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Should Students Have Constitutional Rights?
Keeping Order in the Public Schools

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Should Students Have Constitutional Rights? Keeping Order in the Public Schools

Anne Proffitt Dupre*

This Article focuses on how the Supreme Court's conception of the public school as either an institution of social reproduction or reconstruction, a conflict Professor Dupre maintains is deeply rooted in intellectual history, has affected the power that public schools have been afforded in matters of discipline and order. Professor Dupre argues that the Court—by allowing the reconstruction model to influence its opinion for almost thirty years—paved the way for the decline in school order and educational quality. Although Professor Dupre contends that the Court's recent repudiation of the reconstruction model in Vernonia School District 47J v. Acton is a welcome and heartening revelation for those who would revitalize the public school as a force of social integration, she suggests further refinements to the Court's new approach based on the writings of constitutional framer James Wilson, contemporary ethicist David Luban, and Justice John M. Harlan.

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Introduction

"It is almost impossible for an American of the 1990s to imagine the respect authority was [granted in the 1930s], whether it was held by a president or a teacher or a policeman." Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools. The lack of order and discipline in many schools makes it nearly impossible for students to receive a serious education.

Constitutional doctrine has made it more difficult for the public schools to reclaim the order and discipline necessary to educate students. Although the deterioration of other institutions that are important to the child—family, religion, and community—has certainly played a part in this tragedy, the Supreme Court must also accept responsibility for intervening in the day-to-day running of our nation's public schools. Researchers have inferred, not surprisingly, that the "adversarial and legalistic character of urban public schools"—qualities attributable to the Court's school jurisprudence of recent years—and the corresponding unwillingness of teachers to maintain order have affected educational quality. As other institutions were crumbling, the Court, instead of shoring up the public school as an institution, cleared the way for its decline. The Court's analysis in the school power cases has exacerbated the loss of respect, deference, and trust in the public school as an institution and has wrongly insinuated that these qualities are incompatible

1 Jonathan Yardley, We Have Met the Future and It Is Us, WASH. POST, June 11, 1995, at 3 (Book World) (reviewing David Gelernter, 1995: THE LOST WORLD OF THE FAIR (1995)).

2 In a recent poll by the education association Phi Delta Kappa, the public judged "lack of discipline" to be the biggest problem faced by public schools. Stanley M. Elam & Lowell C. Rose, Of the Public's Attitudes Toward the Public Schools, PHI DELTA KAPPAN, Sept. 1995, at 41, 52. Lack of discipline consistently has been cited as the biggest problem for public schools, together with "fighting/violence/gangs" and "drug abuse," id., both of which are subsets of discipline. "Lack of respect for teachers, authority, students" was also cited as a significant problem, id., and is another subset of school discipline.

3 See generally Marie Winn, CHILDREN WITHOUT CHILDHOOD (1983) (exploring cultural changes that have resulted in a shortened period of nurture and protection for children). Of course, with the disintegration of these institutions, more responsibility fell on the public school. Expected to provide the community with athletic and cultural recreation and the students with breakfast, lunch, and after-school care, the school has been asked to shoulder many of the functions that have previously been the province of other institutions.

with liberty. Indeed, order in the schools increasingly has become "what will stand up in court."

A recent development in Charlotte, North Carolina presents a stunning example of how deeply public schools have been chilled in maintaining order. Charlotte school officials decided that improper behavior like shouting out in class, hitting others in class, walking around the room while a lesson is being taught, and disrupting others will no longer be tolerated. Violators are sent to an alternative school called a "management school." Although Charlotte must be commended for its attempt to maintain an environment in which serious learning can take place, it is no less than astounding that discipline in our public schools is in such a sorry state that the decision to maintain such a minimal standard of order is so newsworthy that it becomes a feature on a major national news show.

A broad social consensus now exists that there is a crisis of order in the public schools. President Clinton's endorsement of school uniforms to put "discipline and learning back in . . . schools" is only one reflection of the bipartisan recognition of the significance of order in the public schools. Parents of diverse social and economic backgrounds—white and black, wealthy and middle class—are removing their children from public schools due to concerns about order and safety. Thus, the undervaluing of order has the potential to undermine the historic mission of the public school institution as a force of social integration.

The chaos that has overtaken many of our public schools did not happen overnight. Serious discipline problems usually do not arise spontaneously in a school. They creep in as children realize that schools are unwilling or unable to take disciplinary action for lesser conduct. Each time that miscon-
duct by an individual student went unquestioned because the teacher or principal was afraid that it did not meet the "substantial disruption" standard set forth by the Supreme Court,\(^\text{11}\) we took one more step toward the turmoil that exists in the public school community today. The guerilla tactics of these institutional saboteurs have been "condoned, if not honored, by a host of acerbic external critics,"\(^\text{12}\) some of whom I contend have been Justices on the Supreme Court. There are other factors that have contributed to the current state of the public school institution, but I have little doubt that the ethos the Court has created has discouraged teachers over time in their efforts to maintain order.

Recently, however, the Supreme Court changed course in a way that could help public schools become a place where serious learning can and will take place. The Court made front-page headlines with its decision in *Vernonia School District 47J v. Acton*,\(^\text{13}\) in which a divided Court upheld random drug testing for student athletes.\(^\text{14}\) This was the first time the Court has allowed school officials to search students randomly, without suspicion of wrongdoing. Although the decision has been hailed by many,\(^\text{15}\) the Court has also been accused of writing an opinion that "soils the Constitution."\(^\text{16}\)

In the aftermath of *Acton*, much of the commentary has focused on *Acton*’s impact on the Fourth Amendment rights of public school students.\(^\text{17}\)

...
This Article analyzes Acton from a different and, in my view, more illuminating perspective. Rather than discuss how Acton fits into existing Fourth Amendment doctrine, I examine how Acton fits into the Court’s conception of school power. In Part I, I argue that—from the time the Court first decided to intervene in the public schools in Tinker v. Des Moines Independent Community School District18—it has been the Court’s conception of the public school as an institution and the power it should be afforded that has driven its analysis of student rights. In Part II, I set forth two models of school power: social reproduction and social reconstruction. In the social reconstruction model, the school is viewed as an institution that needs power only to facilitate the students in their attempts to construct a new social order. In contrast, in the social reproduction model, the school must have the power to inculcate students with society’s traditions and values so that the students will have the ability as adults to participate knowledgeably in democratic institutions. I reveal in this section how the conflict between these two models is deeply rooted in American intellectual history, and I illustrate how the Court has vacillated between them.19 In Part III, I explain that, for those who are serious about the kind of public school reform that would revive confidence in the public school as an institution, Acton’s repudiation of the reconstruction model is a step in the right direction. To the extent that Acton’s definition of the nature of school power—as that of a custodian or guardian—allows school officials to predict with more certainty the extent to which specific efforts to keep order are permissible, it will also enhance the ability of the public school to provide each student with a serious education. Finally, I suggest that further study is needed to refine the construct that the Acton Court set forth regarding the nature of school power. To that end, I recommend that we return to a theory that has been buried for over twenty-five years in Justice Harlan’s dissent in Tinker, for within that dissent is the seed of another model of school power. Instead of the guardian-ward construct established by the Acton Court, I suggest that an attorneyship model may better express the power relationship between student and school.


19 For a more thorough discussion of the reconstruction and reproduction models, see infra notes 111-141 and accompanying text.
I. School Order and the Constitution

In the last half of the twentieth century the Supreme Court has considered school discipline and order in various doctrinal contexts, including the First Amendment, the Fourth Amendment, and the Fourteenth Amendment. In Part A, I examine how the Court has dealt with the relationship between public school and student in these different contexts, and in Part B, I point out the unacknowledged common thread that runs through each of these opinions.

A. The Supreme Court's Jurisprudence of Discipline and Order

1. The First Amendment

I begin with the Court's attempt to address student expression in the school setting and Tinker, the watershed opinion that announced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In 1965 a group of adults, with their children, decided to wear black armbands to publicize their opposition to the hostilities in Vietnam. The principals of the Des Moines schools, aware of the plan, adopted a policy prohibiting students from wearing armbands to school. The students wore the armbands to school and were suspended until they returned without the armbands. The students, through their fathers, sued the schools, requesting an injunction restraining school officials from disciplining petitioners and nominal damages. The district court upheld the school authorities' ban on the armbands because it determined the prohibition was reasonable to prevent disturbance of school discipline, and an equally divided Eighth Circuit affirmed without opinion. The Supreme Court reversed, sending shock waves down the corridors of public schools. In essence, the Court declared that absent "substantial disruption" or "mate-
rial interference” with the education process, the school could not restrain student expression.24

Eighteen years later, the Court again addressed student expression in school in *Bethel School District No. 403 v. Fraser*.25 A student, Matthew Fraser, by his father as guardian ad litem, sued the school for attempting to discipline him after he gave a nomination speech at a school assembly that contained a number of obvious sexual metaphors that “glorifi[ed] male sexuality.”26 Students at the assembly reacted by simulating masturbation and sexual intercourse with their hips, a reaction the Ninth Circuit termed merely “boisterous.”27 Although the school district ultimately prevailed, the two lower courts, relying on the *Tinker* substantial disruption/material interference standard, had rejected the school’s argument that it was justified in disciplining Fraser because the speech had a disruptive effect on the educational process.28 Fraser was awarded $278 in damages and $12,750 in litigation costs.29 It took three years of litigation before the United States Supreme Court finally told the Bethel School District that it was permitted to impose a disciplinary sanction on Matthew Fraser.30

In some ways, the majority opinion in *Fraser* is little more than a reprise of Justice Stewart’s quip about obscenity—“I know it when I see it.”31 The majority opinion could be read as stating merely that “certain modes of expression are inappropriate in the school setting and this is one of them.” According to the Court, the school’s role in “teach[ing] by example the shared values of a civilized social order” gave the school the power to discipline a student who showed such disregard for civility.32

*Hazelwood School District v. Kuhlmeier,*33 decided two years after *Fraser*, addressed student First Amendment rights once again, this time in the context of a school-sponsored newspaper.34 Students brought suit against the school district, the school principal, and a teacher, alleging that their First

24 See *Tinker*, 393 U.S. at 514.
26 Id. at 678-79, 683. Fraser gave the following speech:
   I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pours it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally— he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.
   Id. at 687 (Brennan, J., concurring in the judgment) (internal quotation marks and alterations omitted).
27 Fraser v. Bethel Sch. Dist., 755 F.2d 1356, 1360 (9th Cir. 1985). The court’s full description was that “[w]hile the students’ reaction to Fraser’s speech may fairly be characterized as boisterous, it was hardly disruptive of the educational process.” Id.
28 See id. at 1359.
29 See *Fraser*, 478 U.S. at 679.
30 The incident occurred in 1983, see id. at 677, and the Supreme Court upheld the disciplinary action in 1986.
32 *Fraser*, 478 U.S. at 683.
34 See id. at 262-64, 267.
Amendment rights had been violated when the principal deleted two pages of articles from one issue of the paper. The Court, noting that the paper was published as part of the Journalism II class, decided that the standard it had "articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." Instead, when exercising editorial control over the style and content of student speech in school-sponsored activities, school officials are not constrained by the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns." As of this writing, the Court has made no further pronouncements since Hazelwood regarding student expression in the public schools.

2. The Fourth Amendment

New Jersey v. T.L.O. was the Court's first and only foray into the Fourth Amendment's application in the school setting until it decided Acton in 1995. In T.L.O. a high school teacher discovered two girls violating a school rule by smoking in a lavatory. The teacher took the girls to the principal's office, where the assistant vice principal ("the principal") questioned them about the incident. When one of the girls, T.L.O., denied smoking, the principal searched her purse for cigarettes. While removing the cigarettes from the purse, the principal came upon cigarette rolling papers, an item closely associated with marijuana use. A thorough search of the purse revealed several items that implicated the student in drug dealing. The principal turned the items over to the police, T.L.O. confessed to selling marijuana at the high school, and the State brought delinquency charges against her. T.L.O. moved to suppress the evidence found in her purse along with the confession, contending that the principal's search violated her Fourth Amendment rights. When the Court finally announced its decision in T.L.O., five Justices wrote opinions.

35 See id. at 262, 264. One article discussed the experience of three students with their pregnancies. The other discussed the impact of divorce on students. The principal excised the articles because he thought the pregnant girls might be identifiable from the text, because he believed the article's references to sexual activity and birth control might be inappropriate to some of the younger students, and because he believed that parents in the divorce story should have had a chance to respond to accusations that appeared in the article. See id. at 263.
36 Id. at 272-73 (footnote omitted).
37 Id. at 273 (footnote omitted); cf. Romano v. Harrington, 725 F. Supp. 687 (E.D.N.Y. 1989) (limiting Hazelwood's constraint on student expression to class newspapers).
39 See id. at 328.
40 See id. at 328-29.
41 See id. at 329.
42 Certiorari was originally granted to examine if the exclusionary rule was applicable to searches conducted by school officials, an issue on which courts disagreed. After hearing argument on that issue, the Court ordered reargument to decide what limits the Fourth Amendment places on searches by school officials. See id. at 332 & n.2.
The Court rejected the argument that teachers and administrators act in loco parentis in their dealings with students and therefore are not subject to the constraints of the Fourth Amendment, although this argument had been accepted by some lower courts. Instead, the Court determined that the Fourth Amendment applies to searches conducted by school officials, but it was unwilling to constrain teachers with the full warrant and probable cause standard usually required of the State. The Court declared that the proper standard for assessing the searches conducted by public school officials is one of reasonable suspicion that the search will turn up evidence that the student has violated the law or a school rule. In the case at hand, the Court ruled that the search met this reasonableness standard and that the evidence in T.L.O.'s purse could be admitted at the delinquency proceedings. The Court explicitly left open the question it later would address in Acton: whether individualized suspicion was necessary for a school search.

3. The Fourteenth Amendment

In Goss v. Lopez, decided in 1975, the Court, in a 5-4 vote, determined that students in public schools had procedural due process rights that afforded them "some kind of notice" and "some kind of hearing" before the school had the power to suspend them. Just two years later, in Ingraham v. Wright, another 5-4 decision, the Court decided that students did not have procedural due process rights that would afford them any notice or hearing before being paddled at school.

In describing the facts of the Goss case, the majority cryptically stated that the petitioners were suspended during a "period of widespread student unrest" that was "a time of great difficulty." Six of the named plaintiffs were suspended for disruptive or disobedient conduct committed directly in the presence of the school principal, who then immediately ordered the suspensions. One of the named plaintiffs was among a group of students demonstrating in the school auditorium while a teacher attempted to conduct a

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44 See infra note 89.
45 See T.L.O., 469 U.S. at 340-41.
46 See id. at 341-42.
47 See id. at 347-48.
49 See T.L.O., 469 U.S. at 342 n.8.
51 Id. at 579 (emphasis omitted).
53 See id. at 682. The difference in the outcome in Goss and Ingraham is a result of Justice Potter Stewart changing sides. The Ingraham Court also determined that paddling at school did not constitute cruel and unusual punishment in violation of the Eighth Amendment. See id. at 664.
54 Goss, 419 U.S. at 569.
55 Id. at 581 n.9.
class there. When the school principal ordered him to leave, and he refused to do so, he was suspended. The school principal also saw another plaintiff physically attack a police officer who was attempting to remove the first student from the auditorium. The second student was also immediately suspended. Four other students were suspended for similar conduct. None was given a presuspension hearing. The Goss Court first determined that the students had legitimate claims of entitlement to a public education as a property interest protected by the Due Process Clause. Moreover, the suspension and the record thereof could deprive the student of his liberty interest in "good name, reputation, honor, [and] integrity," interests that the Court at the time had held were also protected by the Due Process Clause. The Court rejected the school administrators' argument that the students' claim of entitlement—based on the state law providing for free education—was limited by the law itself, which permitted school principals to suspend students for 10 days. The Court also determined that even temporary exclusion from school is "not de minimis," and thus due process must be afforded the student so deprived. After explaining that due process applied, the Court held that a student must receive oral or written notice of the charges against him, an explanation of the evidence the authorities possessed, and an opportunity to present his side of the story. The students in Ingraham—one of whom was subjected to over twenty licks with a paddle that resulted in a hematoma requiring medical attention—were not granted notice of the charges against them or the opportunity to explain their actions. The Ingraham majority first determined that the Eighth Amendment's prohibition against cruel and unusual punishment applied only to those convicted of crimes, not to the paddling of school children. But because corporal punishment involves "restraining the child and inflicting appreciable physical pain," the Court held that the student's Four-

56 See id. at 569.
57 See id. at 569-70.
58 See id. at 570. Three additional plaintiffs were suspended without a hearing, but it was not clear on what information the decision was based. See id. at 570-71.
59 See id. at 574.
60 Id. (citation and internal quotation marks omitted). The following year, in Paul v. Davis, 424 U.S. 693, 712 (1976), the Court held that there is no liberty interest in reputation alone.
61 See Goss, 419 U.S. at 575-76; see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (holding that property "cannot be defined by the procedures provided for its deprivation"); Vitek v. Jones, 445 U.S. 480, 491-94 (1980) (holding that the transfer of a prisoner from a jail to a mental facility was a deprivation of liberty, and procedural requirements regulating the transfer were independent from the liberty interest held by the prisoner). But see Bishop v. Wood, 426 U.S. 341, 345-47 (1976) (holding that a public employee receives procedural due process protection only if the law or contract defining the job expressly states that the employee can be fired solely for cause).
62 Goss, 419 U.S. at 576.
63 See id. at 581. The Court stated that it was addressing only "the short suspension, not exceeding 10 days." Id. at 584. It cautioned that "[l]onger suspensions or expulsions . . . may require more formal procedures." Id.; cf. In re Gault, 387 U.S. 1, 51-57 (1967) (requiring formal due process standards and criminal constitutional protections in juvenile court proceedings).
65 See id. at 664.
teenth Amendment liberty interests were implicated. Nonetheless, the Court saw no need for a Goss-type hearing. At common law, teachers were permitted to inflict corporal punishment on children in their care, and the Court reasoned that state remedies were sufficient protection against the abuse of that privilege. Moreover, imposing even an informal hearing before paddling would be too much of a burden on the teacher trying to maintain classroom order. In short, the Court explicitly made a cost-benefit analysis and decided that the likely impairment of teacher authority and resulting loss of school discipline was too important to jeopardize, even for a constitutional liberty interest.

