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The Evolving Constitutional Rights Of Students

Over past 40 years, courts refine powers of school officials

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Forty years ago, the U.S. Supreme Court first recognized the constitutional rights of students in public schools in its watershed decision of *Tinker v. Des Moines Independent Community School District.* Prior to *Tinker*, courts viewed school officials as acting *in loco parentis* — literally, "in the place of a parent" — and, with limited exceptions, recognized the broad authority of school officials to enact and enforce rules to maintain order in the schools.

The court's decision in *Tinker* marked the imposition of constraints on the *in loco parentis* doctrine, constraints reflecting the status of school officials as government agents. Through the years since *Tinker*, the court has balanced the role of school officials acting *in loco parentis* with the constitutional limitations on governmental actors imposed by Bill of Rights protections. While articulating students' rights, the court has acknowledged that the special characteristics of the school environment mandate different standards for school officials as compared to other governmental actors, and has developed uniquely designed rules to accommodate the evolving nature of the public school environment.

Tinker

Tinker involved the suspension of students who, in violation of a recently created school rule, wore black armbands to school as a Vietnam War protest. The court ruled that school officials' imposition of discipline violated the students' First Amendment rights; and established that school officials may regulate student speech only when they reasonably forecast that the speech will result in one or more of the following: 1) a substantial disruption of the educational process; 2) material interference with school activities; or 3) invasion of the rights of others. At that time, *Tinker* represented a sea change, as courts had previously deferred to school officials' virtually unlimited authority to regulate student conduct while in school.


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Even as the Supreme Court ushered in this fundamental change, however, it made clear that student rights would not be coextensive with adults' rights. Instead, the court emphasized that constitutional principles needed to be "applied in light of the special characteristics of the school environment." Put another way, the rights of students would be balanced against the responsibility of school officials to maintain an orderly school environment.

The balancing of constitutional limitations with school officials' quasi-parental authority is also evident in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988).

In *Fraser,* the court held that school officials' imposition of discipline did not violate the free speech rights of a student who gave a speech laden with sexual innuendo at a school assembly. Although lower courts had relied on *Tinker* in ruling for the student, the court upheld the school's actions based on the objectionable content of the student's speech, holding that the "inculcation . . . of the 'fundamental values necessary to the maintenance of a democratic political system' . . . [is] truly the work of the schools." After *Fraser*, in light of the special role the schools play in student character development, school officials can regulate indecent student speech at school, without a concern that such regulation would violate students' free speech rights.

Similarly, in *Kuhlmeier*, the court sided with school officials in a dispute over censorship of the school newspaper. In another departure from traditional First Amendment rulings, the Court held that school officials can regulate school-sponsored student speech whenever they have a legitimate pedagogical interest in doing so.

T.L.O.

In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the court ruled that "public school officials do not merely exercise authority voluntarily conferred on them by individual parents . . . [but] rather . . . act in further-

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ance of publicly mandated educational and disciplinary policies." In *T.L.O.*, the court considered whether school officials had violated a student's rights by searching her personal effects.

Although the court upheld the legality of the search, it explicitly recognized students' Fourth Amendment rights in the school setting. However, the court stopped short of mandating the probable cause standard applicable to searches by the police. Instead, the Supreme Court adopted a lower "reasonable suspicion" standard for school officials, in light of the need for "swift and informal disciplinary procedures . . . in the schools."

T.L.O. established that, when assessing the reasonableness of school officials' search of a student, courts must determine: 1) whether reasonable grounds exist at the inception of the search to show that the search will turn up evidence that either the law or school rules have been violated; and 2) whether the search is reasonable in scope and not excessively intrusive in light of the age and sex of the students involved.

In 2007, the "special characteristics of the school environment" led the court to rule that school officials can restrict student speech when such speech is "reasonably viewed as promoting illegal drug use," notwithstanding the *Tinker* standard.

In *Morse v. Frederick*, 551 U.S. 393 (2007), the Court upheld a school's discipline of a student who had unfurled a large banner reading "BONG HITS 4 JESUS" just as school was being dismissed to attend the televised Olympic torch relay. The decision highlights school officials' broad authority to restrict student speech in the school setting when such speech pertains to drugs. The tension between the doctrine of *in loco parentis* and the constraints imposed on it by constitutional limitations is noted in the concurring opinion entered by Justices Samuel Alito and Anthony Kennedy, who observed that "[w]hen public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents."

The Supreme Court recently weighed in once again on student rights in *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009). In *Safford*, the court held that school officials had violated the constitutional rights of a 13-yearold girl by subjecting her to a strip search based on suspicion that she had brought prohibited prescription and over-the-counter drugs to school. The majority applied the *T.L.O.* standard for assessing the propriety of the search, providing further guidance on what constitutes an excessively intrusive search by holding that school officials went too far by conducting a strip search when looking for common pain relievers. The court recognized that school officials act like parents, as the court analogized the school official who had conducted the search to parents who overreact to "protect their children from danger."

However, *Safford* underscores the constitutional limits on the *in loco parentis* doctrine, as lamented by Justice Clarence Thomas, who opined in his concurring and dissenting opinion that the majority had imposed "a vague and amorphous standard on school administrators" and had granted judges "sweeping authority to second-guess" the decisions of school officials. In light of these concerns, Thomas advocated a return to a broad acceptance of *in loco parentis*, a doctrine which, in his view, more readily allows "schools and teachers to set and enforce rules and to maintain order."

Despite Thomas' views, in the four decades since *Tinker*, the Supreme Court has narrowed the doctrine of *in loco parentis* as a legal basis for regulating student conduct while in school. In the process, it has adopted rules that recognize student constitutional rights, but those rights are to be applied "in light of the special characteristics of the school environment," as Justice Abe Fortas famously declared in *Tinker*. Over the next 40 years, the makeup of the Supreme Court and the school environment will change, doubtless leading to further guidance on the middle path that school officials must tread in their efforts to balance their responsibility to guide students' character development with their obligation to respect students' constitutional rights. ■