THE TWENTY-SIXTH AMENDMENT: RESOLVING THE FEDERAL CIRCUIT SPLIT OVER COLLEGE STUDENTSô FIRST AMENDMENT RIGHTS

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I. INTRODUCTION

The free speech rights of public university students are in a precarious position. Since the mid-1980s, public universities across the country have routinely, and often unapologetically, restricted their students' expression. In order to create welcoming and safe environments for their students, universities regulate student speech by promulgating civility codes; banning verbal harassment; censoring the student press; implementing overbroad time, place, and manner restrictions; and denying funding to student groups with disfavored views.[1]

An important ambiguity in the Supreme Court's jurisprudence enables this regulation to occur: specifically, the question of whether the First Amendment standards developed for secondary and primary schools apply to universities.[2] Since it first addressed the university,[3] the Court has conceptualized it as possessing a distinct function in society.[4] It has held the university up as an open marketplace of ideas whose primary function is truth-seeking. This characterization of the university, which emphasizes unbridled dialogue as an essential component of the academic endeavor, stands in sharp contrast to the functions the Court has assigned to primary and secondary schools, which are to keep students safe and cultivate their moral and civic character. In *Hazelwood School District v. Kuhlmeier*,[5] a 1988 decision, the Court explicitly challenged its own distinction between universities, on the one hand, and primary and secondary schools on the other. In a footnote, the *Hazelwood* opinion "reserved" the question of whether the deferential standard it had laid out for high school speech regulation applied to

1. *See infra* Part II, A.

2. *See infra* Part II, C.

3. Unless otherwise specified, throughout the article, "university" refers only to *public* universities and colleges. Because constitutional rights apply against state action, they do not bind the actions of private schools.

4. *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

5. 484 U.S. 260 (1988).

universities.[6] The indecision indicated by the Court's reservation—namely, that the deference allotted to secondary schools to regulate their students' speech *might* apply to universities—has not since been clarified by lower federal courts. Instead, the federal circuits have produced conflicting standards, which range from treating universities exactly like high schools to treating them as wholly distinct institutions.[7]

In a 2007 opinion, the Court expanded high schools' ability to regulate their students' speech without clarifying whether this expansion applied to the university. In *Morse v. Frederick*, the Court upheld a high school's decision to suspend a student for displaying a sign that read "BONG HiTS 4 JESUS" at a public, non-curricular event.[8] As the Court has further empowered high schools to circumscribe their students' speech, universities and some federal circuits, focusing on the similarities between high schools and universities, have deployed the Court's logic and precedent to justify universities restricting their students' speech, imperiling the university's *raison d'etre* as the premier marketplace of ideas.

Surprisingly, there is a paucity of legal scholarship addressing the threat to free speech at universities.[9] This article seeks to fill that void by drawing attention to the threat and providing an argument for sharply distinguishing the rights of primary and secondary school students from the rights of university students.

The argument proceeds by first specifying the reason primary and secondary school students have diminished rights: their immaturity and lack of self-sufficiency. The question of when this childhood abrogation of constitutional rights ends has never been addressed by the Court. By examining the history and text of the largely forgotten Twenty-Sixth Amendment, which gave eighteen-year-olds the right to vote, this article argues that the abrogation must end at age eighteen.

Up to this point, the Twenty-Sixth Amendment has only appeared

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6. *Id.* at 273 n.7.

7. *See infra* Part II, D.

8. 127 S. Ct. 2618, 2629 (2007).

9. Many student notes and comments have addressed the narrower issue of applying *Hazelwood*, the Supreme Court case enabling secondary schools to censor their students' newspapers, to the college press. *See, e.g.*, Daniel A. Applegate, *Stop the Presses: The Impact of* Hosty v. Carter *and* Pitt News v. Pappert *on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. L. REV. 247, 271-79 (2005); Michael O. Finnigan, Jr., *Extra! Extra! Read All About It! Censorship at State Universities:* Hosty v. Carter, 74 U. CIN. L. REV. 1477, 1489-96 (2006); Jessica B. Lyons, Note, *Defining Freedom of the College Press After* Hosty v. Carter, 59 VAND. L. REV. 1771, 1792-94, 1804-07 (2006); Virginia J. Nimick, *Schoolhouse Rocked:* Hosty v. Carter *and the Case Against* Hazelwood, 14 J.L. & POL'Y 941, 982-96 (2006); *First Amendment—Prior Restraint—Seventh Circuit Holds that College Administrators Can Censor Student Newspapers Operated as Nonpublic Fora*—Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc), 119 HARV. L. REV. 915, 919-22 (2006); Jeff Sklar, *The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of* Hazelwood*'s Application To Colleges*, 80 S. CAL. L. REV. 641 (2007). One article dealt with the same issue of applying *Hazelwood* to the college press. Derigan A. Silver, *Policy, Practice And Intent: Forum Analysis And The Uncertain Status Of The Student Press At Public Colleges And Universities*, 12 COMM. L. & POL'Y 201 (2007).

in the legal literature in passing.[10] A close study of the amendment's origins demonstrates that by the time it came up for debate, the people understood the act of enfranchisement to entail the confirmation of full citizenship in the political order. Citizens on both sides of the Twenty-Sixth Amendment debate conceived of the amendment as granting young people "full-fledged citizenship," with all the attendant rights and responsibilities.[11]

Although the initial impetus for the amendment was a desire to give full citizenship to the eighteen-year-old soldiers fighting in Vietnam, the debates focused on the role young people should take in civil and political society. Supporters considered young people mature and responsible, capable of bringing unique assets to the political order. Opponents, in contrast, saw young people as immature, needing a sheltered environment free from "bad" influences. These conflicting visions played out most clearly with the university campus in mind.[12]

When the Twenty-Sixth Amendment came up for debate, the university had only recently started to shed its *in loco parentis* role. The changing legal relationship between the student and the university occupied the main stage in the amendment's debates, as advocates on both sides of the aisle believed that the amendment, if it passed, would preclude the *in loco parentis* model of the university. Opponents of the amendment endorsed the *in loco parentis* university, claiming that the university environment had already become too permissive, producing "malcontent children."[13] They saw university students as morally immature, emotionally charged children, susceptible to the influence of simple slogans and demagoguery. Meanwhile, supporters saw university students as skeptical and rational, capable of seeing through the ruse of demagogues and able to think independently. Correspondingly, they endorsed the Athenian ideal of education, seeing the university as a place where students and teachers engage together in an open pursuit of truth.[14]

Immediately following the amendment's ratification, many legal shifts occurred that incorporated the principle of full citizenship for eighteen-year-olds into the law. States almost uniformly lowered their age of majority from twenty-one to eighteen.[15] In the year after the amendment's ratification, the Court took its first case addressing

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10. Articles on constitutional theory, the voting rights of college students, and childhood rights have mentioned the Twenty-Sixth Amendment briefly. *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 967 (2002) (mentioning history in passing in a theoretical argument about how to interpret the Fourteenth Amendment); Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 562-63 (2000) (containing a few paragraphs on the history of the amendment); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 808 (1999) (containing one paragraph mentioning the amendment and the debates).

11. *See infra* Part III, C.

12. *See infra* Part III, D.

13. *See infra* notes 191-202 and accompanying text.

14. *See infra* Part III, D.

15. *See infra* Part IV, A.

university students' First Amendment rights and accepted the petitioners' argument that university students possessed full, unabridged constitutional rights.[16] In a concurrence, Justice Douglas explicitly tied this development to the Twenty-Sixth Amendment, noting that the amendment precluded the possibility of treating university students as anything other than free adults.[17] The Twenty-Sixth Amendment, as well as Justice Douglas's concurrence, proceeded to ground the judiciary's subsequent move to eliminate the university's role *in loco parentis* in civil law.

The civil and constitutional doctrine following the ratification of the Twenty-Sixth Amendment incorporated the debates' bright-line rule: eighteen-year-olds cannot be denied constitutional rights based on their alleged immaturity.[18] Arguing that this rule should be resurrected in full, this article—like the debates themselves—connects this age-based principle to the rights of university students. Because the university population is overwhelmingly over the age of seventeen, and the secondary school population is overwhelmingly under the age of eighteen, the bright-line rule on the age of adulthood creates a bright-line rule between secondary schools and the university. With respect to the First Amendment, a well-established line of cases dictates that the state can suppress speech harmful to children only if it does not overburden adult-to-adult speech.[19] This produces a deferential standard of review for speech in secondary school, which is primarily a forum for children, and conversely, a strict standard of review for speech in the university, which is almost exclusively a forum for adults.

This article aims to incorporate this lost constitutional history into the constitutional doctrine. A few legal scholars have argued that the Voting Rights Amendments, namely the Fourteenth, Nineteenth, and Twenty-Sixth Amendments, dictate broader constitutional principles than their literal texts provide. While bolstering the argument in this paper, the current legal scholarship fails on two fronts. First, it only touches on the history of the Twenty-Sixth Amendment in passing, and in omitting this history, current scholarship ignores the strongest normative justification for incorporating the Amendment into the constitutional doctrine more broadly than its literal text. Second, the legal scholarship fails to note that the Twenty-Sixth Amendment alone among the Voting Rights Amendments informs a widely accepted, legitimate, non-textual constitutional principle and thus merits separate analysis. The Fourteenth Amendment guarantees rights to all persons; the fact that children legitimately receive abrogated constitutional rights arises, accordingly, not from the text of the Constitution, but from non-textual sources such as societal norms, ethical principles, and traditions. The

16. *See infra* notes 301-309 and accompanying text.
17. Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).
18. *See infra* Part IV, B.
19. *See infra* notes 352-367 and accompanying text.

Twenty-Sixth Amendment, uniquely among the Voting Rights Amendments, provides a textual basis for the upper boundary on an accepted, non-textual principle of constitutional law.

Recovering the Twenty-Sixth Amendment's history untangles the current legal confusion regarding the status of university students' rights. Contrary to some federal circuit holdings and the practices of universities across the country, a proper reading of the Constitution precludes the university from standing *in loco parentis* with regard to its students. In making eighteen-year-olds full, adult citizens, the Twenty-Sixth Amendment rendered paternalism toward them illegitimate. As the supporters of the amendment argued at the time, and as the Court first wrote in the 1950s,[20] treating students as adults, rather than burdening the university, allows it to flourish and truly function as a marketplace of ideas.

Part II of the article examines the current state of free speech doctrine in both secondary and higher education, detailing the Court's practice of deferring to primary and secondary schools' decisions to suppress students' speech, as well as the Court's failure to clarify whether the same deference applies to universities. Part II then reviews the resulting federal circuit split. Part III moves to the historical origins of *in loco parentis* schools, as well as the pervasive constitutional connection between full citizenship and voting rights. Part III then turns specifically to the Twenty-Sixth Amendment's history and closely examines the debates surrounding its passage, demonstrating that the people understood it as granting eighteen-year-olds full citizenship. Part IV traces the incorporation of the principle of full citizenship for eighteen-year-olds into civil and constitutional doctrine following the amendment's ratification. Part IV then argues that this legal and constitutional history should be resurrected unequivocally by the Court. Finally, using current doctrine, it explains how this age-based bright line creates, for the purposes of free speech, a corresponding bright line between primary and secondary schools on the one hand, and universities on the other.

20. Sweezy v. New Hampshire, 354 U.S. 234 (1957).

II. LEGAL DOCTRINE GOVERNING THE UNIVERSITY'S REGULATION OF STUDENT SPEECH

A. Current Threats to Free Speech on the University Campus

Through policies and practices, public universities routinely prohibit and punish student speech that, on its face, is protected by the First Amendment.[21] The confusion in the federal legal doctrine opens the door for this practice because it gives universities the false sense that suppressing their students' speech is, or may be, a permissible exercise of their powers. As some commentators try to downplay the ongoing practical threat to university students' ability to exercise their right to speak freely,[22] it is worth noting the voluminous evidence that universities continue to regularly suppress their students' speech.

University administrators usually couch their suppression of speech in other terminology. One common example is the so-called "free speech zone" or "free speech area" policy. These policies limit student speech and protest to small, often remote areas of campus, effectively rendering the rest of campus a "no speech zone."[23] In 2003, for example, Texas Tech University, a public university with over 28,000 students,[24]

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21. *See, e.g.*, ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (The Free Press 1998); ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY (Ind. Univ. Press 1997); DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS (Cambridge Univ. Press 2005); Alan Charles Kors & Harvey A. Silverglate, *Codes of Silence—Freedom of Speech in University Campuses*, REASON, Nov. 1, 1998.

22. *See, e.g.*, Jon B. Gould, *Returning Fire*, CHRON. HIGHER EDUC., Apr. 20, 2007 (claiming that suppression of speech on campus is not a problem, since according to his analysis "only" nine percent of public campuses have unconstitutional speech codes); Stanley Fish, *Yet Once More: Political Correctness on Campus*, N.Y. TIMES, Oct. 14, 2007, http://fish.blogs.nytimes.com/2007/10/14/yet-once-more-political-correctness-on-campus/?hp (arguing that speech codes on campus are a "fake issue" because they are clearly unconstitutional). *But see* Greg Lukianoff & Robert Shibley, *Return Fire from FIRE*, CHRON. HIGHER EDUC., May 11, 2007 (criticizing Gould's claim that speech suppression is not a problem on campus).

23. *See, e.g.*, Commentary, *It's called "Free Speech,"* WASH. TIMES, Mar. 23, 2007, at A18 (discussing Georgia Tech's repressive "free speech zone"); Susan Kinzie, *U-Md.'s "Marketplace of Ideas" Not for Everyone, Court Rules*, WASH. POST, Sept. 18, 2005, at C04 (use of free speech zones at the University of Maryland); Jenna Russell, *UMass's Effort To Control Protests Spurs More Criticism*, BOSTON GLOBE, Feb. 3, 2005, at B4 (use of free speech zones on campuses across the country, focusing on UMass); Mary Beth Marklein, *On campus: Free speech for you but not for me?*, USA TODAY, Nov. 3, 2003, at 1A (covering the use of free speech zones on campus); *Restrictions Overreach*, USA TODAY, May 27, 2003, at 14A (detailing prevalence of free speech zones); Tamar Lewin, *Suit Challenges a University's Speech Code*, N.Y. TIMES, Apr. 24, 2003, at A25 (covering lawsuit challenging Shippensburg University's free speech zone); Amy Argetsinger, *ACLU-Backed Case Challenges U-Md's "Free Speech Zones"; Limit on Discourse Called Too Broad*, WASH. POST, Mar. 6, 2003, at B08 (covering legal case on free speech zones at the University of Maryland); *see also* Joseph D. Herrold, Note, *Capturing The Dialogue: Free Speech Zones And The "Caging" Of First Amendment Rights*, 54 DRAKE L. REV. 949 (2006) (discussing free speech zones generally); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) (same); Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1 (2005) (discussing campus speech zones).

24. Texas Tech University, Texas Tech Facts, http://www.ttu.edu/facts/ (last visited Oct. 3, 2008)

designated a single gazebo, capable of fitting no more than forty students, as the only place on campus where students could engage in free speech activities.[25] Valdosta State University in Georgia designated just one stage on campus as the "Free Expression Area" for its more than 11,000 students. The stage could only be used between the hours of noon and 1 PM, and 5 and 6 PM, and the policy further required students wishing to use the stage provide the administration with a minimum of 48 hours advance notice.[26]

Universities also target specific viewpoints for censorship, deploying vague and overbroad harassment codes to suppress speech offensive to particular groups. By the early 1990s, for example, over sixty percent of universities prohibited racist speech on campus.[27] Other policies broadly ban any offensive topics; Tufts University, for example, prohibits "unwelcomed communications" that are "calculated to annoy, embarrass, or distress."[28] Sexual harassment policies are often similarly overbroad. In 2003, in a representative policy, the University of Maryland promulgated a ban on, among other things, "idle chatter of a sexual nature, sexual innuendoes" and "comments about a person's clothing, body, and/or sexual activities."[29] Central Washington University's Student Conduct Code prohibits, as sexual harassment, any "sexist statements" or "behavior that convey[s] insulting, degrading, or sexist attitudes."[30]

Further methods of suppressing students' First Amendment rights on campus include the censorship of student newspapers,[31] the requirement that students adopt the university's approved values,[32] withholding student fee funding from groups with disfavored viewpoints,[33] and ordering that those wishing to speak or protest obtain

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25. Betsy Blaney, *Lawsuit Claims Tech Curbing Free Speech*, HOUSTON CHRON., June 13, 2003, at A37.