The cases discussed above arose in different contexts, but each involved the same underlying issue, an issue the Court does not acknowledge but that has nonetheless driven its analysis in all of these cases: how much power should a school have over students? In Part B, I illustrate how—until Acton—the Court failed to admit the real issue behind the school discipline cases—school power. Instead of addressing the issue directly and coherently, the Court created what I call the school power continuum and used that structure to set forth the confusing and often conflicting constitutional standards described above.

B. The School Power Continuum

As it attempted to mesh student constitutional rights with the weighty responsibilities that educators have for the children entrusted to their care, the Court never came to terms with the real issue behind the school cases. Instead, to avoid dealing explicitly with the thorny problems surrounding the nature of school power, the Court implicitly constructed a continuum of school power. On one end of the continuum is the power of the parent, who is not constrained by the Constitution. On the other end is the power of the State which, of course, is constrained by the Constitution. Although the Court was uncomfortable with the notion that school officials possessed the delegated power of the parent, the Court has not limited teachers only to the power the State is allowed to assert against individuals. The Court has acknowledged that schools are "special" and thus need more power over schoolchildren than the State generally has over adult citizens in other contexts. But no guiding principle has emerged with regard to where school power should rank on the parent-state continuum.

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66 Id. at 674. The Court explicitly stated that the case did not involve a state-created property interest. See id. at 674 n.43.

67 See id. at 674-75.

68 See id. at 674, 683.

69 See id. at 680-81.


71 The Court has also struggled with whether to import rights developed elsewhere for adults into the juvenile justice system. Compare McKeiver v. Pennsylvania, 403 U.S. 528, 545, 553 (1971) (plurality opinion of Blackmun, J., and concurrence of White, J.) (holding that there is no right to a jury in juvenile proceedings), with Breed v. Jones, 421 U.S. 519, 528-31 (1975)
When the *Tinker* Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common-law doctrine of *in loco parentis*—slipped out the back door. For if school authority over students is constrained by the Constitution, that authority cannot really be like that of a parent, who is not so constrained. But, until *Acton*, the Court never explained what the nature of school power is, if it is not that of the parent. Instead, unfettered by the *in loco parentis* doctrine, the Justices were left to decide what power the school needed—what rank the school would be given on the school power continuum—based on their own views of the public school as an institution.

The *Tinker* Court could have analyzed school power as identical to that of the state, thus imposing the same burden on schools with regard to constitutional constraints that is imposed generally on the state. But the *Tinker* Court was not prepared to go so far. Instead, Justice Fortas wrote, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." After admitting that the school is "special," and thus different from the state, Justice Fortas could then have explained what made the school special and set forth explicitly the nature of the school's power over the student in light of these "special characteristics." But instead of clarifying the nature of school power, the Court waffled between its assertion that students have constitutional rights and the school's need for some kind of power over students. After noting that the school has special characteristics, the Court's next sentence set forth the now-familiar declaration that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." "On the other hand," hedged Justice Fortas, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

The Court correctly set up the problem—the need to reconcile the rights of the individual student that passed through the schoolhouse gate with the tradition of affirming school power—but never solved it. Instead of defining the nature of school power, the Court created the parent-state power continuum. The Court did so by setting forth a standard for constitutional review that placed a somewhat lower burden on the school's ability to place restrictions on student speech than would be placed on the State in other contexts, but that placed more constraints on the school than could be placed on a parent. By declaring that the school should not have the power to restrain

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23 Not until *Acton* does the Court attempt to do so. See infra notes 265-307 and accompanying text.
24 *Tinker*, 393 U.S. at 506.
25 *Id.* at 507.
26 See Lawrence M. Friedman, *Limited Monarchy: The Rise and Fall of Student Rights*, in *School Days, Rule Days* 238, 245 (David L. Kirp & Donald N. Jensen eds., 1986) (contending that after *Tinker* "the power of schools no longer derived from parental power").
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student speech absent "substantial disruption" or "material interference" with the education process, the Court allowed the school some greater degree of power than the State possesses generally because of the "special characteristics of the school environment." But the Court never explained what these special characteristics are and, more importantly, failed to articulate the nature of the power that the school possesses in light of those special characteristics.

The Court has continued in the manner set forth in the Tinker opinion—floundering about on the school power continuum without articulating the nature of school power—for over twenty-five years. The next time the Court addressed student expression in schools, in Fraser, the Court again failed to illuminate the nature of the power the school possessed. But the Fraser Court, although failing to craft a principle that explained what power the school had, did explain why the school had the power to discipline Fraser for a speech given at school. Again, like Tinker, the Court pointed out that schools are "special" but, unlike the Tinker opinion, the Fraser Court attempted to describe what characteristics of the school made it "special." The "special characteristic" of the public school that was important to the Fraser Court was the school's role in inculcating the "habits and manners of civility" that are "necessary to the maintenance of a democratic political system." Given this important role, the Court was willing to allow school officials the power to discipline students for speech that is "wholly inconsistent with the 'fundamental values' of public school education," even if the speech did not meet the material disruption standard set by Tinker. Thus, the Court established two places on the school power continuum for student expression in school: one for speech like that of Matthew Fraser's where school power was closer to that of a parent and another for speech like that of Mary Beth Tinker where school power was closer to that of the state.

The Court moved the pointer on the school power continuum one more time when it addressed student expression in the school newspaper in Hazelwood. Again the Court merely discussed why the school was special in this case and once more failed to address the nature of school power. This time the Court decided that the school was special because of its pedagogical function when the student expression was a part of a classroom learning experience. The Hazelwood Court accordingly allowed school officials power

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77 Tinker, 393 U.S. at 514.
78 Id. at 506. Compare Connick v. Myers, 461 U.S. 138, 146-47 (1983) and Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), both of which held that a state's interests as an employer in regulating the speech of employees differs from those it possesses in connection with the regulation of the speech of citizenry in general.
80 See id. at 681.
81 See id. at 681-84.
82 Id. (internal quotation marks and citation omitted).
83 Id. at 685-86. The Court also noted the "marked distinction between the political 'message' " in Tinker and the "sexual content" of the speech in Fraser. Id. at 680.
85 See id. at 266-67.
86 See id. at 272-73.
over the content of student speech in school-sponsored expressive activities if the exercise of power is "reasonably related to legitimate pedagogical concerns." The place on the continuum where the Court placed school power changed from Tinker to Fraser to Hazelwood. In short, the Court merely decided how much power the school should have, pointed to that place on the continuum, and then allowed public schools that amount of power.

Before the Supreme Court decided New Jersey v. T.L.O. in 1985, the lower courts were deeply split regarding whether schools were subject to the constraints of the Fourth Amendment. Some courts had held that teachers acted in loco parentis, with the authority of the parent, rather than the State, and were thus not restrained by the Fourth Amendment at all. Other courts had determined that the Fourth Amendment and its probable cause standard applied in full to searches by teachers. Still others attempted to find a point somewhere in the middle of the school power continuum—the point the Supreme Court ultimately chose—and upheld warrantless searches that were supported by a "reasonable suspicion" that the search would uncover evidence of a violation of a school rule or a violation of the law.

It is plain in T.L.O.—in which five Justices wrote opinions—that the Justices were struggling with the inherent incoherence in the school power continuum the Court had created. The majority opinion simply decided that the in loco parentis doctrine was "in tension with contemporary reality" and with cases like Tinker and Goss. The Court, however, failed to clarify what power was left to the school if in loco parentis power was no longer realistic. It merely stated that, although the Fourth Amendment applied to school searches, school officials would not be required to obtain a warrant or to search only when they had probable cause. Based on the special character-

87 Id. at 273 (footnote omitted).
89 See id. at 332 n.2 (citing cases); see also Ranniger v. State, 460 S.W.2d 181, 182 (Tex. Civ. App. 1970) (deciding that a school principal stood in loco parentis "with the parent's duties, rights and responsibilities"). Sometimes courts do not embrace the in loco parentis doctrine fully, but they are influenced by it. See, e.g., In re W., 105 Cal. Rptr. 775 (1973) (balancing in loco parentis status against reasonableness); People v. Jackson, 319 N.Y.S.2d 731 (N.Y. App. Div. 1971) (explaining that an in loco parentis relationship is critical in applying the Fourth Amendment reasonableness standard).
90 See T.L.O., 469 U.S. at 332 n.2 (citing State v. Mora, 307 So. 2d 317, 319 (La.) (concluding that school officials are within the full purview of the Fourth Amendment's prohibition), vacated, 423 U.S. 809 (1975), on remand, 330 So. 2d 900, 901 (La. 1976) (relying on both federal and state law to conclude that a principal and an instructor were functioning as government agents)); Picha v. Wieglos, 410 F. Supp. 1214, 1220-21 (W.D. Ill. 1976) (holding that when school officials search for evidence of a crime with substantial police involvement, the Fourth Amendment probable cause standard applies).
91 See T.L.O., 469 U.S. at 341-42.
92 See id. at 332-33 n.2 (citing cases); see also People v. Jackson, 319 N.Y.S.2d 731, 734-36 (Sup. Ct. App. Term. 1971) (explaining that the in loco parentis doctrine makes any search of students reasonable if based upon reasonable suspicion), aff'd, 284 N.E.2d 153 (N.Y. 1972).
93 T.L.O., 469 U.S. at 336.
94 See id. at 340-41.
istics of the school, "a certain degree of flexibility" is necessary, so reasonable suspicion is enough.95

Justice Powell's concurrence, joined by Justice O'Connor, also stressed the "special characteristics" of the school and the "special relationship" between teacher and student.96 Justice Blackmun, like Justice Powell, agreed that the school is a "special" institution with a "special need for flexibility."97 Within that "special" institution, teachers focus on the task of "teaching and helping" students.98 Because of the increasing problem of weapons and drugs in schools, teachers need the power to respond quickly to problems "to maintain an environment conducive to learning" and "to protect the very safety of students."99 The time taken by the teacher to develop probable cause would divert teachers from the task of educating.100

Both Justice Powell's and Justice Blackmun's descriptions of the "special" qualities of the school as an institution are important because they explain why the Court could allow schools more power than it would allow the State generally. But they again failed to define just what that power is. Justice Powell merely described the power teachers have as broad, "unparalleled except perhaps in the relationship between parent and child,"101 and the upshot of that power: schools need not comply with the "full panoply" of constitutional rules.102 Neither Justice fully defined the nature of the power he described.103

The pronouncements of the Goss and Ingraham Courts, a mere two years apart, demonstrate how the Court's failure to deal explicitly and coherently with the question of school power results in confusion and misunderstanding. Like Tinker, the Goss Court placed an appreciable restraint on the school: only a student whose presence poses a "continuing danger" or an "ongoing threat" to the school community could be removed from school

95 Id. at 340; cf. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (permitting a warrantless, suspicionless drug testing search of employees who handle drugs or firearms by the Government when acting as an employer).
96 T.L.O., 469 U.S. at 348-49 (Powell, J., concurring).
97 Id. at 352 (Blackmun, J., concurring in judgment).
98 Id. at 353 (Blackmun, J., concurring in judgment).
99 Id. (Blackmun, J., concurring in judgment).
100 See id. (Blackmun, J., concurring in judgment). Justice Blackmun is more candid than other Justices in admitting that his views are drawn from his own experience that he surmises others have shared. He notes that "every parent knows" that children will test the boundaries of acceptable conduct and imitate misbehavior and assumes "[e]very adult remembers from his own schooldays the havoc a water pistol or pea shooter can wreak until it is taken away." Id. at 352. Having seen firsthand the necessity for the school to maintain order and having viewed how the school wielded its power (at least in removing the water pistol or pea shooter), he was less wary of a school with the power to search absent probable cause and a warrant.
101 Id. at 348 (Powell, J., concurring).
102 Id. at 350 (Powell, J., concurring).
103 Unlike Justices Powell and Blackmun, Justice Brennan did not perceive a special relationship between teacher and student; instead, he equated teachers with "all other government officials." Id. at 353 (Brennan, J., concurring in part and dissenting in part). Nevertheless, he acknowledged the special characteristics of the school setting, where students are confined in close proximity to each other and staff. See id. at 357. Given this special setting and the prevalence of drugs and violence, schools needed the power to search without a warrant. See id.
without prior notice and hearing. Nonetheless, the Court refrained from requiring the school to afford students the opportunity to secure counsel, confront and cross-examine witnesses, or call their own witnesses to verify their version of the incident.

In Ingraham, the Court saw no need for any kind of hearing at all. At common law, teachers were permitted to inflict corporal punishment on children in their care, and the Court reasoned that state remedies were sufficient protection against the abuse of that privilege. Moreover, imposing even an informal hearing before paddling would be too much of a burden on the teacher trying to maintain classroom order.

A careful study of Goss and Ingraham reveals the reason for the Court's problem with school power. In short, the Goss and Ingraham opinions represent two starkly different premises regarding the public school as an institution. On one side were the Justices who essentially viewed the institution as the adversary of the child, whom the Court must protect as the child attempts to rebut the values that the school attempts to inculcate. On the other side were the Justices who viewed the institution and its students as sharing in a common enterprise that consisted, at least in part, of teaching children how to be responsible citizens. In the next Part, I consider each of these models in turn and show how the Court has tottered from one model to the other in its attempt to resolve the school power question.

II. Two Models of School Power

The continuum between parent and state that the Court constructed in the cases that addressed the school's power to keep order was actually the result of a more fundamental question about public schools. It reflected the deeper—though unstated—conflict between two different philosophies regarding the mission and character of the public school: social reconstruction versus social reproduction. Part A explains these two models of school power. Part B analyzes how the Court has moved between these two models in its attempt to discern how much power the school has over students.

A. Social Reconstruction and Social Reproduction

The amount of power we are willing to confer upon our institutions is a function of the confidence we have in those institutions to wield that power appropriately. The reconstruction and reproduction models present different

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104 Goss v. Lopez, 419 U.S. 565, 582-83 (1975). The Court was concerned that imposing "even truncated, trial-type procedures" on the "countless" brief disciplinary suspensions that schools deal with "might well overwhelm administrative facilities" and divert resources, costing "more than it would save in educational effectiveness." Id.
105 See id. at 583.
107 See id. at 681-83.
108 See id. at 680.
109 See William B. Senhauser, Note, Education and the Court: The Supreme Court's Educational Ideology, 40 Vand. L. Rev. 939, 959 (1987) (noting that the 5-4 decision in Goss showed sharp division in the Court over the proper role of education in society).
110 These Justices were the Goss majority and the Ingraham dissenters.
views regarding the trust that should be afforded the public school. Indeed, the two models look upon the school as an institution from two sharply different perspectives. Each views the school as having a unique mission, but the two missions are seemingly wholly incompatible with each other.

1. Social Reconstruction

In the social reconstruction model, the school is an institution where power is necessary only to facilitate the child in his attempts to reconstruct a new social order. In fact, the primary mission of the school under this model is to effect “cultural change" in an attempt to move toward a new “planet-wise democratic order.” The school as a force in reconstructing a new social order was a reverse of the traditional function of public education in American society, in which the power of the school was necessary to inculcate—to reproduce—society’s traditions and habits.

In contrast to the social reproduction model, which would allow the school the power it needed to mold children in society’s image, the social reconstruction model would allow the student the power the student needs to avoid perpetuating society’s flaws. To achieve its goal, the reconstruction model endeavors to support those students who rebut the values that the school is trying to inculcate.

The clash between the reconstruction and reproduction models reflects conflicts about the mission of the public school that are deeply rooted in American intellectual history. The writings of John Dewey are often viewed as the genesis of the reconstruction model. Dewey viewed education “as a major force in social reconstruction” with the child in constant battle with his adult adversaries as he tries to free himself from society’s tainted traditions. The reconstructionists were influenced by the romantic view of the

111 V.T. Thayer, Formative Ideas in American Education: From the Colonial Period to the Present 319 (1966) (quoting Theodore Brameld, Education for the Emerging Age 26 (1961)) (internal quotation marks omitted). Theodore Brameld coined the term “reconstructionism” to refer to his belief that “the mission of a philosophy of education is to point the way toward the reconstruction of a culture, ‘which, left unreconstructed, will almost certainly collapse of its own frustrations and conflicts.’” Id. at 318-19 (quoting Brameld, supra, at 1).

112 See id. at 312.

113 See John Dewey, Democracy and Education 92 (1916) (“[I]nstead of reproducing current habits, better habits shall be formed . . . .”).

114 Dewey was perhaps the most influential American philosopher of the early twentieth century. Henry Steele Commanger called Dewey “the guide, the mentor, and the conscience of the American people,” and he declared: “it is scarcely an exaggeration to say that for a generation no major issue was clarified until Dewey had spoken.” Henry Steele Commanger, The American Mind 100 (1950), quoted in Robert B. Westbrook, John Dewey and American Democracy xiv (1991).

115 Richard Hofstadter, Anti-intellectualism in American Life 363 (1963); see also Lawrence A. Cremin, The Transformation of the School: Progressivism in American Education 1876-1957, at 118 (1961) (positing that Dewey cast the school “as a lever of social change” and thrust the educator into the struggle for social reform). Of course, political conditions also had a part to play in social changes. See Dewey, supra note 113, at 115; Hofstadter, supra, at 378.

