic ideals”).

367. See *id.* at 2351 (arguing that a problem of state censorship is that there is “no means of assuring that the censor’s hand will go lightly over ‘good’ as opposed to ‘bad’ speech”).

368. See H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 ST. THOMAS L. REV. 517, 517 (2003) (arguing that tolerance of speech is a democratic necessity because “censorship is more dangerous than free speech”).

369. 790 F.2d 562, 566 (7th Cir. 1986).

370. *Amatel v. Reno*, 156 F.3d 192, 198 (D.C. Cir. 1998).

371. See Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. U. L. REV. 35, 69 (1993) (arguing for respect of student speech rights to be part of public schools’ educational mission, rather than continuous resort to student speech suppression).

Students also need to be instilled with the knowledge that the open exchange of competing ideas is not a zero-sum game.³⁷² To prepare schoolchildren for the discourse that is required in our democracy, “[s]tudents must learn to engage with those who disagree, and [they] should understand that not being affirmed is not the same as being ostracized.”³⁷³ The state should educate its K–12 schoolchildren that exposure to the marketplace of ideas can actually enhance one’s particularity;³⁷⁴ the counterpoint need not be feared, suppressed, or censored.³⁷⁵ To live and participate in a pluralistic society like the United States,³⁷⁶ students should be taught how to “endure the speech of false ideas or offensive content and then to counter it.”³⁷⁷ They must be instilled with the confidence to “accept or reject ideas of which [they] do not approve” as a constitutionally free society requires such instruction.³⁷⁸ American schools must take the necessary risks to foster “this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”³⁷⁹

Public schools’ inculcation of students and the preservation of students’ freedoms of expression need not be a dichotomy,³⁸⁰ although this understanding has been the presumption of the Court’s post-*Tinker* inculcative ideology.³⁸¹ It is time for the Court to recognize that the “suppression of student criticism [is] at odds with schools’ responsibility to inculcate the habits of citizenship.”³⁸² Here, the Court must endorse a children’s rights, justice-based approach, which contemplates what is necessary for safeguarding children’s constitutional rights and

372. See, e.g., Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 729 (1987) (“It is in school that a child has her first full opportunity to see society’s plurality and to learn by experience that she can live with others significantly different from herself without ultimately yielding her own particularity.”).

373. Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 752 (2016).

374. See Hafen, *supra* note 372, at 729 (discussing how exposure to significantly different views in the educational process can enhance one’s particularity).

375. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (“But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”).

376. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–66 (1997) (discussing the requirements of participants in a reasonably pluralistic democracy).

377. *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

378. *Id.* at 591.

379. *Tinker*, 393 U.S. at 508–09.

380. See *Amatel v. Reno*, 156 F.3d 192, 198 (D.C. Cir. 1998) (“[I]nculcation of values cannot be characterized as a suppression of expression in every context.”); Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 79 (2006) (arguing that “student liberty and successful socialization are not perfectly inversely related”).

381. See Waldman, *supra* note 194, at 1120–21 (discussing how the Court’s student speech cases justify the reduction of students’ First Amendment rights based on “protection and education”); Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 980–81 (2003) (“At the same time that courts have championed, albeit within limits, schools’ inculcative role, they have acknowledged a countervailing interest in free expression and thought.”).

382. Brown, *supra* note 74, at 282–83.

ensuring that children will have what they “need as children to have substantive equality as adults.”³⁸³ The Court must follow its earlier precedent to preserve as transcendent, even in public schools and on college and university campuses, students’ speech rights.³⁸⁴ As the Court articulated in *Keyishian v. Board of Regents*, two years prior to its decision in *Tinker*:

[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, (rather) than through any kind of authoritative selection.”³⁸⁵

The Court and the state need to reclaim this type of democratic-values inculcation through a consistent and expansive safeguarding of students’ constitutional rights in every part of the schoolhouse and in every future student rights case.³⁸⁶ Doing so is necessary to remediate the current phenomenon of student suppression of speech on college and university campuses.

CONCLUSION

During the 1966 student opposition to North Carolina’s speaker ban, the UNC Student Body President stated: “I hope history will record that the student body did not shy away from this challenge, but firmly and responsibly met it head on.”³⁸⁷ Whenever there are attempts to unconstitutionally suppress speech, citizens have the moral and civic responsibility to challenge that action.³⁸⁸ Historically, as with the UNC speaker ban protests, American college and university students have been on the frontlines of these battles.³⁸⁹ Today, though, a

383. Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 756 (2009).

384. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (identifying the transcendence of these safeguards).

385. *Id.* (first quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); then quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

386. See Redish & Finnerty, *supra* note 105, at 117 (discussing how harmful indoctrination in the form of dangerous values inculcation “occurs in the shaping of the curriculum” and in “extra-educational processes” that take place “outside the context of the actual educational function”).

387. *Speaker Ban Monument, UNC (Chapel Hill)*, COMMEMORATIVE LANDSCAPES OF N.C., <http://docsouth.unc.edu/commland/monument/168/> [<https://perma.cc/D52D-P965>] (last visited Nov. 3, 2018).

388. See Childress, *supra* note 265, at 1970 (“The most positive value of protecting speech may well lie in deflecting or muting the effects of its biggest danger, governmental suppression of speech.”).

389. See Oren R. Griffin, *Constructing a Legal and Managerial Paradigm Applicable to the Modern-Day Safety and Security Challenge at Colleges and Universities*, 54 ST. LOUIS U. L.J. 241, 247 (2009) (discussing the college and university student activism of the 1960s and 1970s); Thomas Huff, *Addressing Hate Messages at the University of Montana: Regulating and Educating*, 53 MONT. L. REV. 157, 165 (1992) (discussing the civil rights and Vietnam War college student protests that promoted expansive free speech principles); Anita Tijerina Revilla, *Raza Womyn Mujerstoria*, 50 VILL. L. REV. 799, 820 (2005) (noting that “[s]tudent activism has historically been a tool of resistance and

critical mass of students on U.S. college and university campuses are instead emulating state suppression of speech by quashing “expressions of feelings with which they do not wish to contend.”³⁹⁰

The resulting stifling collegiate environment runs contrary to Frederick Douglass’s famous pronouncement that “[e]ducation . . . means emancipation. . . . light and liberty.”³⁹¹ However, the state of student censorship at institutions of higher education should be no shock, as post-*Tinker* K–12 education has failed to provide equivalent emancipatory illumination for students when it comes to the nation’s conception of what student speech rights actually are. Instead, the anti-democratic values inculcation of speech suppression has become the norm,³⁹² internalized and adopted by many students as the only option when encountering speech that is objectionable to them. The results have been flashpoints of speech suppression by students on college campuses and universities.

This devolutional phenomenon needs to end. The Supreme Court and the state, through its school entities, should realign the educational-inculcative model with a rights-based methodology. Treatment of students’ First Amendment speech rights should coalesce with the principles that the Supreme Court articulated during the height of World War II in *West Virginia State Board of Education v. Barnette*.³⁹³ In that case, the Court emphasized the importance of dealing with ideological diversity in our country—a concept it imbued with constitutionally democratic civic importance:

[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.³⁹⁴

transformation for students in higher education who voice discontent with . . . governmental regulations”).

390. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); see also Bradley A. Smith, *The Academy, Campaign Finance, and Free Speech Under Fire*, 25 J.L. & POL’Y 227, 252–53 (2016) (discussing how the Supreme Court’s speech rights restriction analysis has resulted in “a more general atmosphere that views we do not like should be silenced, if not by law then by mob action, either physically or in the virtual world of social media”).

391. *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894*, in 5 THE FREDERICK DOUGLASS PAPERS 616, 623 (John W. Blassingame & John R. McKivigan eds., 1992).

392. Cf. Hugh Baxter, *Critical Reflections on Seidman’s On Constitutional Disobedience*, 93 B.U. L. REV. 1373, 1379 (2013) (“[O]rdinary persons likely favor protection of some speech whose content they detest, simply because protection of a wide range of speech against government suppression is a generally accepted norm in American political thinking.”).

393. 319 U.S. 624, 641–42 (1943).

394. *Id.*

At K–12 schools and on college and university campuses in the civic, liberal democracy of America, students should be equipped with the knowledge that they have the right to differ on ideas that go to the core of our republic, and they should have the ability to do so, not by shouting down, but by lifting up their voices in dissent and debate. Because of the speech-suppressive inculcation of K–12 schools, many of these students are instead opting to suppress others. It is time for this inculcation and replication to stop and for the emancipation of students' voices, via true democratic-values inculcation, to begin.