26. Valdosta State University, Free Expression Area Guidelines, http://www.valdosta.edu/judicial/ FreeExpressionAreaFEAGuidelines.shtml (last visited Aug. 2, 2008).

27. Carolyn M. Mitchell, *The Political Correctness Doctrine: Redefining Speech on College Campuses*, 13 WHITTIER L. REV. 805, 818 (1992).

28. Tufts Univ., Student Code of Conduct 126, *available at* http://www.thefire.org/pdfs/d47180caf6992a7abc722cbc08529d6d.pdf (last visited Aug. 2, 2008).

29. David E. Bernstein, *Campus Speech Code Warning*, WASH. TIMES, Aug. 18, 2003, at A12.

30. "Student Information—Judicial Code," *available at* http://www.cwu.edu/~saem/index.php?page=judicial.

31. *See, e.g.*, Marcella Bombardieri, *BC Proposes New, Strict Conditions On Student Newspaper*, BOSTON GLOBE, Nov. 26, 2003, at B3; *Campus Censorship*, USA TODAY, April 8, 2004, at 12A; Suzanne Fields, *Trumping Moses and Matthew; Silencing Free Speech is What the Campus is All About*, WASH. TIMES, Nov. 7, 2005, at A21; Theodore Kim, *Journalism Advocates Decry Teacher's Ouster Over Student's Article in Paper*, USA TODAY, May 9, 2007 at 2A. *See also* Finnigan, *supra* n.9.

32. *See, e.g.*, Kathy Boccella, *Diversity Program Creates Division: Delaware Freshmen Unsettled*, PHILA. INQUIRER, Nov. 2, 2007; Frederick M. Hess, Editorial, *Schools of Reeducation?*, WASH. POST, Feb. 5, 2006, at B07.

33. This is despite numerous Supreme Court holdings that this is unconstitutional—*see, e.g.*, Board of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (funding must be distributed with viewpoint neutrality); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 827, 837 (1995) (cannot discriminate on viewpoint in funding)—universities persist in this

the prior approval of the administration.[34]

In sum, the continued suppression of university students' speech is well-documented. These practices flourish in large part due to the muddled legal doctrine of university students' First Amendment rights.[35] Clarifying that doctrine is, accordingly, a pressing matter.

B. The Court's Deference to Primary and Secondary Schools' Regulation of Student Speech

The Court's first case dealing with the suppression of student speech,[36] *Tinker v. Des Moines Independent Community School District*, arose in a secondary school in 1969 prior to the development of the current public forum framework. In *Tinker*, the Des Moines schools suspended students for wearing black armbands to school in protest of the Vietnam War. The opinion, in an oft-quoted passage, held that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[37]

The *Tinker* Court specified that schools could ban student speech only if it "materially and substantially disrupt[ed] the work and discipline of the school."[38] In this case, school officials did not have reason to believe that the students' black armbands would cause a "material disruption" at the school. As a result, the suspensions were found unconstitutional.

The standard of review described in *Tinker*—administrators can

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practice. *See, e.g.*, Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany, 508 F.3d 94 (2d Cir. 2007) (university unconstitutionally using non-viewpoint-neutral referendum in alloting funds); Christian Legal Soc'y v. Walker, 453 F.3d 853, 867 (7th Cir. 2006) (university unconstitutionally discriminating against group based on viewpoint); *Christian Fraternity Sues University of Florida Claiming Discrimination*, ASSOCIATED PRESS, July 10, 2007 (fraternity sues univerity over the denial of benefits based on their viewpoint); *SoCal University Denies Charter to Christian Group*, ASSOCIATED PRESS, Dec. 20, 2005 (preventing group from organizing on campus based on its viewpoint); *Collegians Win Partial Refund of Mandatory Activity Fees*, ASSOCIATED PRESS, Nov. 11, 2005 (federal judge striking down university's practice of allotting funds by referendum); *University of Oklahoma Allows Funding of Religious Newspaper*, ASSOCIATED PRESS, Aug. 3, 2004 (school makes funding policy viewpoint-neutral).

34. *See, e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853, 873 (N.D. Tex. 2004) (overturning university's requirement that students acquire a permit at least two business days in advance of engaging in protected speech); Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 577-78 (S.D. Tex. 2003) (overruling permit requirement for student speech as giving too much discretion to university officials); Andy Kroll, *Policy Raises Free Speech Questions: LSA Wants to Regulate Distribution of Student Publications in Campus Buildings*, MICH. DAILY, Feb. 4, 2008, at A1 (Michigan considering policy that would require approval to distribute or post any print material).

35. As mentioned, even when rulings are clear, some universities have continued to suppress student speech in open defiance of the law. The muddled legal doctrine is, accordingly, not the whole problem. *See* Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345 (2001).

36. The Court had previously dealt with compelled student speech in W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

37. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

38. *Id.* at 513.

suppress student speech if they reasonably believe it will cause a substantial disruption—includes a "heckler's veto," as it allows administrators to ban speech that causes other students to act up.[39] Decades prior to *Tinker*, the Court held that the heckler's veto, with respect to adults, cannot determine which expressions are silenced.[40] Already, then, the standard of review in secondary school was significantly lower than it was in the adult context. However, since the *Tinker* Court did not define what qualified as a "material and substantial disruption," the parameters of the standard were unclear.[41]

The next Supreme Court case on secondary school students' speech, *Bethel School District v. Fraser*,[42] did not clarify the rule laid out in *Tinker*. Instead, *Fraser* held that secondary school officials may categorically prohibit lewd, vulgar and indecent student speech, regardless of whether it causes a disruption.[43] The Court held that one of the primary functions of secondary school is to "inculcate the habits and manners of civility"[44] in its students. Banning indecent speech accomplishes that end, "teach[ing] by example the shared values of a civilized order" and "the boundaries of socially appropriate behavior."[45] Moreover, lewd speech in a high school "could well be seriously damaging to its less mature audience."[46]

Two years later, the Court extended the category of student speech ungoverned by the *Tinker* standard. In *Hazelwood School District v. Kuhlmeier*, a case in which high school officials removed a story from the student newspaper, the Court decided that the *Tinker* standard only governed the suppression of a "student's personal expression that happens to occur on the school premises."[47] The *Hazelwood* Court applied the recently developed public forum framework to the case, finding that school facilities generally are not traditional public forums and, as a result, only become public forums if the school designates them as spaces open for private expressions.[48] The student newspaper, which in this case operated as part of a class, was not, according to the Court, a designated public forum; rather, it was a school-run activity.[49]

For student speech that occurs in the course of "school sponsored" activities, such as the official student paper, authorities can suppress

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39. Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. R. 1405, 1417 (1985-1986) (describing the heckler's veto as a mob protesting so loudly or violently as to prevent a speaker from speaking and describing the First Amendment requirement that the government stop the mob from deploying the heckler's veto rather than silence the speaker).

40. Terminiello v. Chicago, 337 U.S. 1, 3-6 (1949).

41. *See Tinker*, 393 U.S. at 513.

42. 478 U.S. 675 (1986).

43. *Id.* at 685.

44. *Id.* at 681.

45. *Id.*

46. *Id.* at 683.

47. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

48. *Id.* at 267.

49. *Id.* at 268-70.

speech as long as the suppression is "reasonably related to legitimate pedagogical concerns."[50] Otherwise, the Court reasoned, the school will not be able to fulfill its "role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[51]

Hazelwood set in place a deferential standard of review for secondary school speech suppression: as long as the speech suppression is reasonably related to legitimate pedagogical concerns, it is permissible.[52] Although the *Hazelwood* decision did not overrule the *Tinker* standard, the Court implied that it would rarely, if at all, see occasion to apply the *Tinker* standard.[53] *Hazelwood* cemented *Fraser*'s view of secondary school as a quasi-parental institution, inculcating students with manners, morals, and proper social skills.

The last opinion the Court issued on student speech in secondary schools came nearly twenty years later. *Morse v. Frederick*[54] continued where *Hazelwood* left off, affirming its view of the school as a part-time parent and *Tinker*'s irrelevance. In *Morse*, the Court relied on *Hazelwood*, not for its specific test governing student speech in the course of school-sponsored activities, but to support the notion that *Tinker* does not govern all—perhaps any—types of student speech suppression.[55]

In *Morse*, a student on a school field trip unfurled a banner that read, "BONG HiTS 4 JESUS." The principal asked the student to put the banner down. When the student refused, the principal suspended him from school. The Court affirmed *Tinker*'s holding, but it did not apply the *Tinker* standard to this case, nor did it explain what type of speech *Tinker* might apply to. The only difference the Court noted between the students' speech in *Tinker* and the student's speech in *Morse* was that the latter purportedly encouraged an illegal activity.[56]

In *Morse*, the Court repeated its previous holdings that children have attenuated free speech rights: "the nature of [students' speech] rights is what is appropriate for children in school."[57] It elucidated this, however, by stating that those rights are limited by "schools' custodial and tutelary responsibility for children."[58] The Court determined that the student's right to speak, in this case, was secondary to the school's interest in discouraging illegal drug use. A principal allowing a student to display a pro-drug banner at a school-sponsored event, the Court wrote, "[sends] a powerful message to the students in her charge,

50. *Id.* at 273.
51. *Id.* at 272 (internal citation omitted).
52. *Id.* at 273.
53. *Id.* at 270-73.
54. 127 S. Ct. 2618, 2627 (2007).
55. *Id.* at 2627-28.
56. *Id.* at 2625-26, 2629.
57. *Id.* at 2627.
58. *Id.* at 2628 (internal citations omitted).

including [the student himself], about how serious the school [is] about the dangers of illegal drug use."[59] As a result, the Court found that the school official acted constitutionally in requiring the student to take down his "pro-drug" banner.

Morse, following *Fraser* and *Hazelwood*, held that schools may prohibit student expressions approving of dangerous activities in order to fulfill their "custodial and tutelary" responsibilities, effectively giving school officials *carte blanche* to suppress any student speech that encourages other students to engage in "harmful" activities. In this case it was illegal drugs, but the same logic could easily extend to activities such as fighting, civil disobedience, making sexist and racist comments, sex, skipping school, cheating, disobeying rules, breaking laws, and performing poorly in school.[60]

Even though the *Morse* decision did not explicitly use *Hazelwood*'s standard of "reasonably related to legitimate pedagogical goals," it did use a similarly deferential standard: it equated the failure of a school to suppress a student's speech with the school announcing that it feels indifferent toward, and perhaps endorses, the content of the student's speech.[61] As the Court sees secondary school as functioning to some degree *in loco parentis*,[62] remaining indifferent to negative messages means the school has lapsed in its responsibilities and duties. The Court did not require any empirical showing that the school's failure to condemn a student's message in favor of "bad activity" will actually result in more students engaging in that "bad activity." It was sufficient that the message was sent, regardless of the message's effect on action. As Justice Stevens wrote in dissent, unless a school can suppress any speech *it* sees as harmful, "[the school] must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana." Instead, the Court "blithely

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59. *Id.* at 2629.

60. Justice Stevens made a similar point in dissent: "Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers?" *Morse*, 127 S. Ct. at 2650 (Stevens, J., dissenting).

61. *Id.* at 2629.

62. In a concurrence, Justice Alito explicitly disavowed treating the school as a parent. He rested his concurrence on his belief that "drug use presents a grave and in many ways unique threat to the physical safety of students." He therefore regards this case "as standing at the far reaches of what the First Amendment permits." *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). Despite Justice Alito's explicit disavowal, the Court's construction of the school's failure to ban a student's sign as a compelling, physical harm to the students does conceive of the school as a parent. Justice Alito's concurrence suggests that the Court may restrict schools' ability to act *in loco parentis* if the student speech concerns something less pernicious than illegal drug use. The law as it stands, however, does not provide any restriction, and given that this banner was only minimally pro-drug, the claim that it was uniquely harmful speech is implausible. "BONG HiTS 4 JESUS," while vaguely pro-marijuana, is a statement with unclear meaning and so the finding that it exacts a grave harm cannot, in a principled way, protect most speech. As Justice Stevens wrote in dissent, "[t]he notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible." *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting).

defer[red] to the judgment of a single school principal,"[63] essentially removing any judicial review and allowing schools to suppress speech that one school official *claims* will cause students harm.

In a concurrence to the *Morse* opinion, Justice Thomas called for the Court to stop chipping away at secondary students' speech rights and abandon them altogether. After detailing the "total control" public schools historically possessed to discipline students and maintain order, Justice Thomas concluded that "it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools."[64]

While the Court has yet to explicitly adopt Justice Thomas's position that secondary students have no rights to free speech, the post-*Tinker* jurisprudence seems to operate under that assumption. *Tinker* was the only Supreme Court case to come out in favor of secondary student speech. Since then, the *Tinker* standard has been marginalized, quite possibly limited to its own facts.[65] *Fraser* categorically removed protection for students' vulgar, lewd, and indecent speech. *Hazelwood* and *Morse* set a low, deferential standard of review. Combined, these cases allow school officials to suppress secondary student speech as long as the suppression reasonably serves the school's pedagogical goals, which the Court leaves to schools to define. Summing up its own secondary school doctrine in a Fourth Amendment case, the Court wrote:

> The nature of [public school's] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults . . . proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult . . . . [W]e 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.[66]

The Court has failed to convincingly distinguish its *in loco parentis* vision of secondary schools from Justice Thomas's position in his *Morse* concurrence, which says quite clearly that secondary students shed their constitutional rights at the schoolhouse gates. The *Tinker* ship, with secondary students' constitutional rights to free speech on board, is sinking fast.

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63. *Morse*, 127 S. Ct. at 2648.

64. *Id.* at 2634 (Thomas, J., concurring).

65. As Justice Thomas wrote in his concurrence, "we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't . . . ." *Morse*, 127 S. Ct. at 2634 (Thomas, J., concurring) (citation omitted).

66. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (allowing a secondary school to randomly drug test its student athletes) (internal citations omitted).

C. The Court's Ambiguous Application of Secondary Standards to Universities

The free speech rights of university students, at least for now, have more air in their sails. Due to the Court's ambiguous and sparse holdings, however, their status remains murky. As secondary student rights sink, it becomes pressing to distinguish university students' rights in order to keep them afloat. As it is, some federal circuits have already tied university students' rights to secondary students' rights, letting them sink together as a bundle.

The buoyancy of university students' rights comes in part from the university's institutional function, which differs markedly from the institutional function of secondary schools. The university's *raison d'etre* is to pursue, discover, and accumulate knowledge. Restrictions on speech accord poorly with this aim. In contrast, restrictions on speech facilitate the *in loco parentis* function that the Court has ascribed to secondary schools: speech restrictions reduce student exposure to ideas the school deems harmful and inappropriate.

The Court has long seen the university as an open marketplace of ideas aimed at the discovery of truth. In 1967, Justice Brennan wrote:

> The [university] classroom is peculiarly the "marketplace of ideas." . . . [It] discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection." . . . "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[67]

The Court has continued to affirm this conception of the university.[68] In 1995, Justice Kennedy wrote that the university houses a "tradition of thought and experiment at the center of our intellectual and philosophic tradition . . . [The university originated in a] period of intellectual awakening . . . [and it is] one of the vital centers for the Nation's intellectual life . . . ."[69]

Under this conception of the university, free speech rights are particularly necessary on campus. The Court recognized this most explicitly in 1972, dismissing the idea that free speech rights on the university campus should be diminished, writing, "Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more

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67. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal citations omitted).

68. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995); Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981); Healy v. James, 408 U.S. 169, 180 (1972).

69. *Rosenberger*, 515 U.S. at 835-36 (internal citations omitted).

vital than in the community of American schools.'"[70] The Court has endorsed this view in more recent cases, writing in 1995 that the danger of chilling individual thought and expression "is especially real in the University setting," as the university thrives on "free speech and creative inquiry."[71] This open, truth-seeking community is possible in large part because, as the Court put it, "[u]niversity students are, of course, young adults. They are less impressionable than younger students."[72]

Further bolstering the status of university students' free speech rights is the fact that the Court has never upheld a restriction on student speech at the university level.[73] Of the five cases the Court has reviewed, however, four dealt with the same issue: the university's funding of student groups on campus.[74] The scope of the Court's unanimous vindication of student speech, as a result, is limited. Three of these funding cases involved a university that offered resources to a wide variety of student groups for broad, extracurricular purposes and then denied a particular group access to those resources based on the group's viewpoint.[75] In each case, the Court held that the university's denial must face strict scrutiny, and in no case did it find that the regulation under review met this obstacle.

In the remaining student group case, students sued their university claiming that the university's use of their student fees to fund a wide variety of student groups forced them to speak messages against their will.[76] The Court rejected this claim insofar as the various student groups who received funding were chosen in a viewpoint-neutral manner. As in the previous student group cases, the Court saw the university's funding of a wide variety of student groups in a viewpoint-neutral way as creating an open forum for the exchange of private expressions. A student's contribution thus funds the metaphorical "town square" rather than any particular message spoken in that forum.

The Court's use of strict scrutiny, and the outcome in these four university cases, speaks strongly in support of a sharp distinction between student speech at a secondary school and student speech at a university. The Court has never applied strict scrutiny to regulations on secondary student speech, but, with the exception of *Tinker*, it has

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70. *Healy*, 408 U.S. at 180 (internal citation omitted).

71. *Rosenberger*, 515 U.S. at 835-36.

72. *Widmar*, 454 U.S. at 274 n.14.

73. The five cases the Court has taken regarding university students' free speech rights came out in favor of the students. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235-36 (2000); *Rosenberger*, 515 U.S. at 845; *Widmar*, 454 U.S. at 277; Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 671 (1973); *Healy*, 408 U.S. at 194.

74. *Southworth*, 529 U.S. at 235 (university must allot student fees to student groups in viewpoint neutral fashion); *Rosenberger*, 515 U.S. at 843 (university cannot exclude religious group from student fees because of its viewpoint); *Widmar*, 454 U.S. at 264 (university cannot ban student religious group from using facilities because of its viewpoint); *Healy*, 408 U.S. at 186-87 (university cannot ban the Students for a Democratic Society from using school facilities because of its viewpoint).

75. *Rosenberger*, 515 U.S. at 822-23; *Widmar*, 454 U.S. at 264-65; *Healy*, 408 U.S. at 174-76.

76. *Southworth*, 529 U.S. at 221.

allowed every restriction on student speech in secondary school it has considered.

The Court's fifth university speech-restriction case, *Papish v. Board of Curators of the University of Missouri*, involved a student who distributed a newspaper on campus.[77] The edition in question had a reprint of a cartoon that portrayed policemen raping the Statue of Liberty and the Goddess of Justice, as well as a story concerning an acquitted member of the organization "Up Against the Wall, Motherfucker" with the headline, "Motherfucker Acquitted." The university suspended her for violating the student code of conduct, which prohibited, among other things, "indecent speech." The Court found the suspension unconstitutional, holding that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[78]

Papish stands in sharp contrast to *Morse*, further confirming the split between secondary schools and universities. Although the *Papish* newspaper did not advocate any particular illegal activity, its message was one of anti-enforcement, as it suggested that the natural laws of liberty and justice superseded the authority of the police. Readers are equally likely to understand the *Papish* cartoon as advocating disobedience of law enforcement as they are to understand *Morse*'s "BONG HiTS 4 JESUS" banner as advocating smoking marijuana. The fact that the Court allowed one restriction and not the other suggests that it deploys different standards when it comes to student speech suppression—one for the university and one for secondary school.

The Court has not explicitly held that there are two standards, however, and *Papish* was decided a few years after *Tinker*, over thirty years before *Morse*. The *Morse* opinion does not mention *Papish*, and leaves unanswered how the Court meant to distinguish it from *Papish*. In another secondary school decision, *Hazelwood*, the Court did distinguish the case from *Papish*, and not on the grounds that *Papish* arose at the university level. Instead, it distinguished the cases by the fact that the students in *Hazelwood* produced the paper as part of a class and under the name of the school, while the student in *Papish* produced the newspaper under her own auspices, free from the school's name, input, or control.[79] The fact that the Court distinguished the case only on these grounds—when it could have also distinguished it on the grounds that *Papish* occurred at a university—throws a cloud of ambiguity over the Court's other holdings, which implied that a standard stricter than the secondary school standard applies to the university.

Obfuscating this implication further, the Court has in other instances reasoned as if the standards governing secondary school speech apply, at least in part, to university student speech. The Court frequently

77. *Papish*, 410 U.S. at 667.
78. *Id.* at 670.
79. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.3 (1988).

starts its analysis of university cases by asserting that university students enjoy First Amendment rights of speech and association on the campus, but limits those rights by citing *Tinker*, a secondary school case, for the proposition that cases have recognized that First Amendment rights must be analyzed in light of the special characteristics of the school environment.[80]

The Court also has drawn parallels between secondary and university education in dicta, asserting, for example, that "a university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[81] The language of "reasonable regulations compatible with the educational mission" echoes the analysis the Court has applied to secondary schools and blends together the functions of both institutions as simply "education."

The Court highlighted the mixed signals in its doctrine in *Hazelwood*. In a footnote, it stated, "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[82] This statement encapsulates the Court's failure to make clear (perhaps even to itself) whether university students at school have the same rights as other adults or the diminished rights of secondary school students.[83] As Justice Kennedy wrote in a four-justice dissent to the majority's explication of Title IX—a federal statute whose ban on verbal harassment in the educational context threatens students' free speech rights at both the secondary and university level—"Perhaps even more startling than its broad assumptions about school control over primary and secondary school students is the majority's failure to grapple in any meaningful way with the distinction between elementary and secondary schools, on the one hand, and universities on the other."[84]

The Court has, at times, recognized the stark differences between secondary schools and universities, seeing the former as primarily custodial institutions and the latter as primarily truth-seeking institutions. At other times, the Court has blended them together as educational

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80. The Court has started its analysis this way in three of the five university-student speech cases. *See Widmar*, 454 U.S. at 267 n.5 (quoting *Tinker* for the proposition that students' First Amendment rights had to be understood "in light of the special characteristics of the school environment"); *Papish*, 410 U.S. at 669-70 (citing *Tinker* in support of the proposition that, while students have First Amendment rights, a "state university" has an "undoubted prerogative to enforce reasonable rules governing student conduct"); *Healy*, 408 U.S. at 180 (quoting *Tinker* for the proposition that First Amendment rights must be analyzed "in light of the special characteristics of the . . . environment").

81. *Widmar*, 454 U.S. at 267 n.5.

82. *Hazelwood*, 484 U.S. at 273 n.7.

83. *See also* Board of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 239 n.4 (2000) (Souter, J., concurring) ("[C]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools' relation to them are different and *at least arguably* distinguishable from their counterparts in college education.") (citing *Hazelwood*, 484 U.S. at 262; *Fraser*, 478 U.S. at 677; *Tinker*, 393 U.S. at 504) (internal citations omitted) (emphasis added).

84. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 666-67 (1999) (Kennedy, J., dissenting).

institutions. Without straightforward guidance, the federal courts have splintered on the issue, with some courts affording university students the free speech rights of adults and other courts affording them the diminished rights of secondary school students.

D. Federal Circuit Split on University Students' Speech Rights

Without sufficient guidance from the Supreme Court, the federal circuits have laid down incongruent standards regarding university students' free speech rights. Federal circuits have variously applied the deferential secondary school standard found in *Tinker*, *Fraser*, and *Hazelwood* to universities wholesale, in part, or not at all. Other circuits have largely refrained from ruling on the issue, leaving their district courts to decide. This legal pastiche leaves university students across the country with varying levels of free speech rights, creating a noticeable instability with respect to a fundamental constitutional right.

The Eleventh Circuit, at one end of the extreme, has applied the deferential secondary standard to universities wholesale.[85] In *Alabama Student Party v. Student Government Association of the University of Alabama*, students objected to the University of Alabama's regulations[86] restricting the distribution of student government campaign literature to a few locations and to the three days prior to the election, as well as strictly limiting the place and time for election-related debates.[87] The Eleventh Circuit upheld these severe restrictions on the students' political speech by analyzing the case under the standards set out in *Tinker*, *Hazelwood*, and *Fraser*.[88] The court ignored the possibility that this line of cases might not apply to universities, adopting *sub silentio* the rule that university students possess the same free speech rights as secondary school students.

The *Alabama Student Party* court acknowledged that such severe restrictions on political speech violated the free speech rights of adults as normally conceived. "But," the court reasoned, "this is a university, whose primary purpose is education . . . . Constitutional protections must be analyzed with due regard to that educational purpose."[89] After

85. Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (applying *Hazelwood* to professor's speech in class, emphasizing deference to the university generally in regulating speech); Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344 (11th Cir. 1989) (applying *Hazelwood*, *Tinker*, and *Fraser* to student speech on campus).

86. The regulations were passed by the Student Government Association, which the court found to be an agent of the University of Alabama. *Ala. Student Party*, 867 F.2d at 1344-46.

87. *Id.* at 1345.

88. The court also cited as authority New Jersey v. T.L.O., 469 U.S. 325, 340 (1985), a case holding that high school students have diminished Fourth Amendment rights. *Ala. Student Party*, 867 F.2d at 1346.

89. *Ala. Student Party*, 867 F.2d at 1346.

detailing the standards laid out in *Hazelwood* and *Tinker*, the court continued, "[t]he University views its student government association, including the election campaigns, as a 'learning laboratory,' similar to the student newspaper [in *Hazelwood*]," concluding that "[t]he University should be entitled to place reasonable restrictions on this learning experience."[90] Foreshadowing Justice Thomas's concurrence in *Morse*, the court emphasized that schools need institutional autonomy to function properly. It concluded its entire analysis by holding that courts should defer "to [university] school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission."[91]

The Tenth Circuit has followed the Eleventh Circuit in applying the secondary school standard directly to universities. In *Axson-Flynn v. Johnson*, a Mormon student at the University of Utah's Actor Training Program refused to use certain expletives during an in-class acting exercise.[92] After initially accommodating the student's refusal by allowing her to omit the expletives from the script, the teacher and school officials told the student that she would either have to start using the expletives or leave the acting program.[93]

The Tenth Circuit noted that the standards of review varied with the different types of speech on a university campus. *Tinker*, it held, governed student speech that happened to occur on campus. The speech in this case, because it took "place in the classroom context as part of a mandated school curriculum," was "school sponsored" speech and, as such, was governed by *Hazelwood*.[94] Quoting *Hazelwood* directly, the court wrote, "We will uphold the [University of Utah's Actor Training Program (ATP)]'s decision to restrict (or compel) that speech as long as the ATP's decision was 'reasonably related to legitimate pedagogical concerns.' We give 'substantial deference' to 'educators' stated pedagogical concerns.'"[95]

Applying this high level of deference, the court found the school's justifications for requiring the student to use expletives "reasonable" and upheld the requirement as constitutional. The court stressed its deference, pointing out, "The school's methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching . . . or the most reasonable . . . . [It need only] be reasonable."[96]

In *Cummins v. Campbell*, an earlier case, the Tenth Circuit addressed university administrators who prevented a student group from

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90. *Id.*

91. *Id.* at 1347.

92. 356 F.3d 1277, 1281 n.2 (10th Cir. 2004) (stating that student refused to use "the word 'fuck'" and "the words 'goddamn' and its variants").

93. *Id.* at 1282.

94. *Id.* at 1290.

95. *Id.* at 1290 (quoting *Hazelwood*, 484 U.S. at 273).

96. *Id.* at 1292.

showing *The Last Temptation of Christ*, a film the administrators found too controversial.[97] In the course of granting the administrators qualified immunity, the court stated that *Hazelwood* governed the speech of student organizations that were an organ or extension of the university.[98] The court further found the student organization to be an organ of the school even though it had little connection with the school. It received student fees and had an advisor employed by the school; otherwise, it acted entirely independently, conducting its own affairs. As a result, the court not only applied *Hazelwood*'s standard in the university context, but potentially extended its reach to all but the most underground student groups.[99]

Other circuits, falling short of the direct application approach of the Tenth and Eleventh Circuits, have applied secondary school standards of review piecemeal to the university. The leading articulation of this piecemeal approach comes from the Seventh Circuit's opinion in *Hosty v. Carter*.[100] *Hosty* concerned a university's censorship of a student newspaper. In analyzing the university's actions, the court stated, "*Hazelwood* provides our starting point."[101] Addressing the plaintiff's objection to the application of the high school standard to the university, the court claimed that the Supreme Court's *Hazelwood* opinion "*does not even hint* at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable . . . . [T]here is no sharp difference between high school and college papers."[102] It then went a step further, denying the possibility that a bright line could separate the two levels of schools. "Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools."[103]

Revealing the larger confusion around this issue, the Seventh Circuit used a different standard a year later in *Christian Legal Society v. Walker*.[104] In *Walker*, Southern Illinois University at Carbondale's School of Law denied official recognition and its attendant benefits to the Christian Legal Society (CLS), a student organization, after CLS allegedly violated the school's affirmative action policy by excluding avowed homosexuals from membership.[105]

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97. 44 F.3d 847, 848-49 (10th Cir. 1994).

98. *Id.* at 853.

99. The Supreme Court rejected the notion that student groups receiving money from the school were organs of the school and instead held that when a school collects student fees in order to fund a wide variety of extracurricular activity among students, the student groups receiving that funding are speaking as private citizens, not as organs of the school. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834-35 (1995); Board of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229-30 (2000).

100. 412 F.3d 731 (7th Cir. 2005).

101. *Id.* at 734.

102. *Id.* at 734-35 (emphasis added).

103. *Id.* at 734.

104. 453 F.3d 853 (7th Cir. 2006).

105. *Id.* at 867.

The *Walker* court held that "subsidized student organizations at public universities are engaged in private speech . . . . It would be a leap . . . to suggest that student organizations are mouthpieces for the university."[106] Ironically, the Seventh Circuit itself had taken that leap a year prior in *Hosty*. In assessing the free speech claim, the *Walker* court directed the district court to determine whether the law school's recognition process was a public forum, designated public forum, or nonpublic forum, and apply the corresponding level of review.[107] It did not mention *Hazelwood* as applicable to any finding.