Dewey was not alone in this view. Many educators, disturbed by the disintegrating effects of the Depression upon American society, believed that the school should seize the initiative and
child formulated by European writers like Rousseau, Pestalozzi, and Froebel—that the child "came into [the] world trailing clouds of glory, and it was the holy office of the teacher to see that he remained free, instead of assisting in the imposition of alien codes upon him." The education reformers at the end of the nineteenth century thus set up an antithesis between the "development of the individual" and the "imperatives of social order," that is, the "natural child against artificial society." The central idea of the new educational movement was that "the school should base its studies not on the demands of society, nor on any conception of what an educated person should be, but on the developing needs and interests of the child."

If the needs and interests of the child were to define what is necessary for an education, the school must do no more than accommodate the students as they developed physically and emotionally. Dewey was particularly concerned about adult authority. He desperately wanted to stop adult society from inculcating a conformist character in the child through the teacher, and he saw adult authority as "the" threat to the child.

Hofstadter, supra note 115, at 368; see also id. at 362-63 (noting that despite Dewey's post-Darwinian scientific positivism, Dewey's conception of the child drew largely from romanticism); Albert Lynd, Quackery in the Public Schools 178 (1933) (noting the influence of Rousseau and Pestalozzi on Dewey). Compare Hofstadter's view with that of Richard Wightman Fox, who argues that "Dewey was not the child-centered romantic that conservative critics have made him out to be," Richard Wightman Fox, The Great Pragmatist, N.Y. Times, Aug. 6, 1995, at 21 (Book Review), and Alan Ryan, who is critical of Hofstadter's view of Dewey, but also acknowledges Dewey's "political conception" of education. Alan Ryan, John Dewey and the High Tide of American Liberalism 296, 347-49 (1995); see also A.S. Neill, Summerhill: A Radical Approach to Child Rearing 4-8 (1960) (extolling a school where discipline, direction and suggestion are renounced in favor of student choice); Senhauser, supra note 109, at 945 (stating that under the romantic view, the school should allow the child's "social virtues to control the child's antisocial behavior") (footnote omitted). But see Cremin, supra note 115, at 14, 18 (discussing the view of former U.S. Commissioner of Education William Torrey Harris (1889-1906), a student of Hegel, who believed "the school must lead the child to freedom by leading him away from his primitive self"); THAYER, supra note 111, at 344 (describing Walter Lippmann's criticism of Rousseau and Froebel and "the cult of the child").

Hofstadter, supra note 115, at 368. The notion of the "natural" child does not stem entirely from a romantic "child of nature" heritage. It also has roots in post-Darwinian "naturalism" and the idea of the "naturalistic" child who would use his mind "instrumentally to solve various problems presented by his environment." Id. at 362. Even Dewey refused to believe that the antithesis between the child and society was a finality, but "hoped to achieve a harmonious synthesis of the two." Id. at 374.

Id. at 369. But see THAYER, supra note 111, at 314-15 (quoting George S. Counts as criticizing this child-centered focus as lacking a theory of social welfare "unless it be that of anarchy of extreme individualism") (citation and internal quotation marks omitted). See Hofstadter, supra note 115, at 382 (citing Dewey, supra note 113, at 60).

Id. at 383; see also John Stuart Mill, On Liberty 177 (Gertrude Himmelfarb ed.,
Against this background Dewey set forth his conception of education as growth, "the characteristic of life" that "has no end beyond itself." Because growth goes on automatically, it allowed Dewey’s followers to elaborate on his metaphor—to contrast the “good” self-determining growth from within (the child) with the “bad” molding from without (the school, the teacher). “[T]he growth of the child stood for health, [while] the traditions of society . . . stood for outworn, excessively authoritative demands.”

2. Social Reproduction

Social reconstruction was a reaction against an earlier and altogether different account of the school’s role. If “conscious social reproduction” is the school’s mission, the school must proclaim the child’s place in society by inculcating society’s traditions and habits. Only in “the arduous process of training children to self-discipline” will the public school fulfill its commitment to freedom. Unlike the reconstructionists, proponents of the social reproduction model emphasize “the part played by institutions in maintaining the existing democratic order.”

Influenced in part by Horace Mann’s concept of the universal public school, the reconstructionists advance the concept that the school plays a vital part in creating a sense of community and molding character based on a shared philosophy. The child and the teacher are not adversaries. Rather, as a member of the school community, the child has a concurrent interest with the school, that is, “a constitutive relation between individual [good] and social good based on knowledge.” In fact, the student depends on his relationship with school and teacher, much like his relationship with his par-

1974) (1859) ("State education is a mere contrivance for molding people to be exactly like one another . . . .")

121 DEWEY, supra note 113, at 62.
122 See HOFSTADTER, supra note 115, at 373-74 ("[T]he concept of individual growth became a hostage in the hands of educational thinkers who were obsessed with the child-centered school.").
123 Id. at 374.
124 AMY GUTMANN, DEMOCRATIC EDUCATION 14 (1987) (describing “conscious social reproduction” as “the ways in which citizens are or should be empowered to influence the education that in turn shapes the political values, attitudes, and modes of behavior of future citizens”); cf. SENHAUSER, supra note 109, at 943 (describing “cultural transmission” education ideology as the “transmission of knowledge, skills, morals, and social rules to the student") (citing Lawrence Kohlberg & Rochelle Mayer, Development as the Aim of Education, 42 Harv. Educ. Rev. 449, 452-53 (1972)).
125 Indeed, some educators, critical of the reformers who strove for a new social order, saw the school as an institution that could not construct new social ideas, but could only transmit those that were already accepted. See THAYER, supra note 111, at 318 (citing Nathaniel Peffer, Educators [Groping] for the Stars, 168 Harper’s Magazine 230, 232 (1934)); see also COUNTS, supra note 115, at 3 ("[S]chools, instead of directing the course of change, are themselves driven by the very forces that are transforming the rest of the social order.") , reprinted in EDUCATION IN AMERICAN LIFE 168, 169 (W. Richard Stephens et al. eds., 1972).
126 CREMIN, supra note 115, at 11.
129 GUTMANN, supra note 124, at 23.
ents, to provide him with the qualities necessary to be a responsible citizen in the social compact and to participate in our popular form of government. On the other hand, the school, as a part of the larger community, needs its young, as future citizens of the community, to understand both the rights and responsibilities of citizenship.

Under the reproduction model, the school must guide the student much in the same manner as a parent. To do so, the school must have power similar to that of a parent—power often described by the Latin phrase *in loco parentis*. The doctrine of *in loco parentis* has roots deep in the common law and was born at a time when social reproduction was the dominant, if not the only, theory of the mission of the school. Historically, the authority of the schoolmaster over his students was analogous to that of the master over his apprentice. During the settlement of the American Colonies, the English statutes of artificers, apprentices and labor provided that every person who wished "to set up, occupy, use or exercise any craft, mystery, or occupation" shall serve for seven years as an apprentice. Although the statutes served the economy of the period, the social, moral and educational aspects of apprenticeship were as important as its economic character. Indeed, the training received in apprenticeships was the basic model for education for the lower class in all the colonies during the seventeenth century. The apprentice served without pay, but in return the master was required to give him food, clothing and lodging. The master was also required to teach the apprentice and to take responsibility for the apprentice's moral conduct and training. Because the master took over the care of the child to such a degree, he possessed the same authority over the child as the parent.

Of course, the children of the upper classes did not serve as apprentices. The normal method of education for the upper class was tutorial instruction in the home, a voluntary relationship that allowed for the theory that parents chose to delegate part of their authority to the tutor. As Blackstone put it, the father may:

delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such

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130 "In the place of a parent." BLACK'S LAW DICTIONARY 787 (6th ed. 1990).
131 See Anderson v. State, 40 Tenn. (3 Head) 455, 457 (1859) (noting the similar relationship of schoolmaster and scholar, parent and child, and master and apprentice). Indeed, even the name "schoolmaster," rather than teacher, connotes a master-apprentice relationship in the school setting.
132 PAUL MONROE, FOUNDING OF THE AMERICAN PUBLIC SCHOOL SYSTEM 7 (1940) (citing An Act Containing Divers Orders for Artificers, Labourers, Servants of Husbandry and Apprentices, 5 Eliz., ch. IV (1562) (Eng.) in IV Statutes at Large 159, 170 (Cambridge Univ. ed. 1763)) (internal quotation marks omitted).
133 See id. at 46 (pointing out that even in New England the earliest educational laws were apprenticeship laws, rather than school laws); THAYER, supra note 111, at 3 (explaining that the early legislation in New England that foreshadowed public responsibility for education was primarily apprenticeship law, "similar in design to English law and intended to remedy the great neglect in many parents and masters in training up their children in learning and labor and other employments which may be profitable to the commonwealth").
134 See MONROE, supra note 132, at 7.
135 See id. at 61.
a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.\textsuperscript{136}

When the basic educational model moved from apprenticeship and private tutors to schools, \textit{in loco parentis} moved with it.\textsuperscript{137} The nature of the teacher's power over the student was correlative to that of the parent over his child.\textsuperscript{138} Moreover, good order and respect for the teacher were two general concepts "necessary" for the teacher to effect the mission of inculcating society's values and so "to answer the purposes for which he is employed."\textsuperscript{139}

The diffusion of knowledge through the common school was the way the social reproductionist ensured that the fabric of government continued to stand. According to Mann, known as the father of the American public school, "[t]he theory of our government is,—not that all men, however unfit, shall be voters,—but that every man, by the power of reason and the sense of duty [obtained through education], shall become fit to be a voter."\textsuperscript{140} Thus, in the social reproduction model, public schools would preserve, not reconstruct, republican institutions to create a political community.\textsuperscript{141}

\begin{itemize}
\item[\textsuperscript{136}] \textsc{William Blackstone}, \textit{Commentaries} \textsuperscript{*453}. Even Blackstone did not view the tutor's power as being coextensive with the parent, but limited the power to that "as may be necessary to answer the purposes for which he is employed." \textit{Id.; see also} Guerrieri v. Tyson, 24 A.2d 468, 469 (Pa. Super. Ct. 1942) (cautioning that a teacher has the status of parent to aid in education, not to treat a nonemergency injury or disease of a student); Lander v. Seaver, 32 Vt. 114, 122-23 (1859) (finding that the schoolmaster is not entrusted with all of the parent's authority); \textit{Restatement (Second) of Torts} §§ 152, 154 (1965) (limiting \textit{in loco parentis} authority to the purposes of the school's existence); Stephen R. Goldstein, \textit{The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis}, 117 U. Pa. L. Rev. 373, 380-82 (1969) (explaining that school authorities do not completely displace parents); Paul O. Proehl, \textit{Tort Liability of Teachers}, 12 \textit{Vand. L. Rev.} 723, 727 & n.24 (1959) (describing teacher authority as limited to situations under a teacher's control that are related to the purposes of education).

\item[\textsuperscript{137}] Public schools were considered extensions of the home in light of the culturally homogeneous local communities where the line between neighborhood and family was often blurred. \textit{See} Bruce C. Hafen, \textit{Schools as Intellectual and Moral Associations}, 1993 \textit{BYU L. Rev.} 605, 608.

\item[\textsuperscript{138}] \textit{See Heritage v. Dodge}, 64 N.H. 297 (1886) (ruling that a teacher was justified in the use of corporal punishment against a student who coughed when the teacher believed it was to attract attention and cause disturbance and it was later claimed that the student had whooping cough, and stating that "[t]he law clothes the teacher, as it does the parent, in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment") (a slightly different version of the same case is reported at 9 A. 722 (N.H. 1887)); \textit{Lander}, 32 Vt. at 123 (quoting Blackstone for the proposition that the schoolmaster "has such a portion of the powers of the parent") (emphasis omitted).

\item[\textsuperscript{139}] \textsc{William Blackstone}, \textit{Commentaries} \textsuperscript{*453}. \textit{See generally} State v. Mizner, 45 Iowa 248, 250 (1876) (finding "no doubt" that a teacher may legally inflict reasonable discipline "for the maintenance of his authority").

\item[\textsuperscript{140}] Horace Mann, \textit{The Lecture on Education in Joy Elmer Morgan, Horace Mann: His Ideas and Ideals} 97-98 (1936). "In all nations, hardly excepting the most rude and barbarous, the future sovereign receives some training which is supposed to fit him for the exercise of the powers and duties of his anticipated station." Horace Mann, Twelfth Annual Report in \textit{The Republic and the School: Horace Mann on the Education of Free Men} 92 (Lawrence A. Cremin ed., 1957).

\item[\textsuperscript{141}] \textit{See} Morgan, \textit{supra} note 140, at 91; Rosemary C. Salomone, \textit{Free Speech and School Governance in the Wake of Hazelwood}, 26 Ga. L. Rev. 253, 255 (1992) (describing Mann's view). Mann urged the creation of the public schools in the 1840s, at a time when his state,
B. The Court and the Models of School Power

In essence, the debate about the two different models of school power is really a deep disagreement about the very character and "meaning of the public schools." Are public schools "good" or "bad"? Are teachers the adversary or the ally of the students they teach? A fundamental disagreement about the answers to these questions—a disagreement that is sometimes based on the Justices' mistaken perception of day-to-day life in the classroom—is at the heart of the Court's opinions dealing with school power.

As analyzed below, for the Justice who—either explicitly or implicitly—viewed the public schools as an agent of social reconstruction, teachers are not benevolent "quasi-parents" who should be trusted to act in the best interest of the student. Rather, the teacher is the student's adversary, who will constrict the child's efforts to free society from its oppressive past. Thus the public school itself must be reconstituted. Respect, deference, trust, and especially discipline as an end itself have little value for the child who is in a constant battle with his adult adversaries as he attempts to free himself of society's tainted traditions. I now consider how the Court has lurched back and forth between the reconstruction and reproduction models in its misbegotten attempts to come to terms with the nature of school power.

1. In Loco Parentis

The reproduction model controlled the school power analysis with little dissent when the nature of school authority rested in the doctrine of in loco parentis, as it did under common law. In lawsuits filed against teachers in which the student claimed that disciplinary measures were too harsh, the teacher defended by claiming that the discipline was justified under the in loco parentis doctrine. Courts generally allowed discipline by teachers that could legally have been applied by parents and that was viewed as enhancing good order in the classroom and respect for the teacher. The schoolmaster

Massachusetts, was trying to assimilate large numbers of non-English immigrants. This explains his emphasis on the common schools for social reproduction. Dewey, on the other hand, was a progressive reformer, who wanted to reconstruct, not reproduce, society. See Salomone, supra, at 258.

142 Denno, supra note 5, at 60.
143 See Salomone, supra note 141, at 258 (noting that court decisions from the 1940s through the 1970s reflect the ideology exemplified by Dewey's writings, while later cases are concerned with "cultural transmission"); see also Senhauser, supra note 109, at 948, 979 (contending that the Court's support of a particular education ideology is sometimes result-oriented).
144 See, e.g., Mizner, 45 Iowa at 250 (explaining that "the criminality of a charge of assault and battery may be disproved by evidence showing that the act was lawful," as when a schoolmaster corrects his scholar in a reasonable manner).
145 See id. Courts also applied the in loco parentis doctrine to the relationship between college authorities and students. See, e.g., Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913) (stating that "[c]ollege authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils," and authorities may make rules or regulations that parents could make for the same purpose). In the second half of the twentieth century, courts and commentators saw the doctrine as obsolete and began using contract law to characterize the student-university relationship. See Brian Jackson, Note, The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform, 44 VAND. L. REV. 1135, 1136 (1991).
generally had no right to punish a pupil for conduct that occurred after the class was dismissed.146 Some courts, however, allowed teachers to punish the pupil for speech—in one case for simply calling the defendant “Old Jack Seaver” in front of fellow pupils—that occurred away from school because the behavior might diminish the school master’s authority and “beget disorder and insubordination” in the school.147 When chastising students, the schoolmaster was required to exercise “reasonable judgment,”148 and he would not be held liable unless the punishment was “clearly excessive.”149

Even after states passed compulsory school laws,150 calling into question the concept of voluntary delegation of parental power, the doctrine was so well entrenched that courts continued to apply the in loco parentis doctrine in school discipline and in school search cases.151 One court observed that in loco parentis is “a social concept [that] antedat[ed] the Fourth Amend-

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146 See Hobbs v. Germany, 49 So. 515, 517 (Miss. 1909) (“When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins,” but “[w]hen sent to his home, the authority of the teacher ends, and that of the parent begins.”).
149 Lander, 32 Vt. at 124-25 (reasoning that whether whipping with rawhide is excessive is a jury question, but noting that a schoolmaster has the advantage of being there to know all the circumstances); see also Vanvactor v. State, 15 N.E. 341, 343 (Ind. 1888) (“If the teacher really gave harder blows than ought to have been given, the error was one of judgment only . . . .”)
150 See Goss v. Lopez, 419 U.S. 565, 569-70, 582 (1975) (holding that a principal’s direct observation of a student attacking a police officer did not alter due process requirements).
151 Massachusetts passed the first statewide compulsory attendance law in 1852. Mississippi passed the last one in 1918. See CREMIN, supra note 115, at 127.
ment." Nonetheless, the advent of compulsory school laws undercut the theory that the parent was the source of the teacher's authority. Commentators and courts alike criticized the concept of parental delegation of authority in a system of compulsory education in which neither parent nor child has any choice in whether to attend school. The criticism focused on the source of the school power: "Under a system of compulsory education, a school authority acquires power over the child directly by reason of the law and solely because that authority is the agent of the governmental branch charged with carrying out the law." Despite the theoretical difficulties regarding the source of teacher authority—whether it stemmed from the law of the state or the delegation of the parent—teacher authority still was "most often described in terms of its scope by the Latin phrase in loco parentis" and interpreted to give the teacher "the right to discipline a child at school as a parent would at home."

2. Tinker and the Reconstruction Model

In Tinker the Supreme Court turned away from the in loco parentis doctrine and the social reproduction model that it represented. Because the Court saw reconstruction as the superior model, it needed to reconstruct the school itself as an institution. To that end, the Court changed the rules surrounding the school to fit the reconstruction norm.

The Tinker Court's opinion is rooted in the adversarial character of social reconstruction. For the Tinker Court, the public school institution was

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152 Jackson, 319 N.Y.S.2d at 736.
153 If it is truly compulsory school laws that are the primary theoretical problem with the concept of parental delegation of power, the advent of home schooling statutes may again allow for the theory of parental delegation. See Amy Kaslow, Learning at Home, CHRISTIAN SCI. MONITOR, Feb. 26, 1996, at 9 (discussing statutes or case law in all 50 states that allow home schooling). The parents who decide to educate their child at a school, rather than at home, affirmatively choose to delegate the duty to educate and the concomitant parental power to someone else. See infra notes 284-286 and accompanying text.
154 See School Bd. Dist. No. 18 v. Thompson, 103 P. 578, 581 (Okla. 1909) (questioning whether the "mere act" of sending a child to school amounts to a delegation of parental authority); Proehl, supra note 136, at 726-27 (arguing that when a parent sends a child to school because law so directs, the parent delegates no power to use corporal punishment and that the validity of the in loco parentis doctrine has ceased).
155 William G. Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 IOWA L. REV. 739, 767 (1974); see also McLeod v. Grant Co. School Dist. No. 128, 255 P.2d 360, 362 (Wash. 1953) (en banc) ("[T]he protective custody of teachers is mandatorily substituted for that of the parent."); M.R. Sumption, The Control of Pupil Conduct by the School, 20 LAW & CONTEMP. PROBS. 80, 80 (1955) (arguing that the power to control the pupil is part of the power of the state).
156 Some states confer teacher authority statutorily. See, e.g., FLA. STAT. ANN. § 232.256(1) (West 1989); 105 ILL. COMP. STAT. ANN. 5/34-84a (West 1993 & Supp. 1996); see also Goldstein, supra note 136, at 384 n.44 (claiming it is unclear if legislation preempts in loco parentis authority; cases that state that school boards have only powers statutorily granted to them exist alongside cases that recognize an in loco parentis basis for school board authority).
157 Proehl, supra note 136, at 727 (footnotes omitted).
158 See Denno, supra note 5, at 60 (stating that a new meaning of public schools is evident from the Tinker opinion); Senhauser, supra note 109, at 955 (stating that the Tinker Court implicitly adopted a progressive philosophy).
the enemy, the adversary.\textsuperscript{159} Indeed, the Court declared that the "principal use" of the schools is to "accommodate students."\textsuperscript{160} To avoid the danger that artificial society would stifle the child and thus hinder social reconstruction,\textsuperscript{161} the Tinker Court held school authorities to a rigorous standard: they may discipline students for speech activities only if they "materially and substantially" interfere with "appropriate discipline"\textsuperscript{162} or if the school official can reasonably forecast "substantial disruption of or material interference with school activities."\textsuperscript{163} This standard "implicitly rejected discipline in and of itself" as a goal of education.\textsuperscript{164}

To justify why the school should have the power to restrain student conduct only when it "materially or substantially" interferes with appropriate discipline, the Court painted an ugly picture of what would happen without the protection afforded by this standard. Put simply, the Supreme Court warned the nation that its public schools—like those in Des Moines, Iowa—were dealers in totalitarianism who wished to reproduce a society of robots.\textsuperscript{165} But despite the institution's attempts to impose conformity, "schools may not be enclaves of totalitarianism," cautioned Justice Fortas.\textsuperscript{166} The courts must intervene to protect the students from the totalitarians who would claim "absolute authority over their students" as they try to confine student expression to only those sentiments that are "officially approved."\textsuperscript{167} The school's imposition of "absolute regimentation"\textsuperscript{168} and its attempt to treat students as "closed-circuit recipients of only that which the State chooses to communicate"\textsuperscript{169} must give way to the student's "silent passive expression[s] of opinion"\textsuperscript{170}—the Deweyian impulse of the natural child.\textsuperscript{171}

Given its perception of the public schools, the Court did not want to give the school much power. Thus, it set forth a constitutional standard that, although not as rigorous as that imposed on the state in other circumstances, nonetheless shackled school officials who were attempting to keep "the disciplined atmosphere required for any classroom."\textsuperscript{172}

\textsuperscript{159} See Hafen, \textit{supra} note 4, at 679 (noting how the counterculture of the 1960s "shook public confidence in the schools and in traditional teaching methods by portraying the schools as enemies of true learning and instrumentality of social control").


\textsuperscript{161} See \textit{supra} notes 115-123 and accompanying text.

\textsuperscript{162} \textit{Tinker}, 393 U.S. at 509.

\textsuperscript{163} Id. at 514. Compare the Court's standard with the standard set forth by the district court: whether "a disturbance in school discipline is reasonably to be anticipated." Tinker v. Des Moines Indep. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966), \textit{aff'd}, 383 F.2d 988 (8th Cir. 1967), \textit{rev'd}, 393 U.S. 503 (1969).

\textsuperscript{164} Senhauser, \textit{supra} note 109, at 957.

\textsuperscript{165} See \textit{Tinker}, 393 U.S. at 511.

\textsuperscript{166} Id.

\textsuperscript{167} Id.

\textsuperscript{168} Id. at 508.

\textsuperscript{169} Id. at 511.

\textsuperscript{170} Id. at 508.

\textsuperscript{171} Compare the Court's description here with that of the social reconstruction model, \textit{supra} notes 111-123 and accompanying text.

\textsuperscript{172} Tinker v. Des Moines Indep. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966), \textit{aff'd}, 383 F.2d 988 (8th Cir. 1967), \textit{rev'd}, 393 U.S. 503 (1969). Indeed, one commentator went so far as
That the *Tinker* Court was receptive to social reconstruction over social reproduction and liberty over order is not surprising given the social and political context. *Tinker* was written at a time when people—particularly young people—hoped they could reconstruct a better society. In the process, they questioned “not only the legitimacy but the very concept of authority.”

Many challenged and some rejected altogether the authority of culture, of morality, and of law. *Tinker* was decided in 1969, only five years after the passage of the Civil Rights Act of 1964 and in the midst of angry protests about the Vietnam War. “Order” was one of the values, along with respect, deference, and even trust, that was being challenged at all levels of consciousness. In an era that has been compared to the Protestant Reformation, the moral authority of institutions that had heretofore been virtually unquestioned crumbled, and public schools did not escape the onslaught.

*Brown v. Board of Education* and its progeny had thrust upon the public schools the biggest social reconstruction problem of all: the eradication of racism. The fight for integration exposed the ugly sore of racism on the underbelly of the public schools and the school boards that ran them. Although the quality of our nation’s public schools was questioned after the Soviet Union launched Sputnik in 1957, the character of the institution was questioned during school desegregation. Rather than an institution in which traditional values like “respect” and “order” helped to reproduce a

to state that after *Tinker*, students are protected until “open interruption within classrooms” occurs or students “undertake incitement to riot” or similar overt action.” Denno, *supra* note 5, at 55 (quoting Feiner v. New York, 340 U.S. 315, 321 (1951)).

173 Charles E. Silberman, *Crisis in the Classroom: The Remaking of American Education* 24 (1970). Sociologist Robert A. Nisbet has asserted that the most dangerous intellectual aspect of the 1960s was the refusal “to distinguish between authority and power.” Robert A. Nisbet, *The Twilight of Authority, The Public Interest*, Spring 1969, at 3, 5, quoted in Silberman, *supra*, at 25. One was viewed as being as much a threat to liberty as the other—a view Nisbet called “madness,” for “[t]here can be no possible freedom in society apart from authority.” Id. Nisbet contended that authority is “built into the very fabric of human association,” stemming from the relationships and loyalties of the members of a group—family, church, school or state—and derived from the function that group or institution performs. Id. There also exists authority of “learning and taste; of syntax and grammar in language; of scholarship, of science, and of the arts.” Id. “Above all, there is the residual authority of the core of values around which Western culture has been formed,” including the values of “justice, reason, equity, liberty, [and] charity.” Id.

174 See Silberman, *supra* note 173, at 26; see also Hafen, *supra* note 4, at 676-77 (noting the “profound change in overall social attitudes that shattered public confidence” in public schools).


178 See Hafen, *supra* note 4, at 676 (calling school desegregation in mid-1950s “the heaviest social burden the public schools had yet been asked to bear”).


180 See Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 *Cornell L. Rev.* 1, 73 (1992) (stating that the Court’s de jure segre-
virtuous society, the public school was a battleground in which many school officials' views of "tradition" and "order" were perceived as a way of furthering discrimination and bigotry.

Even so, the *Tinker* majority could not simply eradicate the social reproduction model. Both of the *Tinker* dissents embraced social reproduction as the appropriate model for the public school and eschewed the notion of the school as adversary. In separate opinions, the *Tinker* dissents, Justice Black and Justice Harlan, recognized that the school officials in Des Moines had been motivated by the "legitimate school concern[ ]" that the protest would distract students from their studies. Justice Black pointed out that the armbands did exactly what the school principals had feared: they allowed students to defy orders of teachers and diverted the students' minds from their studies to the "highly emotional subject of the Vietnam war." Justice Black had no use for the cornerstone of the social reconstruction model, Dewey's notion that the school should be guided by the impulse of the natural child. For Justice Black, children are sent to school "to learn, not teach." Instead of focusing on the Deweyian concept of the purer interest of the child, Black espoused the "original idea of schools" that was the essence of the reproduction model: "that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders." In Justice Black's view, the child must be molded; the school and the student have a concurrent mission—the social reproduction mission—in the training of children "to be good citizens—to be better citizens." Reconstruction was not always the best solution to a problem, for although "[c]hange has been said to be truly the law of life . . . sometimes the old and the tried and true are worth holding." Unlike the majority, which viewed school authority as an enemy of liberty, Justice Black saw "uncontrollable liberty" as an "enemy to domestic peace." According to Justice Black, the school acts, not as an adversary, but instead helps the child to find his place in society while "giving us tranquility and . . . making us a more law-abiding people."

### 3. In the Shade of Tinker: The Reconstruction Motif

Thus the battle lines were drawn. In the opinions that followed *Tinker*, the Court, in cases like *Fraser*, sometimes tried to retreat from the strong reconstruction theme set forth in *Tinker*. But the strains of *Tinker* can be heard in every Supreme Court opinion regarding the school's power to keep order; that is, every opinion until *Acton*.

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182 *Id.* at 518 (Black, J., dissenting).
183 *See Id.* at 522 (Black, J., dissenting).
184 *Id.*
185 *Id.*
186 *Id.* at 524.
187 *Id.*
188 *Id.*
189 *Id.*
The school order case following Tinker, Goss v. Lopez, was also greatly influenced by the reconstruction model. Once again the Court adjusted school disciplinary rules to fit the reconstruction norm. In deciding that the student must receive only "some kind of notice and some kind of hearing," Goss appears at first blush to be somewhat deferential to school authorities. Justice White, writing for the majority, was aware of the volume of disciplinary suspensions that occurred in schools. He performed a cost-benefit analysis and announced that to "impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities... and, by diverting resources, cost more than it would save in educational effectiveness."

But even as the Court stated how application of the Due Process Clause was an "intensely practical matter[]" and that intervention in the public school system required "'care and restraint,'" the opinion—like Tinker—revealed that the Court viewed teachers and principals as adversaries of the students, consistent with the reconstruction model. "In short, the Goss majority elevate[d] to constitutional status a particular view of how public school officials should relate to their students." Many at the time feared the damage done to the public schools would not be easily remedied.

The Goss majority purported to be concerned about "unfair or mistaken exclusion from the educational process," an interest that trumped the school's interest in maintaining order. Yet even when the school principal himself witnessed the severe misconduct, as he did in Goss, the Court was unwilling to concede that the principal could fairly ascertain what had occurred. Despite witnessing the severe misconduct leading to the suspension, "[t]hings are not always as they seem to be" to the school-principal-as-witness, and the school principal could not be trusted to understand fully an event that occurred in an auditorium full of people. Even during this time of "great difficulty" and "widespread student unrest," he may not

\begin{itemize}
\item \textit{Goss}, 419 U.S. 565 (1975).
\item \textit{Id.} at 579 (emphasis omitted).
\item \textit{Id.} at 578 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
\item Pearson, supra note 12, at 851.
\item \textit{Id.} at 579 (stating that "[b]rief disciplinary suspensions are almost countless").
\item \textit{Id.} at 584; see also Kirp, supra note 12, at 860 ("Goss signals an erosion of the confidence which has historically been placed in the fairness (if not the rightness) of [school officials'] decisions and the supplanting of a relationship based on trust with one adversarial in nature.") (footnote omitted).
\item \textit{Id.} at 581 n.9.
\item \textit{Id.} at 569.
\end{itemize}
act swiftly and decisively without giving the student "the opportunity to characterize his conduct and put it in what [the student] deems the proper context."\(^{203}\)

Like the *Tinker* Court, which viewed public schools—absent court supervision—as enclaves of totalitarianism, the *Goss* Court explained why courts needed to intervene in school discipline. Although school principals would prefer "untrammeled power to act unilaterally," courts must ensure that "an injustice is not done."\(^{204}\) Without courts to ensure fairness, teachers and principals—acting in the adversarial role—would likely make "secret, one-sided," "self-righteous" determinations of facts regarding student discipline.\(^{205}\)

Given this mistrust of the school as an institution, the *Goss* Court set a high standard, comparable to that in *Tinker*, before it would allow the school to discipline students unilaterally. Although the Court acknowledged that the educational function of the school made at least "[s]ome modicum of discipline and order"\(^{206}\) essential to the school community, only a student whose presence poses a "continuing danger" or an "ongoing threat" to the school community could be removed immediately from school.\(^{207}\) In short, the underlying message of *Tinker*, that teachers are the students' adversaries, was endorsed by the *Goss* Court. The *Goss* Court also reinforced the *Tinker* theme that defiance of those who try to stifle the mission of reconstruction would be rewarded by the courts.

Despite the sharp tone of *Tinker* and *Goss* and the domination of the reconstructionists, the reproductionists still had a voice. Perhaps the strongest advocate for reproduction was Justice Powell who, even as the reconstruction model reached its zenith, pressed to restore the supremacy of the reproduction model. In his dissent in *Goss* and his majority opinion in *Ingraham* two years later, he contended that school discipline and order should be based on the reproduction model.\(^{208}\) These opinions set an example for later Justices who would try to retreat from the force field of *Tinker*.

\(^{203}\) Id. at 584; see also Kirp, supra note 12, at 852 ("The majority opinion may not have adopted what John Dewey termed a 'democratic' model of school governance in which decision-making is a shared responsibility, but its position differs markedly from the widely prevalent hierarchical model, which treats students as the recipients of commands.") (footnote omitted).

\(^{204}\) *Goss*, 419 U.S. at 580; see Note, *Due Process, Due Politics and Due Respect: Three Models of Legitimate School Governance*, 94 HARV. L. REV. 1106, 1121 (1981) (noting the distrust of school officials evident in *Goss*).

\(^{205}\) *Goss*, 419 U.S. at 580 (internal quotation marks and citations omitted). Compare id. (viewing student input into factual disputes as helpful), with Board of Curators v. Horowitz, 435 U.S. 78, 87-88 (opinion of the Court), 95 n.5 (Powell, J., concurring) (1978) (viewing student input into academic judgments that involve at least some questions of "objectively determinable fact" as unnecessary). See also Note, supra note 204, at 1117-18 (discussing the Court's treatment of factual questions in academic and disciplinary dismissals).

\(^{206}\) *Goss*, 419 U.S. at 580.

\(^{207}\) Id. at 582-83 (cautioning that notice and hearing should follow as soon as practicable).

Justice Powell respected the child, but was not enamored of the child's inherent superiority over adults. He pointed out that the "experience of mankind, as well as the long history of our law, recogniz[es] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults." Rather than allow the child to reconstruct adult institutions, the function of adult institutions like family, church, and school was to shape the character of the child. Justice Powell vehemently disagreed with the Deweyian view that adult authority in school—the teacher—becomes "the threat to the child." Instead, Justice Powell saw the interest of the school and the interests of the pupil as "essentially congruent." In his view, the school is not the student's adversary but an ally that acts both for the student's benefit and for the public generally.

Justice Powell viewed the public school as the institution where the state and the people come together to accomplish a shared mission: to teach their youngest members the good citizen's responsibility under the social compact of our democratic government. Because of the commonality of interests between the State and the public school system, Justice Powell chastised the Court for thinking in the "traditional judicial terms of an adversary situation." In so doing, he argued that the Court both ignored the larger congruent interests of state and student and "misapprehend[ed] the reality of the normal teacher-pupil relationship." Par from the "totalitarian" acting with "untrammeled power" in making "secret" "self-righteous" determinations, Justice Powell conjured "warm memories" of teachers and stressed the teacher's "good faith[, J dedication" and "commitment" to students.