Applying an even stricter standard, the *Walker* court ordered the district court to issue a preliminary injunction requiring the school to recognize CLS, holding that CLS would most likely prevail on its freedom of expressive association claim. The court wrote, "This case is legally indistinguishable from *Healy* . . . ."[108] The Supreme Court in *Healy*, in sharp contrast to the *Hosty* analysis, wrote, "The precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital . . . .'"[109]

Like the Seventh Circuit, the Fifth and Ninth Circuits have applied the secondary school standards to the university in a confused, piecemeal fashion.[110] In *Martin v. Parrish*, for example, the Fifth Circuit applied *Fraser*—the Supreme Court case that enabled high schools to ban their students' "vulgar" speech—to the university setting.[111] The *Martin* court acknowledged that the *Fraser* holding may have hinged on the custodial and tutelary nature of high school, but it continued, "Nevertheless, we view the role of higher education as no less pivotal to our national interest. It carries on the process of instilling in our citizens necessary democratic virtues, among which are civility and moderation."[112] In contrast, in *Schiff v. Williams*, an earlier case, the Fifth Circuit rejected a university's attempt to censor a student newspaper, finding that while the students' "poor grammar, spelling and language expression could embarrass, and perhaps bring some element of disrepute to the school," such concerns were insufficient justification for censorship.[113] *Schiff* cited *Papish*, the Supreme Court decision upholding the right of

106. *Id*. at 861.

107. *Id*. at 866.

108. *Id.* at 864.

109. Healy v. James, 408 U.S. 169, 180 (1972) (internal citation omitted).

110. Flint v. Dennison, 488 F.3d 816, 830 (9th Cir. 2007) (applying *Hazelwood* to funding restrictions on student government campaigns and finding the restrictions justified as part of providing an "educational experience"); Hudson v. Craven, 403 F.3d 691, 700-01 (9th Cir. 2005) (applying the principle from *Hazelwood* that schools can control expressions of politics in their name and refraining from deciding whether *Hazelwood* applies in full to the university); Brown v. Li, 308 F.3d 939, 949-51 (9th Cir. 2002) (holding that *Hazelwood* applies to university curricular speech).

111. 805 F.2d 583, 585 (5th Cir. 1986).

112. *Id.*

113. 519 F.2d 257, 260-61 (5th Cir. 1975).

university students to print vulgar expressions.[114]

Moving toward the other end of the spectrum, the Second and Sixth Circuits have afforded university students a higher level of free speech protection. While explicitly reserving the question of whether secondary school standards apply to the university,[115] the Second and Sixth Circuits have both come down hard on university attempts to suppress student speech. The Sixth Circuit rejected a university's decision to prevent the publication of a student yearbook it found to be of "poor quality" and "inappropriate."[116] It also found a Central Michigan University harassment code that prohibited "offensive speech" to be unconstitutionally overbroad and vague.[117] In still another case, the Sixth Circuit viewed a university's termination of a professor following a classroom discussion that involved offensive words as a decision motivated by "undifferentiated fear," and, as a result, unconstitutional.[118] The Second Circuit, in its only case addressing university students' speech rights, found a university's decision to restrict the amount of political campaigning that could occur in student newspapers to be an unjustifiable infringement on students' right to free speech.[119]

At the other extreme, in its only case addressing university student speech, the First Circuit summarily declared that *Hazelwood* "is not applicable to college newspapers."[120] The Fourth and Eighth Circuits' only takes on the issue, although dated, also provide university students full free speech rights. The Fourth Circuit in *Joyner v. Whiting* rejected a university's attempt to suppress the publication of a student paper, holding, "If a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment."[121] The Eighth Circuit cited the *Joyner* decision in holding that a university cannot reduce a student paper's funding because it disapproves of the paper's content.[122] Extending the Fourth Circuit's holding, the Eighth Circuit wrote, "A public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper."[123]

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114. *Id.* at 261.

115. Husain v. Springer, 494 F.3d 108, 124-26 (2d Cir. 2007) ("[W]e need not decide in this case which of the two approaches embraced by other circuits governs evaluations of the First Amendment protections afforded student media outlets at public colleges."); Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) (stating that the question of whether *Hazelwood* applies to universities has not been answered and need not be for deciding whether the university can exercise control over the student yearbook).

116. *Kincaid*, 236 F.3d at 345.

117. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182 (6th Cir. 1995).

118. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 681-82 (6th Cir. 2001).

119. Husain v. Springer, 494 F.3d 108, 125-26 (2d Cir. 2007).

120. Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 (1st Cir. 1989) (dicta in the course of rejecting a student's claim that the university's decision to stop subsidizing student lawsuits violated the student's First Amendment rights).

121. 477 F.2d 456, 460 (4th Cir. 1973).

122. Stanley v. Magrath, 719 F.2d 279, 282 (8th Cir. 1983).

123. *Id.*

Finally, the Third Circuit has rejected the applicability of secondary school standards to the university setting. In *DeJohn v. Temple University*, the Third Circuit explained that speech which "*cannot* be prohibited to adults *may* be prohibited to public elementary and high school students," as "elementary and high school administrators have the unique responsibility to act *in loco parentis*." [124] Elementary and high schools possess "special needs of school discipline."[125] Because public colleges cannot legitimately proffer that justification, "[d]iscussion by adult students in a college classroom should not be restricted."[126]

The federal circuit courts have fractured widely over the free speech rights of university students. This disparity arises from the Supreme Court's ambiguous holdings and serves to provide university students with speech rights that range from weak to robust, depending on their place of residence. Surprisingly, few scholars have attempted to clear up this confusion. In the next section, I will argue that a sharp distinction exists between secondary schools and the universities, and, as a result, the Court should affirm the approach of the First, Second, and Fourth Circuits and afford university students the robust free speech rights of adults in other settings. The issue is a pressing one, as some federal circuits, most starkly the Tenth and Eleventh, have already thrown the university student baby out with the secondary student bathwater.

III. CLARIFYING THE DOCTRINE: *IN LOCO PARENTIS* AND THE TWENTY-SIXTH AMENDMENT

A. *In Loco Parentis* and Diminished Constitutional Rights

History provides a useful starting place for ascertaining why secondary school students have limited constitutional rights and, in turn, why some federal courts have extended these limitations to university students. From the inception of public schooling through the mid-twentieth century, courts allowed primary and secondary schools to operate draconian regimes, "requir[ing] absolute obedience."[127] During this time period, the courts saw secondary schools as "the substitute of the parent" and accordingly free to "command obedience, to control stubbornness, to quicken diligence, and to reform bad habits" in their

124. 537 F.3d 301, 315 (3rd Cir. 2008).

125. *Id.*

126. *Id.*

127. Morse v. Frederick, 127 S. Ct. 2618, 2631 (2007) (Thomas, J., concurring) (describing the legal status of public schools during this time period).

young students.[128] Because the legal doctrine "of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way," secondary schools, with the courts' stamp of approval, historically suppressed their students' speech at will.[129]

In 1954, the Court's *Brown v. Board of Education of Topeka* opinion[130] curtailed grade schools' role as *in loco parentis* for the first time.[131] By giving students equal protection rights in school, *Brown* put a limit on the school's ability to act as a parent. In the 1960s and 1970s, this trend continued, with the Court issuing decisions that gave secondary school students rights to free speech[132] and due process.[133] After the high-water mark in the 1970s, however, the Court reversed course, narrowly circumscribing the applicability of the freshly minted student rights. From the 1980s to the present time, the Court seemingly abandoned these rights, reverting in large part to the *in loco parentis* view of secondary school that prevailed throughout most of American history.[134]

Courts also construed universities as *in loco parentis* until the middle of the twentieth century. At that point, the legal view of the university shifted. In the late nineteenth century, the American university had started to change its focus from molding and training students to cutting-edge research. The university, accordingly, started to fill a different function in society. Rather than serving to inculcate society's values into a new generation, it served to seek and accumulate knowledge.[135]

An institution focused on obtaining new truths, rather than on training youth, necessarily has a different relationship to its students. In attending a truth-seeking institution, students seek knowledge alongside their teachers, partaking in the intellectual journey directed by the faculty. In the mid-twentieth century this changing relationship found its way into the legal doctrine.[136] Courts saw the legal relationship between a university and its students, for the first time, as one between an adult student and an institution, governed by a contractual agreement. This adult, business-like relationship between schools and students eclipsed the institution's special duty to take care of its students' physical safety

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128. *Id.* (internal citation omitted).

129. *Id.* at 2633.

130. 347 U.S. 483 (1954).

131. *See, e.g.*, Frederick W. Staub, *What Would Ernie Say Is Fair?*, 17 THEORY INTO PRAC. 329 (1978).

132. *Tinker*, 393 U.S. at 503-06.

133. *See* Carey v. Piphus, 435 U.S. 247 (1978); Goss v. Lopez, 419 U.S. 565 (1975); *In re* Gault, 387 U.S. 1 (1967).

134. *See supra* Part II, B.

135. *See, e.g.*, Brian Jackson, *The Lingering Legacy of* In Loco Parentis: *An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1141-42 (1991).

136. *See, e.g.*, ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 7 (1999); D. Parker Young, *Student Rights and Discipline in Higher Education*, 52 PEABODY J. OF EDUC. 58, 58 (1974).

and moral development. As the schools' special duty to take care of students and mold their values lapsed, the schools lost the compelling reason they once possessed to abrogate their students' constitutional rights, most notably their rights to free speech, association, exercise of religion, liberty, and privacy.

The judiciary increasingly envisioned the university as a truth-seeking institution in the 1960s and the 1970s, but after that, it started to send mixed messages. The judiciary largely reverted to *in loco parentis* at the secondary school level, but hesitated with respect to the university. It implied, at times, that the university had a separate, distinct legal identity, and it implied, at other times, that schools of all levels labored under the same set of rights and duties.[137] This confusion infiltrated the federal circuits, resulting in the current circuit split with respect to students' free speech rights. Given the trajectory of the decisions, it is important to identify why reverting to *in loco parentis* at the university level is no longer a legitimate option.

B. Childhood, Voting, and Full Citizenship

The first universities in America imported the Cambridge, England model of the university, which included the understanding that the university operated *in loco parentis*.[138] Students matriculated, on average, at the age of fifteen, and it was considered common for students to enroll at age ten, eleven, and twelve.[139] As the age of legal independence was twenty-one, the students of early American universities were mostly children. "The extreme youth of students was ample justification, in the eyes of early college administrators, to enforce strict discipline and regulate every aspect of student life."[140]

Over the latter half of the nineteenth century, the average age of matriculation rose to eighteen and remained there, with mild variation, throughout the twentieth century.[141] Up until 1970, the age of legal independence, with a few exceptions, was twenty-one.[142] This meant that until 1970, college campuses were, in the eyes of the law, occupied

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137. *See supra* notes 67-84 and accompanying text for a review of the conflicting signals with respect to the First Amendment. For an account of the legal confusion more generally, see, for example, Dana E. Christman, *Change and Continuity: A Historical Perspective of Campus Search and Seizure Issues*, 2002 BYU EDUC. & L.J. 141 (2002) (describing confusion with respect to students' Fourth Amendment rights); Gavin Henning, *Is* In Consortio Cum Parentibus *the New* In Loco Parentis*?*, 44 NASPA J. 538 (2007) (describing the judiciary's confusion on the status of the university more generally); Jackson, *supra* note 135 (same).

138. Iran Cassim Mohsenin, *Note on Age Structure of College Students*, 23 HIST. OF EDUC. Q. 491, 492 (1983).

139. *Id.* at 493.

140. *Id.*

141. *Id.* at 495-96.

142. *See infra* note 180 and accompanying text.

largely by children.

During the late 1960s, spurred by the fact that so-called children were fighting and dying for the country in Vietnam, the nation opened a vigorous debate on when young people ought to move from their sheltered status as children to full-fledged adult members of political society. The issue had first come to the national stage during World War II. Representative Jennings Randolph of West Virginia introduced legislation to lower the voting age in 1942, declaring unconscionable the fact that the young soldiers risking their lives for the country were being denied the full set of political rights at home.[143] It was not until the Vietnam era, however, that the issue took center stage. In Vietnam, the average age of a soldier dropped from World War II's twenty-five[144] to a mere nineteen or twenty.[145] At the same time, the Vietnam War was seen by many as unjustified, thereby making the sacrifice required of soldiers even greater.[146] Given its heavy reliance on young people to fight an unpopular war, the nation could no longer ignore the fact that it was, on the one hand, requiring young people to risk and sacrifice their lives for the nation, and on the other, denying them basic political rights.

This debate culminated with the passage of the Twenty-Sixth Amendment to the Constitution, which lowered the voting age from twenty-one to eighteen. This marked the tipping point in a gradual shift from seeing individuals in this age group as children to seeing them as adults. It also marked the coinciding shift from seeing the university as *in loco parentis*, occupied by children, to seeing it as a true marketplace of ideas, occupied by autonomous, free-thinking adults. The Twenty-Sixth Amendment codified this shift, preventing a statutory or judge-created reversion to seeing this age group as children and, correspondingly, seeing the university as *in loco parentis*.

While the text of the Twenty-Sixth Amendment refers only to voting, the debate leading up to and surrounding its passage reveals that the people understood the right to vote to have broader ramifications—namely, until a person had the right to vote, she was not a full citizen or member of the political community. This nexus had existed since the nation's origin. At the time of the founding, states routinely excluded paupers, non-property owners, women, blacks, Indians, Catholics, Jews, and illiterates from casting a ballot. These same groups were denied other rights and responsibilities and in various ways treated as second-class citizens.

The 1789 Constitution was relatively quiet on the issue of

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143. *See, e.g.*, JANE EISNER, TAKING BACK THE VOTE: GETTING AMERICAN YOUTH INVOLVED IN OUR DEMOCRACY 9-10 (2004).

144. *See, e.g.*, Albert A. Blum, *The Fight for a Young Army*, 18 MILITARY AFF. 81, 83 (1954).

145. *See, e.g.*, JOEL OSLER BRENDE & ERWIN RANDOLPH PARSON, VIETNAM VETERANS: THE ROAD TO RECOVERY 19 (1985); David M. Halbfinger & Steven A. Holmes, *Military Mirrors a Working Class America*, N.Y. TIMES, Mar. 30, 2003, at 1.

146. *See, e.g.*, William L. Lunch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 32 W. POL. Q. 21 (1979).

citizenship and voting. It delegated the establishment of voting criteria for state and federal elections to the state governments with only two potential restrictions: the Article I requirement that "the People of the several States" choose the members of the House of Representatives[147] and the Article IV Guarantee Clause requiring states to have a Republican form of governance.[148] At the time, people did not understand either provision to require a right to vote, as it was widely believed, at least by those in power, that white, propertied, male citizens represented and spoke for the people at large.[149] The disenfranchised groups were seen as both less capable of and less interested in participating in the political process.

The belief that those without voting rights are not full members of the polity has prevailed throughout American history. The interests of the disenfranchised, to the degree that the polity recognized them, had to be looked out for by others, and as a result, they were wards of the participating members of political society. By acquiring the power to vote, a citizen came to control one share of the joint political enterprise and became a full stakeholder in the polity. While no one doubts that those between the ages of eighteen and twenty-one were citizens prior to the Twenty-Sixth Amendment, that women were citizens prior to the Nineteenth Amendment, and that paupers were citizens prior to the Twenty-Fourth Amendment, the granting of the right to vote raised their status as citizens to what might be called full citizenship.

The perceived lack of capability among the disenfranchised provided the justification not only for withholding the vote but for diminishing their rights across the board. Americans throughout history have understood rights and responsibilities as bundled. Accordingly, those perceived as possessing diminished capacity to carry out responsibilities have also possessed diminished rights.

The right to vote carries special significance because it is prior to all other rights and responsibilities; it determines who has a say in setting the rights and responsibilities of all citizens. As the Supreme Court put it, it is the right that is "preservative of all rights"[150] and "at the heart of our democracy."[151] Withholding the right to vote represents a fundamental exclusion from the political community.[152] In her analysis

147. U.S. CONST. art. I, § 2, cl. 1.

148. U.S. CONST. art. IV, § 4, cl. 1.

149. It was not until 1849 that a case was brought under the Guarantee Clause claiming that a state government's widespread disenfranchisement made the government insufficiently republican in nature. The Court delegated the enforcement of the Guarantee Clause to Congress, claiming it was a "political question." Luther v. Borden, 48 U.S. 1, 46-47 (1849).

150. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

151. Burson v. Freeman, 504 U.S. 191, 198 (1992).

152. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 94 (1989) (arguing that the right to vote is crucial to equal citizenship); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987) (noting that the right to vote "confirms an individual person's membership" in the community); Pamela S. Karlan, *Not by Money But by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV.

of American citizenship, Judith Shklar found that the right to vote "has always been a certificate of full membership in society."[153]

As America became a more democratic nation, it simultaneously extended suffrage and full citizenship to previously excluded groups. The Fifteenth Amendment, which gave blacks the right to vote, was passed alongside the Fourteenth Amendment, which required that citizens, most pointedly newly enfranchised blacks, receive equal protection, due process of the law, and all the privileges and immunities of U.S. citizenship. The simultaneous passage of these amendments reveals the pervasively understood nexus between the right to vote and full citizenship. When the Nineteenth Amendment, which gave women suffrage, came up for passage fifty years later, the people debated the Amendment in wider terms than whether women should cast ballots.[154] Instead, the debate was framed and understood as a debate over whether women should possess full citizenship. Although there was no complementary "women's" Fourteenth Amendment, the Fourteenth Amendment was written in general language, requiring equal protection, privileges and immunities, and due process for all citizens, not only blacks. Eventually, the Court read the Fourteenth Amendment to require strong justification for any law that distinguished between men and women, recognizing women's constitutional status as full citizens.[155]

Between the Civil War and the Vietnam War, the people amended the Constitution to enfranchise blacks,[156] women,[157] and those unable to pay taxes.[158] The people also amended the Constitution and passed federal laws granting these groups previously denied rights.[159] Tracking this democratic expansion, the Supreme Court recognized the vote's importance as a marker of political inclusion by making it a constitutionally protected right. This right to vote as a fundamental right of all citizens did not arise from a specific clause in the Constitution, but from a reading of the text's democratic trajectory and the practice and

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1455, 1465 (1994) (stating "Voting is a way of declaring one's full membership in the political community.").

153. JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2 (1991).

154. *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002); Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993); Sarah B. Lawsky, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783 (2000).

155. Craig v. Boren, 429 U.S. 190 (1976) (giving women heightened protection under the equal protection clause).

156. U.S. CONST. amend. XV (ratified Feb. 3, 1870).

157. U.S. CONST. amend. XIX (ratified Aug. 18, 1920).

158. U.S. CONST. amend. XXIV (ratified Jan. 23, 1964).

159. *See, e.g.*, U.S. CONST. amend. XIV (ratified July 9, 1868) (guaranteeing all persons equal protection, due process, and the privileges and immunities of citizenship); The Civil Rights Act of 1875, 18 Stat. 335 (requiring equal accommodations in hotels, inns, theaters, and public conveyances for all persons regardless of race) (struck down by the Supreme Court in *The Civil Rights Cases*, 109 U.S. 3 (1883)); The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1994)) (requiring employers pay employees of different genders the same pay for the same work); The Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241; 42 U.S.C. § 2000a-e (2006) (banning discrimination in employment and other areas of public life).

tradition in American political society, leading the Court to conclude in 1964, "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[160] The Court held that any exclusion from the ballot must have a compelling justification.[161]

In 1961, Senator Jennings Randolph of West Virginia, who sponsored the amendment to lower the voting age, invoked this analysis in the Twenty-Sixth Amendment debates, claiming, "we [as a nation] have traveled a long road . . . to the conviction that voting is a right of all persons on whom we impose the responsibilities of citizenship."[162] Professor James A. Gardner, who analyzed the Supreme Court voting cases up to 1997, found that the Court was most responsive to arguments that the vote was a marker of inclusion in the political community, and thus denying the right to vote or infringing it made a citizen less than a full member in the political community. As the country had opened up full citizenship to almost all people in society, the Court, moved by the position that "to be denied the vote is to be either excluded altogether from membership in the community or consigned to some kind of second-class citizenship," demanded that any remaining exclusions have compelling justification.[163]

C. The History of the Twenty-Sixth Amendment

By the time the Twenty-Sixth Amendment came up for debate, the nexus between voting and full citizenship was well established in the Constitutional text, Supreme Court doctrine, and tradition. As Professor Elizabeth S. Scott wrote in her analysis of the legal construction of adolescence, "The right to vote has long been the defining marker of legal adulthood and . . . of full-fledged citizenship."[164] In deciding whether to pass an amendment lowering the voting age, the people were deciding whether to lower the age at which young people became "full-fledged citizens." Throughout the Twenty-Sixth Amendment debate, enfranchisement was equated with granting the right of full citizenship. In the Senate hearings, for example, supporters routinely spoke of the

160. Reynolds v. Sims, 377 U.S. 533, 567 (1964).

161. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627-28 (1969); *Reynolds*, 377 U.S. at 562; Yick Wo v. Hopkins, 118 U.S. 356, 370-71 (1886).

162. *Nomination and Election of President and Vice President and Qualifications for Voting, Part 1: Statements of Senators Sponsoring Proposed Amendments: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. of the Judiciary on 87 S.J. Res. 1; 87 S.J. Res. 2; 87 S.J. Res. 4; 87 S.J. Res. 9; 87 S.J. Res. 12; 87 S.J. Res. 14; 87 S.J. Res. 16; 87 S.J. Res. 17; 87 S.J. Res. 20; 87 S.J. Res. 23; 87 S.J. Res. 26; 87 S.J. Res. 28; 87 S.J. Res. 48; 87 S.J. Res. 54; 87 S.J. Res. 58; 87 S.J. Res. 67; 87 S.J. Res. 71; 87 S.J. Res. 81; 87 S.J. Res. 90; 87 S.J. Res. 96; 87 S.J. Res. 102; 87 S.J. Res. 113; 87 S.J. Res. 114*, 87th Cong. 187 (1961) (statement of Sen. Randolph).

163. James A. Gardner, *Liberty, Community and the Constitutional Structure Of Political Influence: A Reconsideration of the Right To Vote*, 145 U. PA. L. REV. 893, 906 (1997).

164. Scott, *supra* note 10, at 562.

amendment as giving young people "full citizenship."[165]

Deputy Attorney General Richard Kleindienst argued that young people were "better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship."[166] Other supporters described giving young people the vote as giving them "their right to full participation in our democracy."[167] In the House, receiving the vote was characterized as granting "a plenary right on citizens 18 years of age or older to participate in the political process, free from discrimination on account of age."[168] President Johnson, in a speech advocating the amendment, argued that it was time to give the youth the "equal citizenship" the Nineteenth Amendment had given women.[169] The popular media expressed the same view.[170] One editorial opined in favor of the amendment, "[t]oday's young men and women are sufficiently mature at age 18 to function as full-fledged citizens."[171]

Much of the argument for extending full citizenship to those over eighteen was that they had already assumed the greatest responsibilities of citizenship.[172] Senator Joseph M. Montoya argued that "the present

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165. *See, e.g.*, *Lowering the Voting Age to Eighteen: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. of the Judiciary on S.J. Res. 7, S.J. Res. 19, S.J. Res. 32, S.J. Res. 34, S.J. Res. 38, S.J. Res. 73, S.J. Res. 87, S.J. Res. 102, S.J. Res. 105, S.J. Res. 141, S.J. Res. 147*, 91st Cong. 9, 78, 94, 138, 153, 158 (1970) [hereinafter *Hearings* 1970] (testimonies construing the vote as giving young people "full citizenship").

166. *Id.* at 78 (testimony of Deputy Attorney General Richard Kleindienst).

167. *Id.* at 151. (statement of James Brown, Jr., National Youth Director of the NAACP). *See also Lowering the Voting Age to 18: Hearings on S.J. Res. 8, S.J. Res. 14, and S.J. Res. 78 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 90th Cong. 14 (1968) [hereinafter *Hearings* 1968] (Sen. Javits referring to granting the vote as making eighteen-year-olds "adults"); *see id.* at 16-18 (Sen. Miller, an opponent, arguing that if the vote is granted, "a fortiori" all other legal rights of adulthood should be granted); *see id*. at 33 (Sen. Holland, an opponent, testifying, "the period for fully responsible citizenship [had] become longer . . . . The right to vote implies full citizenship and entails certain duties and responsibilities of citizenship."); *see id.* at 35 (Sen. Pearson testifying young people "have an eminent claim to the full rights of citizenship"); F.M. Brewer, *The Voting Age*, *in* EDITORIAL RESEARCH REPORTS 1944, VOL. II (C.Q. Press 1944), *available at* http://library.cqpress.com/cqresearcher/cqresrre1944090900 (last visited March 23, 2008) (quoting Mrs. Franklin D. Roosevelt as saying eighteen-year-olds were ready to be "full citizens"); Martin Packman, *Eighteen-Year-Old and Soldier Voting*, *in* EDITORIAL RESEARCH REPORTS 1954, VOL. I (C.Q. Press 1954), *available at* http://library.cqpress.com/cqresearcher/cqresrre1954022400 (last visited March 23, 2008) (making the point that giving vote would require giving all other privileges and responsibilities of adulthood in the Maryland senate debates); Arnall Ellis, State of the State Message, Admitting Youth To Citizenship, Jan. 1943 (construing giving vote as giving full citizenship).

168. Vikram David Amar, *Jury Service As Political Participation Akin To Voting*, 80 CORNELL L. REV. 203, 245-46 (1995) (quoting 117 Cong. Rec. 7535 (1971) (remarks of Rep. Poff)).

169. *Text of Johnson Message Asking Amendment to Lower Voting Age to 18*, N.Y. TIMES, June 28, 1968, at 27.

170. *See, e.g*, Bruce K. Chapman, *The Right to Vote at 18*, TRIAL MAGAZINE, Feb./Mar. 1970 (arguing that vote is needed because "adult demands are made on them, but adult rights and privileges often are denied" and "the right to vote is society's most conspicuous symbol of adult treatment and adult prestige"); Tom Devine, *Voting at 18*, CHI. TRIB., Aug. 19, 1970, at 20 (youth ready for "full citizenship" and to accept responsibilities and decisions of "adult society").

171. *Grown-up: Giving Ballot to 18-Year-Olds Might Add to Stability*, THE WHEELING INTELLIGENCER, Feb. 12, 1970 (also stating "today's 18-year-old is better informed and better equipped intellectually, if not emotionally, to assume the full duties of citizenship than his grandfather was at the same age").

172. *Hearings* 1970, *supra* note 165, at 74 (testimony of Rep. Cowger).

minimum voting age of 21 is . . . outdated . . . . In almost every respect 18 is the age at which responsibility begins, not 21."[173] President Richard Nixon echoed that sentiment in a radio address to the nation, pointing out that, given the legal responsibilities young people already bore, society's refusal to treat them as full citizens was "overprotective" and "over-patronizing."[174]

Young people had already taken on the most onerous of citizenship's responsibilities: fighting and dying for the country. If young people could give their lives to defend the nation, advocates pointed out, then surely the nation should make them full-fledged members.[175] Ramsey Clark, the former United States Attorney General, testifying in favor of lowering the voting age, pointed out, "Twelve thousand young men sent into deadly combat gave their lives but were never permitted to participate in the democratic process by which we determine whether any shall go." In light of this, he asked, "How do we defend our position: Vietnam, yes; Vote, no?"[176]

Supporters of maintaining the voting age at twenty-one frequently misunderstood the point of the popular mantra, "old enough to fight, old enough to vote." They interpreted the argument to mean that if a person was mature enough to fulfill the day-to-day duties of a soldier, he was also mature and capable enough to vote. "[W]hat makes a good soldier is not so much maturity as its absence," one supporter responded to this misinterpretation. "Eighteen year olds make better soldiers than twenty-six year olds because they are more inclined to follow orders unquestioningly."[177]

This response, of course, misses the point of the argument "old enough to fight, old enough to vote." It is not the act of soldiering or the day-to-day participation in military life that proves maturity; this life indeed might entail deferring to superiors. Rather, it is the gravity and weight of making such a sacrifice for the collective polity that proves political maturity. If a person is deemed capable of making the decision to risk his life to benefit the polity, then he is capable of being a full citizen and making a direct contribution to the polity's choices. Finding a person fit and capable to make the decision to sacrifice everything for the polity, and then claiming he is not fit to have full membership in the

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173. *Id.* at 275-76 (testimony of Mr. Speiser, American Civil Liberties Union).

174. *Id.* at 79 (testimony of Deputy Attorney General Richard Kleindienst).

175. As President Eisenhower put it, "If a man is old enough to fight he is old enough to vote." ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 278 (2000); *see also* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345, 1359 (2003).

176. *Hearings* 1970, *supra* note 165, at 102 (testimony of Clark Ramsey, former U.S. Attorney General).

177. *Hearings* 1970, *supra* note 165, at 288 (statement of Mr. Gahringer). *See also* Editorial, *The Washington-Times Herald*, Aug 13, 1943 (arguing that women and old men cannot serve, but should vote, so serving must not guarantee the vote); Rep. Emanuel Celler, The American Forum of the Air (Jan. 13, 1954) (arguing "the thing called for in a soldier is uncritical obedience, and that is not what you want in a voter.").

polity, is to exploit him in the worst way. It is to send him to his death for a cause that he is (allegedly) not fit and capable of understanding.[178]

Indeed, at the time the Twenty-Sixth Amendment was up for debate, states that had the death penalty found eighteen-year-olds sufficiently capable and responsible to put them to death. The penal codes in all states except one categorized eighteen-year-olds as capable of understanding the moral and political ramifications of their actions and, accordingly, held them accountable for their actions as if they were adults.[179] Eighteen-year-olds could not deflect responsibility when they violated the nation's criminal laws by blaming their youthful ignorance or immaturity.

By 1970, eighteen-year-olds bore the gravest political responsibilities: fighting for the country and receiving adult punishment for violating the penal code. The polity also allowed eighteen-year-olds to work, pay taxes, marry, and assume some forms of civil liability. It did not, however, allow eighteen-year-olds other rights of full-fledged citizenship, like an unabridged right to contract. The age of majority generally remained, like the right to vote, at twenty-one.[180]

Supporters of the amendment, accordingly, backed the persuasive proposition that a group taking on the weightiest obligations of citizenship should thereby earn full citizen status. Even if one were to accept this argument, however, one might avoid giving the group full citizen status by instead taking away their responsibilities. Supporters dismissed this option by asserting that young adults were well qualified for both the greatest responsibilities and the full package of citizenship, and thus, society should move them from their status as quasi-adults to full-fledged citizens.

The assessment that young people were qualified for full citizenship arose in large part from the changing nature of society and, correspondingly, the changing nature of what it meant to be eighteen. Supporters did not argue that eighteen should have always been the age of adulthood; rather, they argued that as the social and material conditions of society had changed, the age at which young people matured had lowered. Due to improved diet, sanitation, and medical care, the age of physical maturity, for example, had dropped three years from 1870 to 1970, making it so that an eighteen-year-old in 1970 was, on average, as physically mature as a twenty-one-year-old in 1870.[181]

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178. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 22 (President of the Young Democratic Clubs of America, testifying in response to the argument that military service did not entail maturity, "I hope this is not an admission that the United States is sending mentally immature men overseas to sacrifice their lives.").

179. *Hearings* 1970, *supra* note 165, at 6-7 (California, the one exception to this rule, allowed the juvenile court the discretion to decide whether a person aged 16-21 should be tried as a juvenile or an adult).

180. *Hearings* 1968, *supra* note 167, at 31-32 (Sen. Holland listing the age of majority for the purposes of contracts, wills, marriage, firearms, and drinking, which varied by state, but in most cases was set at twenty-one).

181. *Hearings* 1970, *supra* note 165, at 223 (testimony of Dr. Margaret Mead).

Supporters of the amendment made an analogous claim with respect to social and political maturity. Supporters pointed out that in previous generations, society was structured so that eighteen-year-olds were significantly less experienced, educated and informed.[182] "Age 21 is no longer the magic formula for the transition of a child to an adult," Lawrence Speiser, the director of the American Civil Liberties Union, wrote. "It was a criteri[on] adopted many years ago in response to social and legal realities at that time. Because they lacked a formal education, young persons had to mature through experience and survival for 21 years."[183] Representative Jenison seconded this view, claiming that the twenty-one year age mark originated in and belonged to an era in which people lacked "the means for obtaining with ease a general knowledge of public affairs, public issues, and candidates for public office." In contrast, he continued, "greater educational opportunities and present-day newspaper, radio, and television facilities" had made it easier for citizens to be educated and informed at an earlier stage in life.[184] Advocates quoted the following statistics to illustrate the evolution in the availability of education: in 1910, 6 percent of eighteen-year-olds had graduated from high school; whereas in 1970, 81 percent of eighteen-year-olds had graduated from high school.[185]

Ramsey Clark elaborated further, claiming that young people were not only "the best educated generation to date," but also "experienced beyond their age group in any other time," for they had been "subjected to more interpersonal relationships, experienced a greater and more difficult range of social pressures, [and had] been more alone in making more critical decisions" than any previous generation.[186] These "critical decisions" arose in the context of society's increasing mobility and opportunity, as well as the responsibilities the polity had already imposed on young people by law. Young people had to decide when and where to work, whether to pursue higher education, whether to marry, where to live, and whether to go to war. More opportunities, personal and professional, meant young people had more significant choices to make.[187]

Much as improved nutrition, sanitation, and health care had lowered the age of physical maturity, the improved quality and availability of education and information, as well as the increase in life choices and responsibilities, had lowered the age of social and political

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182. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 3-4 (Sen. Bayh remarking that this generation was more involved politically, economically, and socially than previous generations).

183. *Hearings* 1970, *supra* note 165, at 273 (testimony of Mr. Speiser, American Civil Liberties Union).

184. 113 CONG. REC. 5101 (1967); *see also Hearings* 1968, *supra* note 167, at 7 (Sen. Mansfield remarking that a high school graduate in 1968 was "far superior" in knowledge and education to a graduate two or three decades earlier).

185. 116 CONG. REC. S3216 (daily ed. Mar. 9, 1970) (statement of Sen. Goldwater).

186. *Hearings* 1970, *supra* note 165, at 103 (testimony of Ramsey Clark).

187. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 9 (1968) (Sen. Tydings stating young people had more education, maturity, and responsibilities than previous generations).

maturity. As a result, young people were now well equipped to take on the "fullness of citizenship." Deputy Attorney General Kleindienst summarized this line of argument:

> America's 10 million young people between the ages of 18 and 21 are better equipped than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplify the highest qualities of mature citizenship.[188]

Those debating the Twenty-Sixth Amendment understood it to present the polity with a choice: complete the move towards treating eighteen-year-olds as full, adult citizens, or reverse course and re-validate their status as older children. This decision necessarily relied on the social and political qualities of eighteen-year-olds as they were currently formed, but it also required making a normative decision about how the life cycle should operate. Parenting young people longer requires significant societal resources: caregivers must invest time and money, and the contributions young people would make if they were allowed to function as adults are lost. The age at which older children are expected to take on full legal responsibility affects the age at which they grow up, and, accordingly, the age at which they become independently contributing members of society who are responsible, legally and socially, for their choices.

People mature under the weight and expectation of rights and responsibilities. During the debates, supporters often voiced this sentiment.[189] They claimed, for example, that giving young people full political rights would "encourage civil responsibility [and] promote greater social involvement and political participation,"[190] and "facilitat[e] individual emotional growth and maturity."[191] Withholding these rights, in contrast, created an "enforced dependency," an "infantilization of the adolescent," which "gives rise to an impressive self-fulfilling prophecy." Treating young people as children "provokes" them to act like children and thereby "sustain[s] our perception of [them] as immature." Denying young people the "responsibilities of progressive maturity" produces a response of "childish behavior."[192] Further, it causes young people's

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188. *Hearings* 1970, *supra* note 165, at 78 (testimony of Deputy Attorney General Kleindienst).

189. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 45 (Chairman of the Young Republican National Federation testifying, "When you give people responsibility and ask them to act as mature adults with responsibility, you receive from them an acceptance of that responsibility.").

190. *Amendments to the Voting Rights Act of 1965: Hearing on S. 818, 2456, 2507 and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 323 (1969-70).

191. *Hearings* 1970, *supra* note 165, at 323 (National Commission on the Causes and Prevention of Violence, Statement on Challenging Our Youth, Nov. 1969).

192. *Id.* at 29 (statement of Dr. Menninger, member, National Commission on the Causes and Prevention of Violence).

"interest in public affairs [to] wane"[193] and produces a "feeling of noninvolvement" that results in "irresponsible behavior."[194]

Opponents of lowering the voting age put forward the opposite account. They argued that giving young people full political rights was tantamount to "pushing a little boy off the end of the dock in order to teach him how to swim."[195] Society could best benefit young people, in their view, by imposing *more* discipline and order, with adults firmly and fully "holding on to the reins" of parental and governmental authority. Like "permissiveness that allows unlimited candy and pop" decays children's teeth, "permissiveness [shown toward young people] decays [their] morals, life and all sense of responsibility." Giving young people the freedom of adults turns them into "malcontent children."[196]

Underlying this claim was the belief that young people, while formally educated, were immature and ill equipped for the responsibility of adulthood. While they possessed the abstract knowledge learned in school, they lacked the "wisdom and responsibility" a person acquires only through experience: "Wisdom is an aging process, gained through the application of knowledge."[197] Maturity comes from the "stabilization of personality and character," and on this measure, "each succeeding generation appears to mature later than its predecessors."[198]

A university philosophy professor testified that his students knew an impressive number of political and social facts, but also displayed "an almost universal inability to interpret such facts in any really adequate way."[199] They internalized the views of their teachers, particularly the ones with "strong and attractive personalities," often adopting the "most ingenuous of frameworks" through which to see the world. "It is natural for the young to view social problems in abstractly moralistic terms, as [a] contest [between] 'good guys' and 'bad guys.'"[200]

The professor's perception was echoed by other opponents of lowering the voting age. Young people, in their view, failed to grasp moral complexity and lacked a sense of self strong enough to make independent moral judgments.[201] As a result of this two-pronged failure, young people tended to parrot any charismatic, clever adult who sought to influence them. Young people's political behavior mimicked the

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193. *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, 2456, 2507 and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 323 (1969-70).

194. *Hearings* 1970, *supra* note 165, at 79 (testimony of Deputy Attorney General Kleindiest).

195. *Id.* at 284 (address by Rep. Chamberlain).

196. *Id.*

197. *Id.* at 283 (address by Rep. Chamberlain).

198. *Id.* at 288 (statement by Mr. Gahringer).

199. *Id*. at 289 (statement by Mr. Gahringer).

200. *Id.*

201. *See*, *e.g.*, Brewer, *supra* note 167 (summarizing the opposition in 1944 as arguing that "real knowledge" cannot be gained in the classroom and youth need practical experience before voting); Packman, *supra* note 167 (summarizing the same opposition point ten years later).

behavior of their parents,[202] popular teachers, or radical demagogues.[203] Representative John Rarick, for example, claimed that young people were "proficient in parroting loudly the emotional slogan programmed into them."[204] Senators voiced the same fear, claiming that young people "are prone to take an extreme point of view,"[205] drawn to "promises rather than to performance," possess attitudes that "[shift] from place to place," and are thereby likely to provide "fertile ground for demagog[ues]."[206]

The campus upheavals of the sixties provided an oft-cited example of what could happen if young people's immaturity were empowered. Representative Charles Griffin, for example, pointed to the "student strikes over the country" as evidence of young people's inability to take a "cool and reasoned approach to the problems facing America." Young people were, accordingly, ill-suited "to accept responsibility."[207]

While opponents saw the whole spectrum of campus political activity, from violence against persons and properties to peaceful rallies and speeches, as demonstrative of young people's immaturity, supporters saw the nonviolent political activity as evidence that young people were prepared to participate fully in the political system. Supporters dismissed the campus violence, which was universally condemned in the debates, as the work of a tiny minority of young people.[208] Supporters pointed out that most of the ringleaders were twenty-one or older.[209] The peaceful protests, organizations, and speeches, on the other hand, exemplified young people's awareness and knowledge of political events, as well as their desire and willingness to invest in the political system by lawful means. Supporters considered resort to such lawful means to be a virtue of democratic citizens. This activism proved young people's ability to "infuse . . . the political process" with "perceptiv[ity]," "fresh energy," "idealism," "enthusiasm," "skill," and "dedication and conviction."[210]

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202. *See, e.g.*, 100 CONG. REC. 3050 (1954) (an opponent claiming young people would mimic their parents).

203. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 10 (Sen. Tydings summarizing the opposition as claiming young people would be swayed by parents and special interest groups); *see id.* at 32 (Sen. Holland stating "radicalism has had its greatest appeal to the youth between the ages of 18 and 21"); 100 CONG. REC. 3050 (1954) (an opponent claiming young people would fall for demagogues and corrupt politicians).

204. 116 CONG. REC. 8493 (1970).

205. *Hearings* 1968, *supra* note 167, at 15 (statement of Sen. Miller).

206. *Id.* at 32-33 (statement of Sen. Holland).

207. 116 CONG. REC. 20251 (1970).

208. *See, e.g.*, *Hearings* 1970, *supra* note 165, at 16; *Hearings* 1968, *supra* note 167, at 3 (remarks of Sen. Bayh); 114 CONG. REC. 19491 (remarks of Sen. McGee); Andrew Hacker, *Even If They Can't Read, They Should Have The Vote*, N.Y. TIMES, Apr. 18, 1965, (Magazine) at SM26; John Herbers, *Analysis of Student Movements Finds Most Nonviolent, With New Left a Minor Factor*, N.Y. TIMES, Jan. 14, 1970.

209. *Hearings* 1970, *supra* note 165, at 16 (statement of Theodore E. Sorensen, former special counsel to President Kennedy).

210. *Hearings* 1970, *supra* note 165, at 22 (statement of Dr. Menninger, member, National Commission on the Causes and Prevention of Violence); *id*. at 306 (Interim Statement on Campus

Supporters not only rejected the notion that young people had an immature tendency to violence; they also rejected the claim that young people were easy targets for charismatic pedagogues. To the contrary, they argued, young people were skeptical and critical across the board, questioning teachers, parents, radicals, and politicians alike. As Senator Barry Goldwater put it, "Far from being the possible victims of demagogues, I think the challenging, probing minds of today's youth will serve to expose the dishonest politician quicker than anything else."[211] Kingman Brewster, the President of Yale at the time, testified that young people have a "full measure of good old-fashioned 'show-me' skepticism," heaping "scorn" on the "malefactor of great slogans."[212] Senator Moody pointed out that, in his experience, it is young people who "have no patience generally with weasel-worded answers."[213]

What opponents construed as a political vice—young people's inexperience, their lack of stabilized personality, and their tendency to see things as black and white—supporters construed as a political virtue.[214] The fact that young people lacked a stabilized personality and vested interests meant that they were more likely to vote for the general good of the polity, rather than whatever policy served their personal interest.[215] Senator Kilgore, for example, claimed that, in his experience, "[y]ounger people do not let selfish personal interests influence their vote."[216] Former Governor of Kentucky Burt Combs pointed out that older people operated with a greater number of "prejudices, preconceptions, and misconceptions," and those biased frames prohibited them from seeing the public good as clearly as young people.[217]

While young people's inexperience may cause partial blindness to the moral compromises embedded in institutional realities, it also means that they will possess high standards and great aspirations. Supporters insisted that the enthusiasm, idealism, and vigor of young people would

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Disorder, National Commission on the Causes and Prevention of Violence).

211. *Id.* at 132 (statement of Sen. Goldwater).

212. *Id.* at 24 (statement of Dr. Menninger, member, National Commission on the Causes and Prevention of Violence).

213. *Proposing an Amendment to the Constitution of the United States to Grant to Citizens of the United States Who Have Attained the Age of Eighteen the Right to Vote: Hearing on 82 S.J. Res. 127 Before the Subcomm. of the S. Comm. on the Judiciary*, 82nd Cong. 61 (1952) [hereinafter *Hearings* 1952]. *See also Hearings* 1968, *supra* note 167, at 10 (Sen. Tydings saying young people "are earnest and informed; they are skeptical and searching" and less likely to be taken in by demagogues).

214. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 3 (Sen. Bayh characterizing young people as a "vigorous and exciting force" that should be "utilized by society" by making them full participants); *see id.* at 6 (Sen. Mansfield remarking young people's "idealism and enthusiasm" will have a "beneficial influence on the conduct of government").

215. *See, e.g.*, *Hearings* 1968, *supra* note 167, at 76 (Congressman Hechler testifying "[Young people] tend to think more broadly, perhaps more idealistically, in terms of the general good without reference to one or more economic interests . . . . [Young people] may think more in terms of the common good than those with established economic interests."); *Hearings* 1952, *supra* note 213, at 60; 105 CONG. REC. 17622 (1959).

216. *Hearings* 1952, *supra* note 213, at 60.

217. *Hearings* 1970, *supra* note 167, at 75 (statement of Rep. Cowger).

"improve the overall quality of our electorate,"[218] as well as the "quality of [the] debate and decisions in our public life."[219] The energetic and fresh-eyed idealism of the young would provide a much-needed check on the world-weary cynicism of older generations, "inject[ing] into our political bloodstream youthful, vigorous thinking,"[220] "shaking us out of our complacency,"[221] and helping to "remove the crusty, shopworn reasons why the policies and goals which are promised to voters don't ever seem to get accomplished."[222] Young people "are a great force against the hypocritical handshaking, backslapping, baby kissers of the old school of politics."[223]

In sum, supporters agreed with opponents that youth had a tendency to idealize, but disagreed over the value of that tendency. Opponents saw the tendency to idealize as immaturity that, when empowered, produced dangerous moral excess, infecting society with zealotry and disorder. Supporters, on the other hand, saw it as a legitimate part of the life cycle of mature political views, where each phase of that life cycle contributed to the overall health of the polity.[224] Just as youth had a tendency to change their minds, idealize, and push for great reforms, older citizens had a tendency towards closed minds, cynicism, and resignation; in conjunction, the two produced a polity with a healthy balance of growth and stability.[225]

These competing views of the eighteen-year-old occupied center stage in deciding whether to grant eighteen-year-olds full citizenship.

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218. *Id.* at 162 (statement of Sen. Kennedy).

219. *Id.* at 298 (statement of Sen. Pell).

220. *Granting Citizens Who Have Attained the Age of Eighteen the Right To Vote: Hearing on 83 S.J. Res. 53; 83 S.J. Res. 64 Before the Senate Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 83rd Cong. 16 (1953) [hereinafter *Hearings* 1953] (statement of Duane Emme).

221. *Hearings* 1970, *supra* note 165, at 24 (statement of John D. Rockefeller, III).

222. *Id.* at 133 (statement of Sen. Goldwater).

223. Brief of Youth Franchise Coalition, et al., as Amici Curiae at 20, Oregon v. Mitchell, 400 U.S. 112 (1970) (No. 43).