To the reproductionist, order is not incompatible with individual liberty. Indeed, order is essential to the individual interest of the student in obtaining a "meaningful" education. In stark contrast to Dewey and those who viewed the public school's mission as social reconstruction, Justice Powell, as a strong proponent of the social reproduction model, viewed conformity—at least conformity to school discipline—as "an integral and important part of training our children to be good citizens."
Although Justice Powell's view did not prevail in the 5-4 decision in *Goss*, only two years later, in *Ingraham v. Wright*, he was able to convince one more member of the Court that—based on his reproductionist view of the public school as an institution—schools should be allowed the power to paddle students unconstrained by the Eighth Amendment or the Due Process Clause. In contrast to the image created by previous decisions of an "enclave[ ] of totalitarianism" acting in secret, Justice Powell expanded the theme he began in his *Goss* dissent that education in the public schools was a shared enterprise. The public school is not a secret enclave, but an "open institution" from which students freely return home at the end of every school day. Moreover, students have the support of family and friends while at school, as well as that of teachers and other pupils. Unlike the majorities in *Tinker* and *Goss*, both of which assumed that without court intervention students would likely be harmed by their teachers, Justice Powell trusted teachers. He maintained that mistreatment like that claimed by the plaintiffs in *Ingraham* was an "aberration." And, unlike the *Goss* Court, which did not trust the school principal's immediate suspension of students for gross misconduct, Justice Powell essentially stated that, most of the time if a child is paddled for conduct directly observed by the teacher, he probably deserved it. In contrast to *Goss* and *Tinker*, the *Ingraham* majority expressed its confidence that teachers would usually restrain students in good faith and because of legitimate school concerns. This pronouncement was the first time a majority of the Court had made such a strong statement in support of order in public schools since *Tinker*. Thus, given this faith in teachers and the presence of additional safeguards—the openness of the school and the supervision by the community—the student would not suffer due to reduced constitutional protection. Instead, the processes of com-

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222 Justice Stewart changed sides between *Goss* and *Ingraham*. Chief Justice Burger and Justices Blackmun and Rehnquist sided with Justice Powell in both decisions.
223 See *Ingraham*, 430 U.S. at 683. In 1975 the Court affirmed, without opinion, a three-judge district court panel ruling that the state's interest in maintaining order was sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes despite parental objection. See *Baker v. Owen*, 423 U.S. 907 (1975), aff'g 395 F. Supp. 294, 301 (M.D.N.C. 1975).
224 *Tinker*, 393 U.S. at 511.
225 *Ingraham*, 430 U.S. at 670.
226 See *id*. In addition, many schools have guidance counselors, nurses, and parent volunteers who may witness and protest instances of mistreatment.
227 *Id*. at 677.
228 *See id*. at 677-78.
229 *See id*. at 678; cf. *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) (stating that it would be more appropriate to place the burden on those complaining to show that the school officials' action was motivated by other than legitimate school concerns).
230 See *Ingraham*, 430 U.S. at 678 & n.46. Justice Powell was referring to the Eighth Amendment's protection against cruel and unusual punishment. See *id*. at 670. Justice Powell also emphasized that Fourteenth Amendment due process concerns were satisfied by the state's...
Community debate and legislative action would address the issue better than Court intervention.

The division between Tinker/Goss and Ingraham was a stark one, both in substance and in tone. It was based on two divergent conceptions about the public school as an institution. Ingraham was undoubtedly a victory for those who would give public schools greater power to effectuate the mission of social reproduction. Indeed, Ingraham is perhaps, at least until Acton, the opinion that is most solicitous of school power. But it must have confused those educators who were responsible for the day-to-day operation of the school. After all, just two years after Goss had declared—in a 5-4 vote—that school officials could not suspend a student without notice and a hearing, the Ingraham Court determined—in another 5-4 vote—that it is permissible to paddle a child with no procedural safeguards. After Ingraham, it became more obvious than ever that the Court was reeling back and forth between social reconstruction and social reproduction and that the perceived need for school power based on the proclivity of any five Justices would decide the fate of our nation’s public schools. School officials might take some comfort from the tone of the Ingraham opinion, but with Goss and Ingraham each hanging by a 5-4 vote, teachers and principals trying to carry on each day could only guess at the direction the Court would take in future cases.

In New Jersey v. T.L.O., the Court continued to send conflicting messages because of its struggle to come to grips with school power. At one level T.L.O. appears to be a strong reconstructionist opinion. Indeed, it attempted to extinguish the main weapon in the reproduction arsenal—the in loco parentis doctrine. Before T.L.O. the lower courts were deeply split regarding how the in loco parentis doctrine affected searches at school. The Court relied on its most fervent reconstruction opinions, Tinker and Goss, to resolve the conflict in the lower courts and to repudiate in loco parentis. According to the Court, the in loco parentis doctrine was “in tension with contemporary reality” and with Court precedent holding that school officials were “state actors” in Tinker and Goss. Many courts and commentators agreed that the T.L.O. Court, together with the long arm of Tinker, had snuffed out in loco parentis. The Acton Court would show that they were wrong.

preservation and codification of common law constraints and remedies regarding corporal punishment. See id. at 674-80.


232 See supra notes 89-92 and accompanying text.

233 T.L.O., 469 U.S. at 336. The Court further stated that, given Tinker and Goss, it was “difficult to understand” why school authorities “should be deemed to be exercising parental rather than public authority” when conducting school searches. Id. Moreover, the T.L.O. Court emphasized a theoretical problem that had been acknowledged in Ingraham: “the concept of parental delegation” as a source of school authority is not entirely ‘consonant with compulsory education laws.’” Id. (quoting Ingraham, 430 U.S. at 662).

Despite this blow to in loco parentis, certain concepts animated the subtext of the T.L.O. opinion that were inconsistent with the reconstruction theme. Once the Court decided that school officials were subject to the Fourth Amendment, the Court still needed to determine where on the school power continuum the school's power to search begins and the protection of the Fourth Amendment ends. Ten years had passed since Goss. The Court now perceived the need for school power in the light cast by the rising tide of chaos in schools. The Court pointed out that "maintaining order in the classroom [had] never been easy, but [that] in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Because of the precipitous decline in school discipline and the very serious issues facing school officials, the need for power to keep order was great. Even in 1985 it was starting to become evident to some Justices that public schools were in trouble. Implicit in the Court's recognition of the effect of student drug use and crime on the educational process was the dawning recognition—a recognition that grated against Tinker and the social reconstruction model—that public school students must conform to the social order. It was hard to keep an image of the pure school child leading society's reformation when the child keeps others from obtaining a serious education and begins to look like an oppressor himself. Thus, although the Court was unwilling to say that school officials have all the power of a parent when searching students, the Court was also unwilling to constrain teachers with the warrant and probable cause standard usually required of the State.


235 T.L.O., 469 U.S. at 339. The Court also took judicial notice of the difficulty of maintaining discipline in the public schools "today." Id. at 338. The Solicitor General's Amicus Brief supporting the school had informed the Court of "the extent to which the disorder in the nation's public schools now transcends the traditional difficulties of focusing a child's attention on learning." Brief for the United States as Amicus Curiae at 22, New Jersey v. T.L.O., 469 U.S. 325 (1985) (No. 83-712) (citing to statistics on violence from a 1978 study by the National Institute of Education, available in LEXIS, Genfed Library, Briefs File. The Solicitor General informed the Court that many schools "are in such a state of disorder that the very safety of students and teachers is imperiled." Id. at 7.

236 See T.L.O., 469 U.S. at 352-53 (Blackmun, J., concurring in the judgment) (pointing out that due to increased drug use and possession of weapons at school, teachers need to be able to respond to problems quickly, not only to preserve the education environment, but to protect the safety of students and school personnel).

237 The Court observed that although prisoners had no legitimate expectation of privacy, it was not yet ready to hold that schools and prisons need be equated. See id. at 338.
At first the *T.L.O.* school power determination may seem like a reprise of *Tinker* and *Goss*. Nonetheless, there are hints in the majority opinion that the *T.L.O.* reasonable suspicion standard, although resting somewhere in the middle of the school power continuum, is of a different ilk than *Tinker*'s "substantial disruption" standard or *Goss*'s "continuing danger" standard. For example, Justice White, the author of *Goss*, was now willing to admit that school officials might be capable of reaching common-sense conclusions about the behavior of the students whom they deal with every day. In *T.L.O.*, a teacher saw a student smoking in a school lavatory. The assistant vice principal did not witness the smoking but based on the teacher's report, he searched the student's bag for cigarettes. Justice White allowed that the principal was acting based on a "'common-sense conclusio[n] about human behavior' upon which 'practical people' . . . are entitled to rely." Gone was the palpable mistrust of school officials so evident in *Goss*; gone was the idea that school principals, even if they personally witnessed obvious misconduct, were unable to make a reasoned judgment about what happened. Gone too was the Court's concern in *Goss* that school officials would discipline students unjustly if they acted in response to the reports of others, like the teacher who reported T.L.O. for smoking.

The disagreement between Justice Stevens and the majority about the importance of school rules is further evidence that the Court was slipping away just a bit from the reconstruction force field that, except in parts of *Ingraham*, had held it in tow since *Tinker*. Echoing *Tinker*'s substantial disruption standard, Justice Stevens would have allowed school officials the power to search a student only under limited circumstances: when there is reason to believe that the search will uncover evidence that the student was either violating the law or engaging in conduct "seriously disruptive of school order." Justice Stevens, in keeping with the adversarial character of the reconstruction model, believed that teachers must not be trusted to make their own determination whether the repercussions from student misconduct might be a sufficiently serious threat to school discipline to warrant a search.

The majority stressed, however, that it did not endorse Justice Stevens' view that some rules regarding student conduct were too trivial to justify a search based on reasonable suspicion. Instead, the majority stated that a search by a teacher or school official "will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Leaning away from the adversarial character of the recon-

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238 *See supra* notes 162-163 and accompanying text.
239 *See supra* note 207 and accompanying text.
241 *See Goss v. Lopez*, 419 U.S. 565, 580 (1975) (cautioning that the risk of error when school officials act on reports of others is not trivial, and "it should be guarded against if that may be done without prohibitive cost or interference with the educational process").
242 *T.L.O.*, 469 U.S. at 378 (Stevens, J., concurring in part, dissenting in part) (emphasis omitted).
243 *See id.* at 342 n.9.
244 *Id.* at 341-42 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)) (footnote omitted). The Court added that "[s]uch a search will be permissible in its scope when the measures adopted are
struction model here, the Court was willing to trust school officials to evaluate fairly what conduct is destructive of school order without judicial interference. Moreover, the Court correctly recognized, as it had not in Tinker, that "[t]he maintenance of discipline in the schools requires not only that students be restrained from assaulting one another [and] abusing drugs and alcohol, . . . but also that students conform themselves to the standards of conduct prescribed by school authorities." In essence the T.L.O. Court signalled that at least in the school search context, it trusted those who worked in schools every day to better discern the importance of school rules than judges in far-off courtrooms. The reproduction model once more found its strongest voice in Justice Powell, whose concurrence again stressed that, unlike the adversarial picture presented in the reconstruction model, teachers and students share in the institutional mission: "the education and training of young people."

Because maintaining order is essential to both school and student in this shared enterprise, it is in both the student's and the school's interest. Like Justice Powell, Justice Blackmun's focus on the school as a "special" institution with a "special need for flexibility" reveals his affinity for the reproduction model. Significantly, Justice Blackmun observed that within that "special" institution, teachers did not act as adversaries of the student but instead focused on the nonadversarial tasks of "teaching and helping" students.

Despite the loss of parental-like authority to search students without Fourth Amendment restrictions, the T.L.O. majority nonetheless allowed public schools more power to search school children than the State is generally allowed. In addition, the ability to act on a reasonable suspicion that a student is violating a school rule arguably allows schools the discretion to act to maintain order sooner than the material interference or ongoing threat standards of Tinker and Goss. Thus, the T.L.O. Court, while not going as far as Ingraham, was not as restrictive as Tinker and Goss. Most significantly, underlying the T.L.O. Court's sometimes confusing analysis of school power is the Court's as yet only vague notion that the opportunity to obtain a serious education in many of our nation's public schools was eroding at an alarming rate in the face of judicial involvement in school discipline.

The truth of Justice Black's prediction that Tinker transferred the power to control student behavior from the school to the Supreme Court was never more evident than in Bethel School District No. 403 v. Fraser. It took three years of litigation before the Supreme Court finally allowed the school to

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245 Id. at 342 n.9.
246 Id. at 350 (Powell, J., concurring).
247 Id. at 352 (Blackmun, J., concurring in the judgment).
248 Id. at 353 (Blackmun, J., concurring in the judgment).
249 478 U.S. 675 (1986); see James C. Dever, III, Note, Tinker Revisited: Fraser v. Bethel School District and Regulation of Speech in the Public Schools, 1985 Duke L.J. 1164, 1167-68 (documenting examples of students using Tinker "to challenge the actions of public school authorities concerning dances, demonstrations, discipline, student body elections, school searches, hair length, library books, movies, school plays, prayer meetings, textbook selection and school newspapers") (footnotes omitted).
impose a disciplinary sanction on Matthew Fraser for the nomination speech he gave at a school assembly.250

Although Chief Justice Burger attempted to distinguish the armbands in Tinker from Fraser's speech by pointing out that the armbands were a political message, the Fraser majority appeared to be retreating from Tinker, in essence saying, "if this is what is happening in the schools because of Tinker, we've gone too far." Indeed, the majority opinion in Fraser cited part of Justice Black's dissent in Tinker as "especially relevant."251

Like Justice Powell, Chief Justice Burger eschewed the adversarial component of the reconstruction model. Instead, parents, teachers, students, indeed the entire community, share in the enterprise—the education process—to maintain social order.252 Again, the school's mission of social reproduction informs the Court's assessment of the school's need for power: schools need the power to restrain those students who would inhibit the school's inculcation of the manners of civility.253 By allowing school officials that power, the Court sent a significant message that at least in some contexts, it trusted school teachers and principals to determine whether certain expression was sufficiently harmful to its reproductive mission to merit discipline. Indeed the Court, without any mention of T.L.O., even mentioned in loco parentis with approval, noting the "concern on the part of parents, and school

250 See supra note 30 and accompanying text. Note the reconstruction motif in the Ninth Circuit opinion:

We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as indecency in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1363 (9th Cir. 1985), rev'd, 478 U.S. 675 (1986).

251 Fraser, 478 U.S. at 686. "I wish therefore, . . . to disclaim any purpose . . . to hold 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." Id. at 686 (quoting Tinker, 393 U.S. at 526 (Black, J., dissenting)).

252 See Fraser, 478 U.S. at 681; see also Goss v. Lopez, 419 U.S. 565, 593-94 (1975) (chastising the majority for thinking of the school's relationship to students in "traditional judicial terms of an adversary situation") (Powell, J., dissenting).

253 Justice Stevens had remarked on the inculcative role of the public school in his dissent in T.L.O. See New Jersey v. T.L.O., 468 U.S. 325, 373 (1985) (Stevens, J., concurring in part, dissenting in part). He observed that "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry." Id. (footnote omitted). He focused in particular on the value of personal liberty, stressing that if students can be convicted through the use of arbitrary methods destructive of personal liberty, they will feel that they have been dealt with unfairly. See id. at 373-74 (footnote omitted).

In Fraser, Chief Justice Burger also stressed the inculcative role and purpose of public schools. See Fraser, 478 U.S. at 681 (citation omitted). But instead of stressing personal liberty as the value that was "necessary to the maintenance of a democratic political system," id., Chief Justice Burger emphasized the inculcation of the "habits and manners of civility," id. (internal quotation marks and citation omitted), the "shared values of civilized social order," id. at 683, and the "essential lessons of civil, mature conduct." Id. He expressed dismay over the effect the speech had on teachers and other students, in essence, subordinating Fraser's right to expression to the rights of others in the community. See id. at 683-84. The school's role in "teaching by example the shared values of a civilized social order" gave the school the power to dissociate itself from a student who showed such disregard for civility. Id.
authorities acting in loco parentis, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech.\textsuperscript{254}

Following the pattern described above, the \textit{Hazelwood} Court again used the reproduction and reconstruction models to determine how much power a school needs to control expression that is "disseminated under its auspices" in a school newspaper.\textsuperscript{255} A majority of the \textit{Hazelwood} Court, like the \textit{Fraser} Court, embraced the social reproduction model and based its assessment of the need for power on the commonality of interest between student, school, and community. Because publishing the newspaper was a "supervised learning experience"\textsuperscript{256} that was "part of the school curriculum,"\textsuperscript{257} the Court readily observed that the student and the school were bound up together in effectuating the school's mission. Thus, the school ought to have the power to "disassociate itself"\textsuperscript{258} from student speech that may affect public perception of the social reproduction mission: inculcating the "shared values of a civilized social order."\textsuperscript{259} The Court viewed the activity in question in \textit{Hazelwood}—a paper produced in a journalism class—as pedagogical. Thus, educators, rather than students or courts, should have the power to control the activity without heavy constraints. The Court accordingly allowed school officials power over the content of student speech in school-sponsored expressive activities if the school control is "reasonably related to legitimate pedagogical concerns."\textsuperscript{260} This standard—this "rank" on the school power continuum—was, without doubt, different from the substantial disruption standard that the \textit{Tinker} Court had set for student expression. The asserted distinction between \textit{Tinker} and \textit{Fraser}/\textit{Hazelwood} was that \textit{Tinker} involved personal expression that the school merely tolerated.\textsuperscript{261} Because the expression in \textit{Tinker} was not promoted by the school, it would not affect the community's view of the school mission, and the school did not need the power to control that expression. The need for power in \textit{Hazelwood} depended on the need to control the message to the community rather than the need to prevent disruption, and the Court changed the standard for allowing schools power as the need changed. Thus, the place where the Court placed school control on the school power continuum was different in \textit{Hazelwood} and \textit{Tinker}, even though both cases dealt with student expression.\textsuperscript{262}

\textsuperscript{254} \textit{Id.} at 684. Justice Brennan concurred in the judgment, but stressed that the school could discipline Fraser not because the speech was vulgar, but because school officials concluded it was disruptive. \textit{See id.} at 689 (Brennan, J., concurring in the judgment). Justice Marshall refused to accept the statements of teachers and administrators who witnessed the speech and claimed that it was disruptive. \textit{See id.} at 690 (Marshall, J., dissenting).


\textsuperscript{256} \textit{Id.} at 270.

\textsuperscript{257} \textit{Id.} at 271.

\textsuperscript{258} \textit{Id.} at 266 (quoting \textit{Fraser}, 478 U.S. at 685) (internal quotation marks omitted).

\textsuperscript{259} \textit{Id.} at 272 (quoting \textit{Fraser}, 478 U.S. at 683) (internal quotation marks omitted).

\textsuperscript{260} \textit{Id.} at 273 (footnote omitted).

\textsuperscript{261} \textit{Id.} at 270-71.

\textsuperscript{262} Justice Brennan and the dissenters endorsed the reconstruction model and would have set a different standard—closer to \textit{Tinker}—on the school power continuum. The dissenters did not believe school officials needed the power to restrain student expression unless it "‘materially disrupt[ed]’ a legitimate curricular function." \textit{Id.} at 283 (Brennan, J., dissenting) (quoting \textit{Tinker}, 393 U.S. at 513). Justice Brennan defined that function narrowly as the "skills" the
Divergent views of the purpose of the school paper drove the power assessment in *Hazelwood*. The majority viewed the school newspaper as part of the school's curriculum, so the school needed the power to limit the educational messages that were circulated. Without the power to limit the educational message, students may not learn what they should from the course, an improper educational message may be sent to other students (in this case, that it is permissible to trample on privacy rights or have irresponsible sex), and the other pupils and the community at large may think that the school endorses the inappropriate message.

The dissenters, resounding with the reconstruction model's view of the child struggling against society's values, viewed the newspaper as a forum in which the students may rebut the values that schools are attempting to inculcate. Because the child must reconstruct corrupt society and lead it to a newer and better place, the child must have the power to do so. Thus, the school should have no greater power than the student who wishes to discredit the values that the school deems essential to its reproductive mission.

4. *Out of the Shade of Tinker: A New School Power Paradigm*

The Court could have gone on in this manner—moving back and forth on the school power continuum based on the Justices' everchanging views regarding the reconstruction and reproduction models. But the Court recast the analysis of school power in *Vernonia School District 47J v. Acton*. Instead of arguing about the "special characteristics" of the school that may or may not allow for a certain amount of power on the school power continuum, the *Acton* Court simply set forth the very nature of the power the school possesses, and pronounced that the power is broad and deep.

As the Court described the facts, teachers and administrators in Vernonia, Oregon saw disciplinary referrals more than double in the late course was designed to teach. *Id.* at 284 (Brennan, J., dissenting). The dissent further stated that the principal's decision could not possibly have been based on any "lesson" involving responsible journalism. *Id.* at 285 (Brennan, J., dissenting). Justice Brennan did not dispute outright that the principal reasonably could have concluded that one of the deleted articles did not sufficiently protect the anonymity of the pregnant girls discussed. Indeed, Justice Brennan could not: a teacher had testified that she could identify at least one girl. *See id.* at 274. Instead, Justice Brennan was more concerned that the publishing students did not receive an explanation from the principal before the newspaper was printed without the article in controversy (the principal testified that he believed there was no time), *see id.* at 263, and that the principal's post-publication explanation was not detailed enough. *See id.* at 285 (Brennan, J., dissenting). His quarrel then, was apparently not with the principal's reasons for deletion, but with his methods.

The dissent asserted, consistent with the reproduction model, that teachers were the adversaries of the students and if given the chance would act as "thought police," would "assume an Orwellian guardianship of the public mind," and would "transform students into closed-circuit recipients" of state-approved topics. *Id.* at 285-86 (Brennan, J., dissenting) (internal quotation marks and citations omitted). To avoid the "brutal censorship" and "unthinking contempt" for individual rights of the adult oppressor, high school students—despite their presumed emotional immaturity and lack of experience with regard to the legal, moral, and ethical journalistic standards—should determine what is responsible journalism for a school-sponsored newspaper. *Id.* at 289-90 (Brennan, J., dissenting). According to the dissenters, the school did not need and should not have the power to make that determination.

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1980s, a trend they attributed to increased drug use. The school officials believed and the district court found that student athletes were not only using drugs, but were the leaders of the drug culture. After unsuccessfully trying to address the problem with special classes, speakers, presentations, and drug-detecting dogs, the school district held a parent “input night” to discuss the proposed drug testing policy. The parents in attendance unanimously endorsed the policy and the school board approved it.264

The Acton majority first pointed out that “special needs” existed in the public-school context, and that the T.L.O. Court “explicitly acknowledged” that “the Fourth Amendment imposes no irreducible requirement” of individualized suspicion of wrongdoing.265 But the Acton Court’s analysis of school power lies primarily in the section of the opinion that described the privacy interest of public school students.266 In that section, the Court achieved much more than simply declaring that student athletes have limited privacy expectations. By linking the legitimacy of those privacy expectations to the student’s legal relationship with the State, the Court could—in defining that legal relationship—set forth the nature of school power. In so doing, the Court breathed new life into what many viewed as the all-but-dead doctrine of in loco parentis. The Acton Court simply defined the nature of school power as “custodial,” “tutelary,” or that of a “reasonable guardian.”267

The Court emphasized that “central” to its analysis was the fact that those subject to drug testing are “(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.”268 The Court’s use of the term “custody” at the beginning of its school power analysis foreshadows the “custodial” nature of school power that the Court highlights later in the opinion. In addition, Justice Scalia used the term “schoolmaster” to lay the foundation for the Blackstone quote in the next paragraph—a quote that

264 See id. at 2388-89. Under the policy, students who wish to play sports “must sign a form consenting to the testing and must obtain the written consent of their parents.” Id. at 2389. Student athletes are tested once at the beginning of their sport season. Additionally, once each week of the season, 10% of the athletes are randomly chosen for testing. After the students produce a urine sample, an independent laboratory whose procedures are 99.94% accurate tests the samples for amphetamines, cocaine, and marijuana. See id. at 2389. A positive test entitles the student to a second test. If the second test is negative, the school takes no further action. If the second test is positive, the parents are notified. Then, at a meeting with student and parents, the principal gives the students the option of participating in a six-week assistance program (including weekly urinalysis) or suspension from athletics for the remainder of the season and the next season. Suspension penalties increase for second and third offenses. See id. at 2390.

265 Id. at 2391 (internal citation and quotation marks omitted). For a discussion of the special needs doctrine, see generally Kenneth Nuger, The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis, 32 Santa Clara L. Rev. 89 (1992).

266 Acton, 115 S. Ct. at 2391-93.

267 Id. at 2392, 2397.

268 Id. at 2391. By inserting the numbers “(1)” and “(2),” the Court indicates that these elements are to be analyzed separately. Thus, children who are not in the temporary custody of “the State as Schoolmaster” have different expectations of privacy. See Stuart C. Berman, Note, Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School Search Exception, 66 N.Y.U. L. Rev. 1077, 1123 n.249 (1991) (citing statutes and cases giving Fourth Amendment protection to minors outside the school).
The George Washington Law Review describes the parental delegation of power to the schoolmaster, who then stands *in loco parentis*.\(^2\)

Justice Scalia quickly noted that at common law, "and still today," children lack "some of the most fundamental rights of self-determination."\(^2\) Even the "right to come and go at will" is subject to the "control of their parents or guardians."\(^2\) Here Justice Scalia has both set up the control of parent or guardian as virtually absolute, "even as to [the child's] physical freedom,"\(^2\) and equated the power of a guardian—which he employed later in the opinion to describe the nature of school power—\(^2\) with that of a parent. After describing how children lack rights because of parental power and control, Justice Scalia changed the scene to the school. But Justice Scalia did not immediately reveal the nature of power in *public* schools. He first made a special point to discuss the power of teachers and administrators in *private* schools who, he stated, "stand *in loco parentis* over the children entrusted to them."\(^2\) In fact, he declared, the "tutor or schoolmaster is the very prototype" of *in loco parentis* status.\(^2\) The Court then quoted Blackstone’s description of *in loco parentis*: parental delegation of authority to the child’s tutor or schoolmaster, who is then considered to be *in loco parentis*, assuming the parent’s power of "restraint and correction."\(^2\)

Although the Court did not explicitly state that it unequivocally endorsed the *in loco parentis* doctrine in public schools, its description of the schoolmaster as the prototype of *in loco parentis* status and its quotation of Blackstone with approval surely conveys that the Court is comfortable with the doctrine, at least in some contexts.\(^2\) Moreover, by pointing out that private school teachers stand *in loco parentis* over schoolchildren, the Court pointed the reader toward the inference that this relationship may be part of the reason that private schools are generally considered capable of preserving the kind of environment where serious learning can take place.\(^2\) By

\(^{269}\) *See* Acton, 115 S. Ct. at 2391.
\(^{270}\) *Id.*
\(^{271}\) *Id.*
\(^{272}\) *Id.*
\(^{273}\) *See* id. at 2397 (describing school power as that of a "reasonable guardian").
\(^{274}\) *Id.* at 2391.
\(^{275}\) *Id.*
\(^{276}\) *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *453*) (internal quotation marks omitted).

\(^{277}\) *See* Kamisar, *supra* note 17, at 2246 (noting the Court’s emphasis on the fact that a drug detection policy involved minors “over whom school personnel stand in loco parentis” and questioning whether the entire student body could be tested under *in loco parentis* or some other justification); Rossow & Stefkovich, *supra* note 70, at 49 (stating that Acton “invigorated” *in loco parentis*); Drug Testing: High Court Gives Schools’ Adults Freedom to Make the Rules, CINCINNATI ENQUIRER, July 5, 1995, at A6 (stating that the “Court held that schools serve ‘in loco parentis’ for the children entrusted to their care”); Mickenberg, *supra* note 17, at C8 (noting Court’s “heavy reliance on the schools’ in loco parentis responsibility”); *Supreme Court, in School Case, Upholds Random Drug Testing*, DRUG DETECTION REP., July 5, 1995, at 1 (explaining that the Court based its opinion in part on the fact that children are “under control of school officials as stand-ins for their parents”).

\(^{278}\) *See* JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 179-80 (1982) (finding that private schools “produce better cognitive outcomes than public schools” even when “family background factors that predict
subtly approving the principle behind in loco parentis, Justice Scalia set the stage for the Court’s depiction of the nature of school power.

The Court first alluded to the source of the school’s power and then spelled out the nature of that power. The Court seemed to be asserting for the first time that the school possesses a sui generis power that has two sources: the delegated power of the parent and the power of the State.\(^{279}\) The Court observed that T.L.O. had “rejected the notion that public schools, like private schools, exercise only parental power over their students.”\(^{280}\) Justice Scalia pointed out that the Court had stated in T.L.O. that this view (presumably the view that public schools exercise “only” parental power) is not consonant with compulsory education laws and is inconsistent with opinions treating school officials as state actors in other contexts.\(^{281}\) To make the point that school power may nevertheless be derived from the parent, Justice Scalia depicted T.L.O. as “denying that the State’s power over schoolchildren is formally no more than the delegated power of their parents.”\(^{282}\) Thus, the power may be more than, but it still includes, the power of the parent.\(^{283}\) Significantly, despite the theoretical conflict between compulsory school laws and the theory of voluntary parental delegation of power, the Acton Court appears to have declared without explanation that parental delegation is nonetheless a source of school power.

As surprising as this declaration may seem, if it is truly compulsory school laws that are the primary theoretical problem with parental declaration of authority, the Court is actually on firmer ground than it would initially appear. In recent years, all fifty states have passed statutes that allow parents, subject to various checks and conditions, to teach their children at home.\(^{284}\) In the states with “home school” statutes, the parents may freely choose to educate the child themselves, rather than send the child to a school.

\(^{279}\) See Thayer, supra note 111, at 324 (noting that the school “as the servant of more than one master” is called upon to help students “resolve the conflicting claims of the local community, the larger society, and the accepted principles and ideals of a still higher authority”).

\(^{280}\) See id. at 2392. Justice Scalia was not entirely correct here. In discussing the conflict with compulsory education laws, the T.L.O. Court actually stated that “the concept of parental delegation as a source of school authority is not entirely consonant with compulsory education laws.” New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (emphasis added) (internal quotation marks and citation omitted). Indeed, one commentator observed that after T.L.O. “courts cannot possibly view public school officials as anything but ‘state’ actors when examining their conduct vis-a-vis students.” Goodwin, supra note 234, at 691 (emphasis added). The T.L.O. Court also stated, however, that “school officials act as representatives of the State, not merely as surrogates for the parent.” T.L.O., 469 U.S. at 336. But if Justice Scalia was attempting to clear up the ambiguity in T.L.O., he should have stated that he was doing so instead of claiming that the T.L.O. Court had set forth a straightforward analysis.

\(^{282}\) Acton, 115 S. Ct. at 2392 (emphasis added).

\(^{283}\) But see Levin, supra note 234, at 1680 (arguing that school is not extension of parent, but of government).

\(^{284}\) See Kaslow, supra note 153, at 9. See generally Jon S. Lerner, Comment, Protecting
In so doing, the parents also choose whether to keep to themselves all of the parental power that is necessary to restrain and correct the child so that he may obtain an education or, instead, to delegate the duty and the accompanying power to someone else. Rather than comment further on the dual source of the school’s power, the Court chose instead to denominate the nature of that power. It is the nature of that power that affects the privacy expectations of the students with regard to drug testing by the school. Of course, the nature of school power will also affect the privacy expectations of the students if the school attempts other kinds of school searches and will affect the analysis of other constitutional guarantees for students as well.

The nature of the power that schools possess is “custodial” and “tutelary,” terms the Court had never used before to describe the relationship between school and student. Later in the opinion the Court used the term “guardian” to portray the nature of the school’s power. Justice Scalia never explained how he selected the terms “custodial,” “tutelary,” or “guardian,” but he explained the effect of this power: the state is permitted a greater degree of “supervision and control” than it could exercise over “free adults”; close supervision of school children is required; schools may enforce “rules against conduct that would be perfectly permissible if undertaken by an adult.”

But Justice Scalia had to walk a fine line here. The more control the State exercises over school children, the more “custodial” a relationship becomes, the closer the State gets to a constitutional “duty to protect” under

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285 See 1 WILLIAM BLACKSTONE, COMMENTARIES *453 (stating that a parent may delegate part of his parental authority to the schoolmaster, who then has the power of restraint and correction “necessary to answer the purposes for which he is employed”).

286 See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) (“Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated . . . [either] a public secular education . . . [or] some form of private or sectarian education . . . “). But cf. Ingraham v. Wright, 430 U.S. 651, 670 (1977) (observing that students are “not physically restrained from leaving school”).

287 See supra note 267 and accompanying text.

288 In Schall v. Martin, 467 U.S. 253 (1984), the Court authorized pretrial detention of juveniles and stated that “juveniles, unlike adults, are always in some form of custody.” Id. at 265 (citations omitted). According to Acton, during school hours this custody is committed to teachers and school officials. See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2392 (1995). But cf. Ingraham v. Wright, 430 U.S. 651, 670 (1977) (observing that students are “not physically restrained from leaving school”).

289 Justice Scalia used the term “guardian” twice. See Acton, 115 S. Ct. at 2396 (“The most significant element in the case is . . . that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”) (footnote omitted); id. at 2397 (“[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.”).

290 The Court merely quoted T.L.O.’s statement that a proper educational environment requires close supervision and rules against conduct that would be permissible if undertaken by an adult. See id. at 2392.

291 Id. (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985)).
DeShaney v. Winnebago County Department of Social Services. Justice Scalia did not wish to signal to the lower courts that they had been wrong in their virtually unanimous post-Deshaney rulings that public school students do not have an affirmative constitutional right to governmental protection while at school. So in the midst of all this discussion of power, custody, and control, Justice Scalia must explain that this control by public schools—although substantial—is, "of course," not "as a general matter . . . such a degree of control over children as to give rise to a constitutional 'duty to protect.' "

In the same sentence where Justice Scalia claimed that public schools do not have "such a degree" of control, he described that control with a phrase that affords the school almost unconstrained power, the power the school obtains by acting in loco parentis:

While we do not, of course, suggest that public schools as a general matter have such a degree of control over children to give rise to a constitutional duty to protect, we have acknowledged that for many purposes school authorities act in loco parentis, with the power and indeed the duty to inculcate the habits and manners of civility.

Recall that Justice Scalia has previously described parental authority as control over "the most fundamental rights of self-determination." At last, Justice Scalia finally set forth the obligatory cite to Tinker—"while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate' "—but he severely limited those rights and sub silentio repudiated much of the Tinker subtext about reconstruction in the next clause—"the nature of those rights is what is appropriate for children in school." Given

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292 489 U.S. 189 (1989). Joshua DeShaney, a four year old child, sued social workers who failed to do anything about repeated beatings by his father. The beatings left Joshua with permanent brain damage and profoundly retarded. See id. at 193. The Court refused to find that the State had an affirmative duty enforceable under the Due Process Clause to protect Joshua. See id. at 198. Nonetheless, the Court stated that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Id. at 199-200 (citation omitted).

293 See, e.g., J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) (finding no duty to protect school children from a sexually abusive teacher).

294 Acton, 115 S. Ct. at 2392 (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)). For an argument that the affirmative duty analysis should be based on a certain level of state involvement (some state contribution giving rise to the claim) and on the defendant's state of mind (whether the defendant's knowledge of the circumstances amount to deliberate indifference to the victim's need for help), see Thomas A. Eaton & Michael Wells, Government Inaction as a Constitutional Tort: DeShaney and its Aftermath, 66 WASH. L. REV. 107, 111 (1991).

295 Acton, 115 S. Ct. at 2392 (internal quotation marks, alterations, and citations omitted) (emphasis added); see Rossow & Stefichovitch, supra note 70, at 49 (maintaining that in loco parentis is "invigorated" in Acton); Peters, Note, supra note 17, at 869 (stating that "the Court stated that teachers and administrators stand in loco parentis with respect to the children"). But see Levin, supra note 234, at 1680 (stating that in loco parentis is no longer relevant).