224. *See*, *e.g.*, *Hearings* 1970, *supra* note 165, at 14 (Sen. Cook stating the polity is growing older and needs vitality of youth to balance it); *id*. at 45 (Ian MacGower, Executive Director, Youth Franchise Coalition stating same); *id*. at 75 (stating young people add vitality, energy to electorate); *id*. at 225 (Rep. Cowger stating youth vote establishes a partnership between generations); *Hearings* 1968, *supra* note 167, at 11 (Sen. Javits saying the polity could benefit from "infusions of youthful talent and dedication"); *id.* at 36, 37 (Sen. Pearson testifying that "the country would benefit by [youth's] infusion of idealism and vigor" and youth voting "will have a healthy and beneficial effect"); *id*. at 39 (Sen. Proxmire's statement, reading, "Without the wisdom of age, government would be chaotic and without the vision of youth, government would be stagnant."); *id*. at 40 (Sen. Cannon's statement, reading, "[the youth vote] would be healthy for our politics . . . a breath of fresh air, endowed as [they] are with idealism, compassion, and the desire to move this country forward.").

225. *See supra* note 224; *see also* WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 111 (1992) (quoting President Nixon saying young people "would add to the quality of the debate"); Packman, *supra* note 167 (quoting Sen. Humphrey as saying young people "could be a catalytic and informative force in American politics"); *Shall the Voting Age be Lowered to 18?*, PARENTS MAGAZINE, Dec. 1943, at 18 (quoting George Stoddard saying that "youth in its late teens would constitute a red-blooded, high-minded addition to the country's political power—a shot in the veins"); *Hearings* 1953, *supra* note 220, at 11-16 (1953) (Duane Emme testifying that youth "would give the nation fresh thinking and objective thinking to somewhat offset the degree of subjective thinking we now have").

Opponents saw the eighteen-year-old as needing parental and societal guidance, lest she become an indulged, morally deficient, malcontent child. Supporters saw the eighteen-year-old as mature and idealistic, capable of bringing a responsible, distinct perspective to the political world. Those on both sides of the debate imagined the university as the primary place these conflicting scenarios would play out. The next section will highlight the centrality of the university and the university student to the people's debate over whether eighteen-year-olds were mature adults meriting equal treatment or older children needing care and firm rules.

D. The Changing Legal Status of the University and the Twenty-Sixth Amendment

At the time of the Twenty-Sixth Amendment's ratification, nearly half of the people between the ages of eighteen and twenty-one were enrolled in some form of higher education.[226] The participants in the Twenty-Sixth Amendment debates were well aware, then, that their decision would profoundly affect the future nature of the institution of higher education. The debaters understood that giving eighteen-year-olds the right to vote, and thereby declaring them full citizens in the constitutional order, would permanently end the legitimacy of the paternalistic legal relationship between students and the university. If university students were free adults, then the university would have to treat them as such, respecting their full constitutional rights and honoring student-university contracts. The Twenty-Sixth Amendment, if ratified, would push the *in loco parentis* role the university had historically exercised over its students—a role which had already receded both in practice and in law by 1970—outside of constitutional bounds. The university student and the university accordingly played a central role in the debates.

At the time of the Twenty-Sixth Amendment debates, the legal status of the university had recently undergone a significant shift. From America's inception through the mid-twentieth century, the doctrine of *in loco parentis* had dominated the legal relationship between the student and the university. A 1924 state court expressed the prevailing rule of the time:

> As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand *in loco parentis* and in their discretion may make any regulation for their

226. *Hearings* 1970, *supra* note 165, at 46 (Mr. MacGowan stating that as of 1970, 47% of the people between the ages of 18 and 21 were enrolled in higher education); *Hearings* 1968, *supra* note 167, at 21 (R. Spencer Oliver stating that as of Sept. 1966, 47% of the people between the ages of 18 and 21 were enrolled in higher education).

> government which a parent could make for the same purpose. . . . [C]ourts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[227]

During the 1940s and 1950s, cases appeared that suggested that the constitutional rights of students might cabin, or even eliminate, the *in loco parentis* legal relationship that continued to prevail. In 1943, the Supreme Court ruled that elementary school students had a constitutional right not to salute the flag if it violated their religious beliefs to do so,[228] and in 1954, the Court ruled that black elementary school students had a constitutional right to an education equal to the one provided white students.[229] These cases suggested, for the first time, that schools had to respect their students' constitutional rights, which conflicted with and curbed the school's ability to treat them like children.

In *Sweezy v. New Hampshire*, a narrow plurality opinion issued in 1957, the Court turned its attention to the university.[230] *Sweezy* held that a State Attorney General's questioning of a professor about his allegedly subversive political beliefs at the behest of a state legislator violated the professor's right to due process. This narrow holding was soon forgotten. However, the plurality opinion, as well as the concurring opinion based explicitly on the First Amendment, painted a new picture of the university as an institution that needed to operate freely as a marketplace of ideas. Chief Justice Warren wrote for the plurality that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[231] Justice Frankfurter agreed in his concurrence. Quoting T. H. Huxley, he wrote, "A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.' This implies the right to examine, question, modify, or reject traditional ideas and beliefs."[232]

This conception of the university, which notably included both teachers *and* students as having the right to freely inquire, study, and evaluate, gave a legal presence to practices and ideals that had already taken root in society. The American Association of University Professors (AAUP), formed in 1913, had issued a strong statement in 1915[233] (altered and re-issued in 1940)[234] defending the academic

227. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924).

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

229. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494-95 (1954).

230. 354 U.S. 234 (1957).

231. *Id.* at 250.

232. *Id.* at 262 (Frankfurter, J., concurring).

233. AM. ASSOC. OF UNIV. PROF., *1915 Declaration of Principles on Academic Freedom and Academic Tenure* in POLICY DOCUMENTS AND REPORTS (9th ed. 2001).

234. AM. ASSOC. OF UNIV. PROF., *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, available at http://www.higher-ed.org/resources/AAUP_1940stat.htm (2008).

freedom of professors and conceiving of the university as an institution aimed at open inquiry and the acquisition of knowledge. By the time *Sweezy* came before the Court, the 1940 AAUP statement had started to influence the academy's perception and regulation of itself.[235]

The consequences of the *Sweezy* opinion for *in loco parentis* were unclear, as the legal holding was on narrow grounds applicable to limited facts. It addressed state legislators trying to control the activities of professors, which did not necessarily mean that universities should stop exercising parental control over students. Nevertheless, its strongly worded conception of the university as an open marketplace of ideas, which pointedly included students as participants in that marketplace rather than as depositories for the knowledge accumulated by a professorial marketplace, established a key stepping stone for the demise of *in loco parentis*.

In 1961, a federal court, for the first time, decisively circumscribed the *in loco parentis* doctrine at the university level.[236] In what quickly came to be described as a landmark decision,[237] the federal court of appeals in *Dixon v. Alabama State Board of Education* held that a state university, when expelling its students, had a constitutional obligation to provide students with due process. Writing thirteen years after the decision, a professor of higher education aptly described the turn of events following *Dixon*:

> The doctrine of *in loco parentis* which for so many years was followed on our campus, both public and private, is no longer legally valid. The avalanche of court decisions following the landmark *Dixon* case in 1961 have one by one added judicial nails into the coffin of that doctrine.[238]

In 1967, the Court issued another opinion, *Keyishian v. Board of Regents of the University of the State of New York*, which, in finding the state's punishment of professors' "seditious" utterances in violation of the First Amendment, affirmed its conception of the university as the marketplace of ideas.[239] The opinion pointed out, "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,

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235. *See, e.g.*, Walter P. Metzger, *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 61 (Summer 1990).

236. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

237. D. Parker Young, *Student Rights and Discipline in Higher Education*, 52 PEABODY J. OF EDUC. 58, 58 (Oct. 1974); *see also* ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 7 (1999); Gavin Henning, *Is* In Consortio Cum Parentibus *the New* In Loco Parentis*?*, 44 NASPA J. 538 (2007), *available at* http://publications.naspa.org/naspajournal/vol44/iss3/art9; Philip M. Hirshberg, *The College's Emerging Duty to Supervise Students:* In Loco Parentis *in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189 (1994).

238. Young, *supra* note 237, at 58.

239. 385 U.S. 589, 593 (1967).

[rather] than through any kind of authoritative selection.'"[240] The same year, the AAUP, which had only tangentially addressed students in its 1940 statement, alongside ten other university associations, promulgated a "Joint Statement on Rights and Freedoms of Students," which specified that students, like professors, had the right of free inquiry and evaluation.[241] The debate over the Twenty-Sixth Amendment occurred in the midst of this recognition of students' rights and the Supreme Court's affirmation of the university as a marketplace of ideas, both of which abridged the *in loco parentis* doctrine. At the time, it was understood that enacting the Twenty-Sixth Amendment would invalidate the already disappearing doctrine of *in loco parentis* as applied to universities, whose populations were overwhelmingly eighteen and older. Higher education professor Parker Young, writing three years after the Twenty-Sixth Amendment passed, analyzed the situation accordingly: "If any notion of *in loco parentis* still exists today," then the Twenty-Sixth Amendment and the resultant movement to lower the age of majority to eighteen should "lay to rest such contentions."[242]

As covered above, much of the Twenty-Sixth Amendment debate focused on when a young person in our society should be treated as capable of operating as a free adult, with all the attendant rights and responsibilities. The figure of the university student loomed large in this dispute. Supporters of the amendment argued that the university student should be conceived of as a free adult, voluntarily acquiring higher education as she saw fit. Under this conception, the university was an open "marketplace of ideas," reminiscent of ancient Athens, where students and teachers voluntarily came together to explore ideas in an extended, open dialogue.[243] Opponents of the amendment, on the other hand, saw the university as a seamless extension of high school, a place where still-immature, older children lived under the gentle, guiding hand of the university. On this view, the university, accordingly, still took responsibility for their students' physical and moral well-being.

Supporters went so far as to justify the new voting age on account of its connection to the end of secondary school, arguing that "[t]he critical change in the role of our young people in today's society occurs when they graduate from high school, usually at age 18."[244] While other important milestones also occurred at eighteen, like becoming eligible for the draft in the case of men, graduating from high school had the

240. *Id*. at 603 (internal citation omitted).

241. Gary Pavela, *Academic Freedom for Students Has Ancient Roots*, CHRON. HIGHER EDUC., May 27, 2005, at B8.

242. Young, *supra* note 237, at 58.

243. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995).

244. *Hearings* 1970, *supra* note 165, at 295 (statement of Sen. Montoya); *see also id.* at 548 (Appellant's Opening Brief, Puishes v. Mann, No. 25-401 (9th Cir.)); *Hearings* 1968, *supra* note 167, at 9 (Sen. Tydings stating "the age of eighteen—the age of high school graduation" marked the time when citizens were prepared to vote); *id.* at 36 (Sen. Pearson testifying that the age young people generally graduate from high school is the best place to start the vote).

most universal applicability and resonance in the life cycle.[245] After graduating high school, each person made a significant, free choice of what to do with his or her life; some "go into the job market; others enter the armed forces; and still others go on to higher education."[246] The voluntary nature of the decision to attend a university revealed the state's assessment that the high school graduate was fully educated for the purposes of citizenship. As one supporter put it, "Our 18-year-olds have completed their compulsory education. As far as the State is concerned, an 18-year-old is educated."[247]

Supporters of lowering the voting age praised universities that had already shifted (in line with the AAUP's Joint Statement on Student Rights) to operating on a model of treating their students as free adults with full rights to free inquiry, and condemned those that had not. One commentator lauded the change he had observed: "Back in the fifties, the student role in running the school was roughly akin to that of a spear-carrier in a Shakespearean drama; now the student body has one of the biggest speaking parts in the play."[248] Senator Goldwater testified that he had "probably visited more colleges and universities in the last decade than anyone in the country" and had found that he was "constantly impressed by the wisdom and interest, and concern with vital matters, that is shown by the students whom I have met." He then refuted the claim underlying the opposition's view that the university needed to parent their students, stating that "[f]ar from being the possible victims of demagogues," youths possessed "challenging, probing minds."[249]

Congress' Brock Report on Student Unrest,[250] which involved a tour of over fifty university campuses, concluded that the voting age should be lowered, as university students were "better educated and more vitally concerned with contemporary problems in our country than at any previous time in our history."[251] The National Commission on the Causes and Preventions of Violence likewise released reports on challenging youth and on campus disorders. Adamantly endorsing the Twenty-Sixth Amendment,[252] the reports praised university students for

245. In 1970, for example, 81% of 18-year-olds had graduated from high school. *Hearings* 1970, *supra* note 165, at 133 (statement of Sen. Goldwater).

246. *Hearings* 1970, *supra* note 165, at 295 (statement of Sen. Montoya); *see also Hearings* 1968, *supra* note 167, at 36 (1968) (Sen. Pearson testifying 18-year-olds "may choose their own professions and thus take responsibility for their own future"); *id.* at 110 (Rep. Onge stating knowledge and interest in public affairs is highest for most people upon graduation of high school; ergo, voting should start then); *id.* at 112 (Claude Ury, educational consultant, stating high school education equips students with civic education sufficient for voting); *but see id.* at 113 (Gov. Volpe arguing that the voting age should be set at 19, since voting should commence when almost all have graduated from high school).

247. *Hearings* 1970, *supra* note 165, at 111 (statement of Private Springer).

248. *Id.* at 121 (statement of Stephen L. Bogardo, member, Board of Directors, National Businessmen's Council).

249. *Id.* at 132 (statement of Sen. Goldwater).

250. *Id.* at 206 (Rep. Railsback explaining and submitting the report for the record.)

251. *Id.* at 217 (Report of the Brock Campus Tour).

252. *Id.* at 314 (National Commission on the Causes and Prevention of Violence, Statement on

being "intelligent" and "idealistic."[253]

In particular, the report on campus disorders endorsed the Athenian ideal of the university painted in *Sweezy*[254] and *Keyishian*,[255] stressing that the university needed to treat students as adults and not malcontent children if the university was to serve its proper function in society. The report argued that the university was "the citadel of man's learning and of his hope for further self-improvement" and emphasized that the university had to remain "an open community that lives by the power of reason," with a "commitment to rational discourse," "listen[ing] closely to those with conflicting views," and standing against those "who would impose their will on everyone else."[256] The report then endorsed the words of Kingman Brewster, then-President of Yale, who insisted that universities must implement a policy of "the encouragement of controversy, no matter how fundamental; and the protection of dissent, no matter how extreme. This is not just to permit the 'letting off of steam' but because it will improve the [university] as a place to be educated."[257]

The report critiqued the view, which existed on some campuses, that "the academy is an enclave, sheltered from the law." "This is a serious misconception," the report argued, "a residue of the time when the academy served *in loco parentis*, making and enforcing its own rules for students' behavior."[258] Both students and the university are subject to the laws of the polity. Students should be accountable to the law if they act violently against people or properties. At the same time, "students have the right to due process and to participate in the making of decisions that directly affect them,"[259] as well as the full sweep of First Amendment rights.[260]

Supporters' view of the university's function in society rested on, among other things, their belief that university students were free, responsible adults who chose for themselves whether or not to enroll in an institution of higher education.[261] They believed that students would be better off learning in an Athenian university as opposed to one that sheltered them from "bad" influences.[262] The *in loco parentis* model

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Challenging Our Youth, Nov. 1969).

253. *Id.* at 305 (National Commission on the Causes and Prevention of Violence, Interim Statement on Campus Disorder, June 9, 1969).

254. 354 U.S. 234, 250 (1957).

255. 385 U.S. 589, 593 (1967).

256. *Id.* at 307.

257. *Id.*

258. *Id.*

259. *Id.* at 308.

260. *Id.* at 310.

261. *See*, *e.g.*, *Hearings* 1968, *supra* note 167, at 63 (Sen. Randolph testifying, "Now, at the age of 18 the majority of our young people are being graduated from high school. They are completing studies in preparation for responsibilities—responsibilities in the processes of higher education, responsibilities in earning livings, responsibilities in rearing families.").