296 Acton, 115 S. Ct. at 2391.

297 Id. at 2392 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).
the nature of school power that Acton set forth, the rights that are "appropriate" for children in school will be circumscribed.298

The Court stressed that the most significant element in the case was that the drug testing was undertaken in furtherance of government responsibilities as "guardian" and "tutor." The Court then added a new test: "[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."299 It is interesting to note that Justice Scalia did not describe the government's responsibilities here as that of "custodian" and "tutor," even though he had earlier in the opinion twice described the nature of school power as "custodial" and "tutelary." In this test, however, the Court dropped "custodial" and added "guardian," and in the next paragraph he even referred to the students' parents as their "primary guardians,"300 implying that the school or school official is some kind of secondary guardian. The dissent did not take issue with the majority's characterization; indeed, the dissent agreed that "schools have traditionally had special guardian-like responsibilities for children that necessitate a degree of constitutional leeway."301

The contours of school power—as defined by the Acton Court—are thus broad and deep. Blackstone, whom Justice Scalia used to describe the power of the schoolmaster, describes the "guardian" as a "temporary parent."302 Generally, a guardian of a minor child has "the powers and responsibilities of a parent regarding the ward's support, care, and education."303 Similarly, a custodian generally means a person who has "care and control of a thing or person,"304 and custody of a minor child "embraces the sum of parental rights . . . includ[ing] the right to the child's services and earnings, and the right to direct his activities and make decisions regarding his care and control, education, health, and religion."305 It is not clear what the Court meant by "tute-

298 According to the Court, student athletes have even less of a legitimate expectation of privacy. See id. at 2392.
299 Id. at 2397.
300 Id.
301 Id. at 2404 (O'Connor, J., dissenting).
302 1 William Blackstone, Commentaries *460.
303 Uniform Guardianship & Protective Proceedings Act § 2-109, quoted in 39 Am. Jur. 2d Guardian and Ward § 17.5 (Supp. 1996); see also 39 C.J.S. Guardian and Ward § 3 (1976) (stating that a general guardian of the person of a minor virtually occupies the position of a parent, but the legal relationship is not identical with that of a parent) (footnotes omitted); id. at § 55 ("A guardian of the person of a minor stands in loco parentis, being vested with general power of control, and should supply the watchfulness, care, and discipline essential to the young . . . .") (footnotes omitted); 39 Am. Jur. 2d Guardian and Ward § 65 (1968) (guardian stands in loco parentis to ward) (footnote omitted). Although different types of guardians have legal recognition—statutory or testamentary guardians, public guardians, and general guardians, the Court did not specify any particular class guardianship; thus I state the powers thereof only in general terms.
lary" power, but the Court appears to contemplate a power greater than the state generally has over adults.306

Acton thus breaks the Tinker mold, even going beyond earlier attempts to modify Tinker. Now that the Court has stated what the nature of school power is, cases in the future will have to deal with Acton’s explicit declaration of strong school power rather than Tinker’s implicit endorsement of the constrained power of the reconstruction model.307 In the next section I explain why repudiating Tinker and reconstruction is good for public schools, and I suggest the direction that future refinements to Acton may take.

III. The Nature of School Power: The Future

A. The Strength of Acton

For those who are serious about the kind of public school reform that would revive confidence in the public school as an institution, Acton—though flawed—is a giant step in the right direction. It has addressed two problems with the Court’s opinions on school power that have vexed those who would have our nation’s public schools become institutions where students can and do receive a serious education. The first problem is the lack of predictability in the Court’s opinions as it moved up and down the school

306 See LA. CIV. CODE ANN. art. 2333 (West 1995) (“Unless fully emancipated, a minor may not enter into a matrimonial agreement without the written concurrence of his father and mother, or of the parent having his legal custody, or of the tutor of his person.”); LA. CODE CIV. PROC. ANN. art. 4261 (West 1961) (“The tutor shall have custody of and shall care for the person of the minor [and] shall see that the minor is properly reared and educated in accordance with his station in life.”). In Louisiana a “tutor’s” duties can also be similar to those of a trustee. See LA. CODE CIV. PROC. ANN. art. 4262 (West Supp 1996) (“The tutor shall take possession of, preserve, and administer the minor’s property .... He shall act at all times as a prudent administrator, and shall be personally responsible for all damages resulting from his failure so to act.”); see also Rossow & Stefkovich, supra note 70, at 49 (describing tutelary power as somewhat less than in loco parentis but allowing “far more control” than government generally has against adults).

307 Instead of being shaded by Tinker, one lower court has used Acton as support for holding that a search of a student by a public school “liaison police officer” was permissible. See People v. Dilworth, 661 N.E.2d 310, 317, 318, 321 (Ill.), cert. denied, 116 S. Ct. 1692 (1996). Another court has used Acton to uphold a generalized search of all male students if a metal detector has sounded; the students are asked to remove jackets, shoes, and socks, as well as empty their pockets and submit to a pat down. See Thompson v. Carthage Sch. Dist., 87 F.3d 979, 982 (8th Cir. 1996); see also Wojcik v. Town of N. Smithfield, 76 F.3d 1, 3 (1st Cir. 1996) (using Acton to support a determination that school officials did not violate the Fourth Amendment’s prohibition against unreasonable seizure by transporting a student thought to be abused to another school to be interviewed with a sibling); Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1013 (7th Cir. 1995) (implying that Acton limited rights of students: “We know that students do not completely surrender their constitutional rights at the schoolhouse gate [citing Tinker], but ‘the nature of those rights is what is appropriate for children in school’ [quoting Acton!’]); Cheema v. Thompson, 67 F.3d 883, 892 (9th Cir. 1995) (Wiggins, J., dissenting) (stating that Acton “reaffirmed that in the interest of safe school environments, students enjoy fewer rights than adults, or even than children outside of classrooms”); Moule Through Moule v. Paradise Valley Unified Sch. Dist. No. 69, No. 94-17021, 1995 U.S. App. LEXIS 25187, at *1 (9th Cir. July 10, 1995) (upholding school drug testing policy based on Acton). Commentators have observed that Acton may have provided the rationale for “re-empowering” school authorities. Rossow & Stefkovich, supra note 70, at 49. Nonetheless, there remains the possibility, of course, that some future majority will confine Acton to its specific facts.
power continuum, ducking and weaving its way both toward and away from \textit{Tinker}. The second problem is the reconstruction model and \textit{Tinker} itself.

There are always difficulties when the Court decides cases without a guiding principle, and the most obvious problem is the lack of predictability. Deep philosophical divisions in the Court give little guidance to teachers and school officials who must order their day-to-day behavior based on the Court's pronouncements. With no discernible theory of the nature of school power, teachers and school principals in public schools have been at a loss as to what they are allowed to do to maintain order.\footnote{Although it was sometimes possible to glean from an opinion what the vague contours of the power allowed in that particular case may have been, it was difficult to perceive any definition of the contours of school power from case-to-case over time or to take any guiding principle from the opinions that could instruct schools and courts in future cases. Put simply, the opinions before \textit{Acton} may have implicitly addressed why a certain amount of power was needed, but they never made an effort to delineate the nature or scope of that power.}

In addition, the Court never grappled with the serious public concerns that its opinions spawned. The cost in resources to the school to comply with an opinion like \textit{Goss} is not merely the cost of providing "some kind" of notice and hearing. The Court's decision in \textit{Wood v. Strickland}\footnote{The lower courts have also sent confusing signals. For example, in the \textit{Acton} litigation the district court upheld the school's drug testing policy, Vernonia Sch. Dist. \textit{v. Acton}, 796 F. Supp. 1354, 1365 (D. Ore. 1992), the Ninth Circuit reversed, 23 F.3d 1514, 1527 (9th Cir. 1994), and then the Supreme Court vacated and remanded, 115 S. Ct. 2386, 2397 (1995). The federal courts outside the Ninth Circuit were also split on the school drug testing issue. Compare Schaffel by Kross \textit{v. Tippecanoe County Sch. Corp.}, 864 F.2d 1309, 1324 (7th Cir. 1988) (allowing drug testing), \textit{with} Brooks \textit{v. East Chambers Consol. Indep. Sch. Dist.}, 730 F. Supp. 759, 766 (S.D. Tex. 1989) (holding that a drug testing program was unconstitutional), \textit{aff'd}, 930 F.2d 915 (5th Cir. 1991).} the same year it decided \textit{Goss} opened the door to damage actions against school board members and school officials who deny students their "basic, unquestioned constitutional rights."\footnote{The students claimed their due process rights were violated when they were suspended for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or at school activities. The Court held that although public school officials have a qualified good faith immunity from liability for damages under 42 U.S.C. § 1983, a school official is not immune "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected." \textit{Id.}} The prospect of a lawsuit, with its resulting publicity, expense, and unpleasantness is hardly one that will be relished by either teacher or school administrator, even if the school and teacher are ultimately vindicated.\footnote{\textit{"[T]eachers and counselors have become consistently unwilling to exert authority, in part because they fear litigation, but also because they 'are no longer sure that they know what is right, or if they do, that they have any right to impose it.'"} Hafen, \textit{supra} note 4, at 686 (quoting Grant, \textit{supra} note 4, at 41).}

Indeed, a threat by a student or parent, even if it is based on a
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groundless claim and falls short of a formal lawsuit, is an extremely disagreeable experience that most teachers and school administrators will attempt to avoid if at all possible. As Judge Learned Hand once declared, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death."\(^{312}\)

The murky constitutional standards set by the Court—"substantial disruption," "continuing danger," "reasonable suspicion,"—hardly give teachers, who are untrained in the law but fearful of a lawsuit, much comfort. The number of cases that followed in the wake of \(T.L.O.\) challenging whether a school official's suspicion was reasonable demonstrates the vague shape of the reasonable suspicion standard.\(^{313}\) A teacher who hopes to avoid trouble will not always respond right away to problems in the classroom. Rather than dealing with a problem immediately, careful teachers will either spend time trying to ascertain whether a court would find their suspicion reasonable or, more likely, will avoid the problem altogether to avoid any controversy.\(^{314}\)

\(^{312}\) Jerome Frank, Courts on Trial: Myth and Reality in American Justice 40 (1950).

\(^{313}\) "[T]he amorphous 'reasonableness under all the circumstances' standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators." New Jersey v. \(T.L.O.\), 469 U.S. 325, 365 (1985) (Brennan, J., concurring in part, dissenting in part). Students also sue school officials regarding the reasonableness of school "seizures." See, e.g., Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1011 (7th Cir. 1995) (addressing a claim in which a teacher and a school district were sued when a teacher momentarily grabbed a student's wrist and elbow to escort the fighting and cursing student out of the classroom); Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1078 (5th Cir.) (considering a suit in which a school district, a principal, and a teacher were sued for disciplining a disruptive student on a field trip to a detention center when they placed the student in a holding room so that other students could continue the tour without distraction), cert. denied, 116 S. Ct. 532 (1995).

The \(Acton\) Court recognized that testing based only on the reasonable suspicion standard of \(T.L.O.\) would generate lawsuits charging that the testing was imposed without reason or claiming that greater process was necessary before the testing could occur. See \(Acton\), 115 S. Ct. at 2396.

\(^{314}\) Students have used cases like \(Tinker\) and \(Goss\) to challenge a wide variety of decisions by teachers and principals. For examples of the kinds of lawsuits that schools and teachers have been forced to defend in federal court, see Wiemerslage Through Wiemerslage v. Maine Township High Sch. Dist. 207, 29 F.3d 1149, 1150-51 (7th Cir. 1994) (claiming that restricting access to an area adjacent to school gate violated the First Amendment right to assembly); Poling v. Murphy, 872 F.2d 757, 758, 760-61 (6th Cir. 1989) (challenging a decision to disqualify a student from running for student council president when the student gave a campaign speech to the student body that was "admittedly 'discourteous' and 'rude' " toward the assistant principal); Mitchell v. Board of Trustees, 625 F.2d 660, 661 (5th Cir. 1980) (challenging mandatory expulsion for violating a rule prohibiting weapons on campus); Hill by and through Hill v. Rankin County, Mississippi Sch. Dist., 843 F. Supp. 1112, 1114-15 (S.D. Miss. 1993) (claiming a due process violation when a student with a history of disciplinary problems was expelled after another student without provocation, knocking him down, and assaulting and cursing a school secretary); Broussard by Lord v. School Bd., 801 F. Supp. 1526, 1527, 1530 (E.D. Va. 1992) (claiming a one-day suspension for wearing a "Drugs Suck!" t-shirt violated the First Amendment and Due Process Clause); Draper v. Columbus Pub. Schs., 760 F. Supp. 131, 131, 134 (S.D. Ohio 1991) (alleging a procedural due process violation despite an informal hearing with a principal, written notice of a formal hearing and right to appeal sent to parents, and representation by an attorney at an appellate hearing); Dickens by Dickens v. Johnson County Bd. of Educ., 661 F. Supp. 155, 156-57 (E.D. Tenn. 1987) (claiming temporary placement in a "timeout" area that was segregated from other students violated due process); Havercamp v. Unified Sch. Dist. No. 380, 689 F. Supp. 1055, 1056 (D. Kan. 1986) (claiming a due process violation for removal from a varsity
Faced with the Court's mixed feelings regarding reconstruction and reproduction, its uncertain standards, its implied encouragement to challenge school decisions and the possibility of a damage action, the logical reaction by teachers and principals is to overcompensate, with the result that even the "modicum of discipline and order" that the Goss Court allowed was essential cannot be consistently maintained.\textsuperscript{315} Indeed the discretion that due process restrains may well be a "prerequisite to the maintenance of institutional excellence."\textsuperscript{316} As then-Professor Wilkinson\textsuperscript{317} predicted, "[t]he further entry into school discipline of so formidable a force as the courts and the judicial process may simply discourage some school officials from taking firm disciplinary action."\textsuperscript{318} To the extent that Acton encourages public school officials to reclaim order and discipline in the classroom, it will also enrich the opportunity of the public school student to obtain a serious education.

But what of the definition of school power that the Court has adopted? Although, as explained below, the Court's analysis needs refinement, its renunciation of Tinker and the reconstruction model is a welcome and heartening revelation for those who would revitalize the public school. Asking the school to be a major force in reconstructing society's ills is thrusting an enormous weight upon an institution that has burdens enough in performing the education process expected of it. Moreover, the Justices who used this model based their opinions on their own misconceptions about day-to-day life in the classroom and the way serious learning takes place.

Justice Fortas was simply wrong when he said "[t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities."\textsuperscript{319} If all schools
do is what the reconstructionists demand—accommodate students—the students will be unable to obtain the education necessary to put into effect the values inherent in the Constitution. Teachers must necessarily have the ability and the confidence to be judgmental—to demand that students adhere to higher standards of behavior. As Robert Maynard Hutchins observed, the "'ideal education'"—or what I call a "serious education"—is "'not an ad hoc education . . . . It is an education calculated to develop the mind.'"320 On the surface, preserving the educational environment necessary for children to develop the mind requires a degree of authority that at first appears antithetical to First Amendment values.321 As Professor Hamilton has written, the function of the First Amendment is to challenge tyranny,322 and we should find ways to teach children habits of mind that preclude totalitarianism. For children, though, the means is not to challenge school authority. Children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."323 "[I]f free speech is to be meaningful, a citizen must have something worth saying, together with the maturity and the skill needed to say it."324 Only an educated citizen will have the tools to challenge both government tyranny and that of demagogues.325

Maynard Hutchins, A Conversation on Education 11 (1963) (criticizing the American educational system for becoming "a program of accommodating the young until we are ready to have them go to work") (internal quotation marks omitted).


321 See Thayer, supra note 111, at 315-16 ("[G]rowing up involves of necessity a high degree of imposition and indoctrination of the young."); Levin, supra note 234, at 1649 (noting the conflict between creating an ordered environment and the rights of individual students).

322 See Marci A. Hamilton, Art Speech, 49 Vand. L. Rev. 73, 84-85 (1996) (illustrating how the First Amendment "enshrines the most effective means of challenging the ever-entrenching institutionalization of a government that is inherently separate from the people themselves") (footnote omitted); Marci A. Hamilton, The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence, 29 Ga. L. Rev. 81, 84-94 (1994) (examining the First Amendment's historical development as a tool to challenge tyranny).

323 Tinker, 393 U.S. at 515 (Stewart, J., concurring) (internal quotation marks and citation omitted).

324 Hafen, supra note 4, at 666; see also id. at 712 (noting the First Amendment interests of both students and society in sustaining the institutional authority of the school in fulfilling the broad educational goals of the public school system).

325 See Mark V. Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502, 1542-43 (1985) (describing the social base for the Framers' republicanism and stating that citizens must have "sufficient education in public matters and in their republican traditions to understand the virtues of the republican polity, in order that they be able to resist its subversion from within and without").
To help children obtain the necessary capacity for individual choice, the school curriculum must be strong and diverse. Students must first receive a "serious education"—perhaps the ultimate liberation—is not easy, and it is seldom, if ever, divorced from discipline. It most often involves hard work, concentration and constraints—discipline of self and discipline of others so that an environment can exist where serious learning can and will take place.

Requiring substantial interference or material disruption to the education process to occur before a teacher can discipline a student for expression simply does not allow schools to create an environment where serious learning will consistently occur. Even a "slight" disruption can derail a class for a significant period of time. Thus, the Tinker Court's substantial interference standard was based on a fundamentally flawed perception of the reality of the classroom. Although the Court seemed to concede that the school has certain pedagogical concerns, it erred when it second-guessed the school officials' judgment about the effect of the Vietnam protest on school students and the education process. This concern on the part of school officials was patently reasonable. As the district court found, when the armband regulation was promulgated, debate over the Vietnam war "had become vehement in many localities." A protest march had recently been held in Washington, D.C., and incidents of draft card burning had swept the country. "Both individuals supporting the war and those opposing it were quite vocal in expressing their views," even at the school board hearing on the armband regulation. In fact, a mere two months before the armband protest, peace marchers in Oakland were attacked by members of a motorcycle gang, who termed the protesters "un-American." It is no wonder that school officials and teachers believed that a protest would disturb the "disciplined atmos-

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326 Hafen, supra note 4, at 693 (stating that "the most fundamental interest young people have in the values of the first amendment" is "the right to receive a serious education").

327 See Morgan, supra note 140, at 97-98 ("The qualification of voters is as important as the qualifications of governors, and even comes first, in the natural order . . . . As the children now are, so will the sovereigns soon be.") (quoting Horace Mann's Lecture on Education, supra note 140); Suzanna Sherry, "Without Virtue There Can Be No Liberty", 78 MINN. L. REV. 61, 77-78 (1993) (arguing for education that makes one capable of participation as "a virtuous republican citizen"); cf. Paul M. Sniderman & Thomas Piazza, The Scar of Race 13 (1993) (suggesting that those with the least amount of formal education are more likely to make racial judgments).

328 See Hafen, supra note 4, at 665 (cautioning that "[e]xcessive student autonomy can impair the most fundamental learning processes"); see also Thayer, supra note 111, at 361 (noting that Walter Lippmann "attributed the failures of the western democracies in large measure to the fact that educators have substituted the 'cult of the child' for an 'emphasis upon informing and disciplining man's rational nature'"); cf. Ryan, supra note 116, at 348 (describing the two views of education as "those who thought the aim of education was to get the child to master an intellectual discipline" and "those who thought of the 'needs' of the child").


330 See id. at 973.

331 Id.

sphere of the classroom."\(^{333}\) Indeed, if a student had been harmed in any way because of the protest, school officials may have been liable under state tort laws for negligent supervision in failing to protect children from a foreseeable harm.\(^{334}\)

Any teacher knows that disruption of the educational process takes many shapes.\(^{335}\) The *Tinker* Court apparently believed that only a palpable disruption—a physical disturbance or disorder—could affect the school's function.\(^{336}\) But children are easily diverted from their studies and indeed often welcome the smallest distraction as an excuse to attend to something other than the task at hand. Moreover, as any teacher knows and studies of the learning process show,\(^{337}\) the kind of distraction that is sufficient to interfere with the learning process will vary from school to school, from class to class and sometimes even from day to day.\(^{338}\) Plainly the petitioners in *Tinker* wore the armbands to attract some kind of attention. The armbands did exactly what the school principals had feared: they allowed students to defy teachers' orders and diverted the students' minds from their studies to the "highly emotional subject of the Vietnam War."\(^{339}\) The teacher, certainly better than the judiciary, can best ascertain how a war protest at school would affect "the mental or emotional state that is necessary, appropriate, or desirable for learning to take place."\(^{340}\)

By inserting the reconstruction model into the Supreme Court's opinions, *Tinker* did more than merely allow a protest over Vietnam. It paved the way for the decline in school order and educational quality. It even helped to change student perceptions. The underlying message—a message that has

\(^{333}\) *Tinker*, 258 F. Supp. at 972.


\(^{336}\) *See id.* (suggesting that disruption can be nonphysical). Moreover, Justice Fortas was not clear whether the standard is met if conduct or speech merely causes others to be disruptive or if the conduct or speech must also be disruptive in and of itself.

\(^{337}\) *See generally* Diane Felmlee et al., *Peer Influence on Classroom Attention*, 48 SOC. PSYCHOL. Q. 215, 223 (1985) ("Our quantitative analysis suggests that a distracting comment or action does indeed have a statistically significant effect on the probability an individual becomes inattentive at a later point in the lesson, even when controlling for a number of individual and group characteristics.").

\(^{338}\) As Professor Hafen observed, "At one time a student may need the temporary repression of discipline in order to develop the skills necessary for genuine freedom. At other times, that same student may need to be left completely free (perhaps even pushed to break free) to try his or her creative wings." Hafen, *supra* note 4, at 667-68.


\(^{340}\) Diamond, *supra* note 335, at 486 (footnote omitted).
infected to some degree nearly every opinion since Tinker was written—is that, according to the highest court in the land, teachers should be treated like adversaries that should be confronted and challenged, because they are untrustworthy in dealing with students. In undermining the trust between teacher and student, the Court tore at the very fiber of the education enterprise. Even if not singularly responsible for school decline, the Court’s opinions have sent public messages that undermine the school’s efforts to provide students with a serious education. There is no “pedagogical device” to guarantee that a student will achieve.\footnote{See Kirp, supra note 12, at 855.} The success of the education enterprise “depends upon the formation of relationships between students and teachers premised on trust.”\footnote{Id. (emphasis and footnote omitted).} The trust between student and teacher is “vital, because it evokes student ‘motivation to learn . . . independently of teacher demands for compliance.’ ”\footnote{Id. (quoting Charles E. Bidwell, Students and Schools: Some Observations on Client Trust in Client-Serving Organizations, in Organizations and Clients 37, 50 (William R. Rosengren & Mark Lefton eds., 1970)).} But trust is a “personal bond” that is easily damaged and “may well be impossible to attain if students begin to perceive pedagogical objectives as alien to their own needs.”\footnote{Id.}

The Acton Court, like Justice Powell and the reproductionists, recognized the importance of trust between teacher and student. The Court simply refused to allow its opinion to turn the teacher into the adversary of the student. The Acton Court turned a deaf ear to the argument that only the least intrusive search practicable—drug testing only on suspicion of drug use—can be “reasonable” for Fourth Amendment concerns.\footnote{See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2393-94 (1995).} There are indeed difficulties with the individual suspicion alternative. Testing only on individual suspicion would transform the procedure into an accusatory process, with all the shame that goes with it, together with lawsuits claiming incorrect accusations or too little process. There is a risk that some teachers would arbitrarily test troublesome students. But the greatest danger of testing only on individualized suspicion is to the teacher-student relationship. Teachers are in school to educate. To ask individual teachers to play a major role in solving drug abuse by pointing out students they suspect of drug use to be urine-tested turns teachers into the adversaries and accusers, a role few will relish.\footnote{See Mary Beth Alexander, Prop. 187 Opposed by Schools, Enrollment Decline, Higher Costs Feared, L.A. Daily News, Oct. 16, 1994, at AV1 (quoting a school superintendent who feared that school employees would become “police agents” if forced to turn in potential illegal alien children as required by then-pending California Proposition 187). Moreover, an expert on drug abuse in the Acton case stated that, without drug testing, even specially trained teachers would still miss more than 90% of impairment caused by drugs and alcohol. Testimony of R.L. DuPont, M.D., Deposition Testimony at 32, Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354 (D. Ore. 1992) (No 91-1154MA) (April 24, 1992), quoted in Brief Amicus Curiae of National Sch. Bds. Ass’n, at 17-18, Vernonia Sch. Dist 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590) (available in LEXIS, Gented Library, Briefs File).} The risk of a wrong accusation or of ruining a relationship of trust with a student, even one suspected of drug use, will chill teacher accusations and may actually hinder the battle against drug abuse. Moreover, especially
as other institutions are crumbling, students need to have adult figures in
their lives besides their parents with whom they have an ongoing relationship
that is not so colored with fear or distrust.\(^{347}\)

Many students, as Justice Black predicted, are now “willing to defy their
teachers on practically all orders”; public schools are now subject to “the
whims and caprices of their loudest-mouthed . . . students.”\(^{348}\) But the repro-
duction model is not the only alternative to chaos in the schools. Although
abandoning the reconstruction model is a part of the solution, the wholesale
adoption of the reproduction model is not the only course, and it may not be
the best course available to the Court. Although Justice Black accurately
predicted the discipline problems that now occur in many public schools, it is
Justice Harlan’s brief dissent in Tinker\(^ {349}\) that comes close to setting forth a
workable principle for dealing with school power, a principle that has re-
mained buried in the Tinker dissent for almost thirty years, but that should
now be used to refine the new precepts that were set forth in Acton.

B. Refining the School Power Analysis

The problem with the power analysis in Acton is not that it took a sharp
turn away from Tinker and reconstruction. Rather, the Acton Court’s analy-
sis of the nature of school power—that of custodian or guardian—was not
sufficiently nuanced. By bluntly stating that public school power over the
student is tutelary, custodial and guardian-like, the Court gave short shrift to
a complex relationship.

Despite the Court’s use of the term “guardian” to describe school
power, the Court could not really have meant that a school official has all the
power of a parent or guardian, for a parent or guardian could, for example,
presumably strip search a child to search for drugs without reasonable suspi-
cion or make the child take a urine test nightly.\(^ {350}\) Surely school officials do
not have that power. But the Court’s use of the term “reasonable”—
“whether the search is one that a reasonable guardian and tutor might under-
take”—indicates that the Court attempted to set some kind of limit, at least
tacitly acknowledging that this guardian does not have quite the same power
as a parent. Nonetheless, if parents or guardians need not always act reason-
ably, and school officials must do so, then the Court has used the wrong con-
struct to define the nature of school power.

The Court was nonetheless on the right track, even with this defect. Ac-
ton is a starting point for refining the analysis of school power. The “reason-

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\(^{347}\) See Kirp, supra note 12, at 855 (noting the importance of “the formation of relationships
between students and teachers premised on trust” to the success of the educational enterprise);
rather, we trust, is a friend to one in need.”).

\(^{348}\) Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 525 (1969) (Black, J.,
dissenting); see also Morgan, supra note 140, at 49 (“The mobs, the riots, the burnings,
the lynchings, perpetrated by the men of the present day, are perpetrated, because of their vicious or
defective education, when children.”) (quoting Horace Mann’s Lecture on Education, supra
note 140).

\(^{349}\) See Tinker, 393 U.S. at 526 (Harlan, J., dissenting).

\(^{350}\) Assuming no physical or sexual abuse.
able guardian" construct resonates with Justice Harlan's proposal in his dissent in *Tinker* that the Court look at the "good faith" of school officials' actions. Justice Harlan would have accorded school officials "the widest authority in maintaining discipline and good order in their institutions." To that end, he would require the student to show that the school's restraint was "motivated by other than legitimate school concerns." The significant feature of Justice Harlan's proposal is that it essentially envisioned a "best interest" analysis; he assumed that the teacher—who is trained and experienced in the pedagogical needs of students—would act in the best or "legitimate" interests of the students unless the student could show otherwise.

Within Justice Harlan's dissent lies the outline for another definition of the nature of school power. Instead of the guardian-ward construct set forth by the Court, an attorneyship model may better describe the power relationship between student, parent, and school. Professor Hamilton has posited that the attorneyship model of representation, rather than self rule, describes the role of the representative in a liberal republican democracy. Building on the works of Constitutional Framer James Wilson and contemporary ethicist David Luban, Professor Hamilton proposed "a theory of representation patterned after an attorneyship model that envisions the legislator acting as an attorney to her constituents." Although Professor Hamilton contends that the rights and obligations of legislators and their constituents are like that of attorney and client, the model may also have relevance in the school context. As Professor Hamilton explains, "A representative under the attorneyship model is entrusted with delegated responsibility to act in the best interest of her present and future client-constituents while fulfilling an obligation of continual communication." Like a class action attorney, the legislator is delegated the power to make independent judgments by weighing the desires and needs of both present and future clients. The basis for the delegation is the impossibility of running the government "by plebiscite." The representative and the client-constituents are bound together in an "overarching mutual political commitment" to each other. Indeed, the representative acts as the "trustee" for the larger enterprise and, because of that responsibility, may be forced to ignore the voices of some individu-

351 *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting).
352 *Id.* (Harlan, J., dissenting).
353 The *Hazelwood* Court hinted at Justice Harlan's theory when it stated that the school principal had power to control student speech if the restraint was "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (footnote omitted). But the Court acknowledged that power only because the newspaper in question was part of a school-sponsored activity in a journalism class. Pedagogy is much more than what goes on in a particular classroom activity. It is in the atmosphere that exists throughout the entire school—in the hallways, at the lockers, and anywhere that students meet teachers and each other. *See Diamond, supra* note 355, at 478 n.4.
355 *Id.* at 529 (footnote omitted).
356 *Id.* at 523.
357 *See id.* at 534.
358 *Id.* at 533-34.
359 *Id.* at 535 (footnote omitted).
Like an attorney, a legislator's abdication of the responsibility of exercising independent judgment—by refusing to vote, giving narrow interest groups the ultimate decision or engaging in pretextual decisionmaking—is a serious offense. Perhaps most important, the communication element of the attorneyship model gives the people the ability to judge how their representatives exercise their delegated powers and detect any abuse thereof.

If public schools were viewed through the lens of the attorneyship model, we would see school officials entrusted with the delegated responsibility to act in the best pedagogical interest of present and future students while fulfilling an obligation of continued communication with both student and parent. In short, parents would delegate to school officials—teachers and principals—the power to make independent judgments regarding "legitimate school concerns." The delegation occurs because of the hardship on parents who would attempt to shoulder the entire education function—although under recent home schooling laws they may do so if they wish—and the impracticability of allowing the students to make the pedagogical determinations necessary to run the schools and to teach themselves. Although parents, students, and teachers share a common interest in teaching society's youngest members, it is the school officials who are the trustees of that common cause for a significant part of each day. They may sometimes ignore individual voices as long as they are acting within their fiduciary duty to make independent judgments regarding legitimate school concerns. An attorneyship model would leave school officials with the sort of discretion with respect to school order that attorneys exercise with regard to legal strategy.

A comprehensive analysis of how the attorneyship model fits into the school setting is beyond the scope of this Article. But the definition of school power that the Court set forth in Acton may not be the best or even the correct construct. Further study of the construct that should define the nature of school power may help to resolve some of the problems inherent in

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360 See id. at 536.
361 See id. at 538.
362 See id. at 540-41; cf. Ingraham v. Wright, 430 U.S. 651, 670 (1977) (reasoning that the "openness of the public school and its supervision by community afford significant safeguards against abuse").
363 Cf. Mark G. Yudof, Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in Public Schools, 1981 Wisc. L. Rev. 891, 893 (arguing that community control, rooted in expanding patterns of democratic participation, may represent still another mechanism—inconsistent with the legalization model—for controlling government discretion).
364 Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting); see also Hafen, supra note 4, at 723 (explaining that Justice Harlan's dissent would "discourage courts from second-guessing even 'unwise' educational judgments and would encourage courts to resolve questions of fact or law in favor of educational policy makers, while still providing for protection" from extreme decisions); Note, supra note 204, at 1122 (interpreting the opinion in Board of Curators v. Horowitz, 435 U.S. 78 (1978), as the Court's acceptance of the "constraining effects that professional training will bring to the exercise of official power") (footnote omitted).
the *Acton* decision, and it is on this important issue that the scholarship should now focus.366

**Conclusion**

By defining the nature of school power, the *Acton* Court has taken a step toward both practical and theoretical public school reform that may result in less court intervention in the day-to-day life of the classroom. The Court has defined school power such that schools possess the power of a custodian or guardian. The school power continuum, at least for Fourth Amendment purposes, has shifted to the parent end and, if some of the language in *Acton* is taken literally, may even have shifted back to *in loco parentis* power. In its definition of school power, the Court has made plain that the mission of the public school is social reproduction, rather than social reconstruction. By defining the contours of school power, however, rather than merely saying that the school has "special characteristics," the Court has made it more difficult for a future Court, at least that purports to follow *Acton*, to use the school power continuum to press the social reconstruction agenda. And the Court certainly has signalled to the nation that it has confidence in the public schools and educators to deal with yet another social issue: the war on drugs.

Defining school power also gives principals and teachers necessary guidance about the nature of the power they wield, guidance that may help alleviate the chilling effect that court intervention has on attempts to keep order. Public schools—if they are to continue as an institution—simply must be allowed to keep order. Studies have reinforced what many already believed—that students simply learn better in private and parochial schools than in public schools.367 Most important, even after controlling for student backgrounds, the study determined that the most significant difference between public and private schools was the presence of a safer, more disciplined, and more orderly learning environment.368 Recent reports also reveal that a majority of parents would send their children to a private school if they could afford it.369 Indeed, parents and children have not flocked to public schools

366 Cf. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (exploring the notion that the "parent's legal relationship to the child is shaped by fiduciary responsibilities . . . rather than by inherent rights derived from status") (footnote omitted). 367 See COLEMAN ET AL., supra note 278; COLEMAN & HOFFER, supra note 278. 368 See COLEMAN ET AL., supra note 278, at 180-81; see also COLEMAN & HOFFER, supra note 278 (pointing out that black and Hispanic children of parents with lower education levels who attend private Catholic high schools perform significantly better than similar students in public schools). 369 See, e.g., Deborah Anderluh, *Disheartened Parents Choose Private Schools*, SACRAMENTO BEE, June 18, 1995, at A1 (reporting that middle and working class parents are spending past and future savings to avoid a public school system in which they have lost faith); Sean Griffin & Susan Gordan, *Private or Public? Two Schools of Thought*, NEWS TRIB., June 1, 1994, at 1 (special section) (citing a poll in two counties of Washington State in which two-thirds of the respondents said they would prefer private school or home school education for their children if they could afford it); Kaufman, supra note 9, at A1 (citing a nationwide survey where six in ten parents said they would send their children to private school if they could afford it). One study showed that 59% of public school teachers with an annual family income of greater than $70,000
because students have greater constitutional rights there than in private schools. Many parents know that school children need an ordered environment to obtain a serious education. They will stay with public schools if an ordered environment exists, but will leave—if they can afford to—when it does not. As usual, the poorer children suffer the most. Poor children are left in a system that is not working, but that will not be repaired because the rich and the powerful have moved their children elsewhere and have no further incentive to help the public school system.

To the extent that Acton will help the public school start to regain the respect, deference, and trust that is so necessary to an institution that attempts to inspire serious learning, it is truly a commendable opinion. For if we are unwilling to defer to teachers when they are motivated by “legitimate school concerns”;370 if we are unconcerned about the lack of respect that students show toward both public school teachers and the process of learning in that institution; if we are unwilling to trust public school educators to implement necessary disciplinary measures so that serious learning can and will take place, we should disband our nation’s public schools and declare them a failed experiment. That, I am certain, is not the right path to take.