262. *See*, *e.g.*, *Hearings* 1968, *supra* note 167, at 46, 48 (Edward Schwartz, President of the National Student Association, testifying, "Students want power. We want power to govern our

arose, historically, precisely because the university's much younger students were viewed as children in need of guidance. Students educated in an Athenian university, on the other hand, were seen as adults who were given the ability to think freely and responsibly, and who would possess, upon leaving, a superior ability to critique, reason, and make responsible decisions. In addition, supporters of lowering the voting age believed that the university operating according to the Athenian ideal benefited society above and beyond its graduates' abilities: a university community wholly dedicated to the open exchange of reason, ideas, and truth maximized its ability to obtain knowledge. If the university abridged its openness by sheltering and molding its students into a predetermined model of proper behavior, the university itself would become susceptible to stasis of thought. Resources otherwise devoted to truth-seeking would be devoted to training and sheltering students; the whitewashed environment on campus would infect everyone's thoughts.

As opponents of lowering the voting age rejected supporters' conception of university students as free adults, they also rejected the supporters' Athenian ideal of the university. Opponents saw the university's search for truth as secondary to its tutelary and custodial obligations to its students. They interpreted the contemporaneous student activism, both violent and non-violent, as evidence that giving students the freedom to act like adults only produced chaos. They advocated for universities to reassert and reestablish their historical *in loco parentis* role.[263] One professor, referring to campus activism, claimed, "One need only look at what has happened and is happening on the campuses of some of our great universities to see the results of [young people's] lack of maturity."[264]

Another opponent of the amendment testified in the Senate, "College is a test tube of experimentations and growing up; trying different approaches and failing, and trying others . . . . College is training and the search for oneself, and no one really expects [college students] to be completely responsible."[265] Instead, university students must be protected from the force of their own decisions, as well as from negative influences. Senator Holland expounded on this point, claiming that political parties on campus posed a serious threat to vulnerable youth, as the years eighteen to twenty-one are "formative years where youth is reaching maturity during which time his attitude shifts from place to place."[266]

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private lives, power to contribute to the formulation of policy in our universities . . . and power to influence the political processes of our country. This demand for youth power, or student power . . . stems from a growing sophistication among youth in evaluating our world . . . and a growing desire to assume 'adult' responsibilities at an earlier age . . . . [The sensible answer is] the accordance of institutional power to us, both in universities, and in the Nation as a whole.").

263. *Hearings* 1970, *supra* note 165, at 289 (statement of Mr. Gahringer).

264. *Id.* at 27 (statement of Dr. Menninger).

265. *Id.* at 285 (address by Rep. Chamberlain).

266. *Hearings* 1968, *supra* note 167, at 33 (statement of Sen. Holland).

These conflicting views of the university and the university student played an important role in the Twenty-Sixth Amendment debates. An educational institution that acts *in loco parentis* cannot pass constitutional scrutiny if those being parented are adults. When applied to adults, the extensive physical, mental, and moral control exercised over children by their parents and those acting *in loco parentis* transforms from a legitimate exercise of care and moral inculcation into a severe violation of liberty, freedom, and privacy.

When the debates ended soundly in favor of lowering the voting age, the people constitutionally affirmed eighteen-year-olds as full, adult citizens, and, accordingly, ended the constitutional permissibility of *in loco parentis* on the university campus. In the end, the people overwhelmingly endorsed supporters' view of young people and their role in the polity. Little organized or vocal opposition to the Twenty-Sixth Amendment existed. It took only three months and seven days for three-fourths of the states to ratify the amendment, making it the fastest-ratified amendment in American history.[267] Pollsters found that in the three years leading up to the Amendment, 56 to 63 percent of the public approved of giving eighteen-year-olds the vote.[268] In short, the people firmly concluded that eighteen-year-olds were mature enough to take on the rights and responsibilities of adulthood. It was time to give them the vote, and, correspondingly, full citizenship. Students' constitutional rights of free speech, association, religion, due process, and privacy could no longer be abrogated because of their purported immaturity. Though the current First Amendment doctrine does not explicitly recognize the Twenty-Sixth Amendment as enshrining First Amendment rights for those over the age of eighteen, in the years following the ratification of the Twenty-Sixth Amendment, when the debates were fresh, many courts explicitly applied this principle. Before covering this legal history, the next section will address the arguments for reading the Twenty-Sixth Amendment broadly into the Constitution.

IV. THE INCORPORATED TWENTY-SIXTH AMENDMENT AND THE FIRST AMENDMENT

A. Reading the Constitution: the First, Fourteenth, and Twenty-Sixth Amendments

The history behind the Twenty-Sixth Amendment demonstrates that

267. *See, e.g.*, Robert Roth, *Seven Polarizing Issues in America Today: A Rapid Change of Sentiment*, 397 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 84 (Sep. 1971).

268. *See, e.g.*, Hazel Erskine, *The Polls: The Politics of Age*, 35 THE PUB. OPINION Q. 486 (Autumn 1971).

the people understood the extension of suffrage to eighteen-year-olds to entail the extension of "full-fledged citizenship" to eighteen-year-olds. The central question of the debate was, "When does a child become a legal adult?" Prior to the Twenty-Sixth Amendment's ratification, eighteen-year-olds already carried adult status for military, criminal, marital, employment, and tax purposes. But the age of majority, which governs when a person becomes fully responsible for his civil actions in tort and contract, had generally remained, like the voting age, at twenty-one. The three states with an age of majority lower than twenty-one at the time of the Twenty-Sixth Amendment's ratification were three of the four states with voting ages lower than twenty-one.[269]

If the people understood the Twenty-Sixth Amendment to set a minimum age for "full citizenship," as the debates indicated, one would expect to see that states dropped their age of majority to eighteen following the Amendment's ratification. Overwhelmingly, this expectation bore out. North Carolina made this connection explicit, passing a statute prior to the ratification of the Twenty-Sixth Amendment that lowered the age of majority to eighteen, and which would take effect "in the event" that the Twenty-Sixth Amendment was ratified.[270] In the four years following the Twenty-Sixth Amendment's ratification, all states but five followed suit and lowered their age of majority to eighteen, thereby giving eighteen-year-olds the full array of adult rights. Three states, in contrast, lowered the age of majority to nineteen and two left it at twenty-one.[271]

The legal scholarship on the Twenty-Sixth Amendment is sparse.[272] However, a few scholars have argued in favor of reading the "voting right" amendments into the Constitution more broadly than their literal text, providing support for the position taken in this article. The full voting right amendments include the Fifteenth, Nineteenth, and Twenty-Sixth Amendments.[273] The texts of the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, which respectively gave blacks, women, and those aged eighteen to twenty-one the right to vote, are identical aside from the category in question.[274]

The Court has read the Fourteenth Amendment, which does not

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269. Georgia was an anomaly in having a voting age of eighteen and an age of majority of twenty-one. It was the only state in the nation where the voting age differed from the age of majority. *Hearings* 1970, *supra* note 165, at 487.

270. 1971 N.C. Sess. Laws page no. 585.

271. Nicholas C. DiPiazza, Note, *Effect of the New Age of Majority on Preexisting Child Support Settlements*, 5 FORDHAM URB. L.J. 365, 365 n.2 (1976).

272. The Twenty-Sixth Amendment is only addressed in the legal scholarship in passing. The longest and most substantive treatment of it is a few paragraphs in Elizabeth Scott's article on the construction of adolescence. *See* Scott, *supra* note 10, at 562-64 (containing a few paragraphs on the history of the Amendment).

273. The Twenty-Fourth Amendment is a "half" voting right Amendment because it prevents poll taxes only for federal elections, not state or local elections. U.S. CONST. amend. XXVI.

274. The category in question is described as "race, color, previous condition of servitude," "sex," and "age over eighteen," respectively.

mention race in its text and gives all "persons" the rights of due process and equal protection, to particularly protect persons from losing those rights on the basis of their race.[275] This extra protection against race-based violations stems from reading the Fourteenth Amendment in conjunction with the concurrently enacted Fifteenth Amendment, which specifically mentions race, and in light of the framers' intentions for the Amendments.[276] The clear nexus between the voting rights and full citizenship of blacks strengthens the claim for finding the same nexus with respect to the other voting right amendments. Indeed, legal scholars have taken up this position. Reva Siegel has claimed, for example, that the Court should protect women in particular from losing legal rights.[277] She argues that the framers of the Nineteenth Amendment, guaranteeing women the vote, understood it to give women full citizenship. Analogous to the argument in this article, Siegel argues that the Court should incorporate the Nineteenth Amendment's framers' understanding of that amendment, as revealed through the debates, into the constitutional doctrine.[278]

Akhil Amar[279] and Vikram Amar[280] similarly have endorsed the view that the voting right amendments wrote into the Constitution more than their text literally says. They claim that the people understood the right to vote as a right to the full set of political rights. This included the right to serve on a jury, to engage in free speech, and to run for office, but not civil rights like the right to contract. Accordingly, based on the voting rights amendments, those over eighteen, women, those unable to pay taxes, and blacks should get special protection from the loss of any of their political rights. Unfortunately, their coverage of the Twenty-Sixth Amendment debates is brief and superficial. Professor Vikram Amar's article, for example, offers only Representative Poff's and President Nixon's Attorney General's remarks to back up his claim that the people, at the time of the Twenty-Sixth Amendment, equated the right to vote with the full spectrum of political rights.[281] As a result, insofar as the argument relies on the people's understanding at the time of each amendment's ratification, the theory should be expanded with

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275. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 8-10 (1967); Brown v. Board of Education, 347 U.S. 483, 490 n.5 (1954); Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (stating, "Looking at [the Fourteenth Amendment]'s history, it is clear [that its] aim was against discrimination because of race or color.").

276. *Loving*, 388 U.S. at 8-10 (examining the intentions of the framers of the Thirteenth, Fourteenth and Fifteenth Amendment as being especially concerned with race and bearing on the proper interpretation of the Fourteenth Amendment).

277. Siegel, *supra* note 154, at 981-1006.

278. *Id.* at 976.

279. Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 51-52 (2000); Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 471-73 (1995); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201-03 (1991).

280. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 244-45 (1995).

281. *Id.* at 245-46.

respect to the Twenty-Sixth Amendment to include a broader scope of rights: those guaranteed by full citizenship.[282]

The current scholarship thus gives no more than a brief mention to the debates leading up to the Twenty-Sixth Amendment.[283] This is an omission, as the debates, which provide historical and normative reasons for reading the Amendment into the Constitution broadly, offer the strongest justification for reading the Amendment more broadly than its literal text. Also, perhaps arising from this historical omission, the legal scholarship to this point has not recognized that the Twenty-Sixth Amendment has a stronger claim to constitutional import beyond its literal text than the other voting right amendments and so merits a separate analysis. Unlike the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, the debates leading up to the Twenty-Sixth Amendment contained and answered into the constitutional text a question that the Supreme Court had previously struggled to answer: for the purposes of constitutional rights, when does a child become an adult? The other voting right amendments answer no equivalent constitutional question.[284]

The Fourteenth Amendment of the Constitution prohibits states from denying any person "life, liberty, or property, without due process of law."[285] The Court has interpreted "due process of law" to include most of the rights laid out in the Bill of Rights.[286] The Fourteenth Amendment provides these fundamental constitutional rights, including those listed in the First Amendment, to all "persons." Persons include prisoners,[287] illegal aliens,[288] aliens,[289] the mentally disabled,[290] the incompetent,[291] and children.[292] Yet each of these groups of persons,

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282. Part of the Amars' interpretation of the Twenty-Sixth Amendment as affording political rights, but not full citizenship, to those eighteen and older comes from a desire to synthesize the meanings of the same text in various parts of the Constitution, i.e. "shall not deny the vote." It is unlikely that textual unification should trump the Framer's understanding of what they were ratifying. And even if it did, see Siegel, *supra* note 154 (arguing the Nineteenth Amendment was understood to encompass full citizenship, not merely political rights).

283. Generally, there is little scholarship on the debates. For the history of the voting age in America aimed at a general audience, see WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA (Bernard K. Johnpoll, ed., Greenwood Press 1992).

284. *But see* Dorf, *supra* note 9, at 1022-23. Michael Dorf argues that all the voting right amendments, including the Twenty-Sixth, answer another constitutional question: how should the equal protection clause be interpreted? Even if Dorf's theory is correct, the Twenty-Sixth Amendment alone answers *another* constitutional question, "When does a child become an adult for the purposes of constitutional rights?" and this distinction still merits this article's separate analysis.

285. U.S. CONST. amend. XIV, § 1.

286. As the Supreme Court recently put it, "Slowly at first, and then at an accelerating pace in the 1950s and 1960s, the Court held that safeguards afforded by the Bill of Rights—including a defendant's Sixth Amendment right 'to be confronted with the witnesses against him'—are incorporated in the Due Process Clause of the Fourteenth Amendment and are therefore binding upon the States." Danforth v. Minnesota, 128 S. Ct. 1029, 1035 (2008).

287. Wolff v. McDonnell, 418 U.S. 539, 593-94 (1974) (Marshall, J., concurring in part and dissenting in part).

288. Plyler v. Doe, 457 U.S 202, 212 (1982).

289. *Id.*

290. Cruzan v. Mo. Dept. of Health, 497 U.S. 261, 286-87 (1990).

291. *Id.*

according to the Supreme Court, has diminished constitutional rights.[293] In a Fourth Amendment case addressing a person's constitutional right to undergo *only* reasonable searches, the Court put it clearly: "[T]he fact that the subjects of the Policy are . . . children . . . permit[s] a degree of supervision and control that could not be exercised over free adults."[294] This is an accepted and necessary principle of constitutional law that lacks grounding in the literal text of the Constitution.

The Court, through its doctrine, from prior to the Twenty-Sixth Amendment to the current time, has thusly enacted a principle of allotting children diminished constitutional rights, despite their status as persons allotted full rights in the Fourteenth Amendment. Justice Thomas, remember, argued that children have no free speech rights because historically, the people did not afford them any.[295] He further implied that university students suffer the same fate.[296] However, whatever weight that argument may have had with respect to children, the Twenty-Sixth Amendment rebutted its applicability to those over the age of eighteen. The Twenty-Sixth Amendment inscribed into the Constitution an age at which persons become full-fledged, voting members of the democratic political order. It therefore superseded the default, common law tradition specifying that children enter legal adulthood on their twenty-first birthday.

The justices cannot legitimately rely on the traditional common law age of adulthood to deny full rights to those whom the Constitution specifically demarcates as free adults. In other words, the Court's denial of constitutional rights to children, which is based on its interpretation of the people's historical understanding of when a child becomes an adult, is trumped by the people's explicit, textual decision to lower the age of full participation to eighteen. This distinguishes the Twenty-Sixth Amendment from the other voting rights amendments because it alone answers a constitutional question that must be answered: given that the Court must deny children some measure of constitutional rights,[297] at what point in time will a person no longer be subject to this childhood diminishment? The Twenty-Sixth Amendment provides an answer to that constitutional question: persons reach full adulthood at eighteen and

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292. Levy v. Louisiana, 391 U.S. 68, 70 (1968).

293. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 357 (1997) (mentally ill child molesters have diminished constitutional rights); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (children have diminished constitutional rights); Turner v. Safley, 482 U.S. 78, 96 (1987) (prisoners have diminished constitutional rights); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (non-citizens have diminished constitutional rights).

294. *Acton*, 515 U.S. at 654-55.

295. *Supra* note 61 and accompanying text.

296. Morse v. Frederick, 127 S. Ct. 2618, 2631 n.2 (2007) (Thomas, J., concurring).

297. This is clear if one considers a truly abandoned child. The state has no authority to take an "abandoned" adult into custody. This would violate her constitutional right to liberty, privacy, and freedom from unreasonable searches and seizures. However, with a completely abandoned child, it is considered permissible (and right) for the state to take her into custody.

therefore are no longer subject to the childhood diminishment.[298]

The Court's confusing doctrine with respect to university students, as well as the resulting federal circuit split, reflects a general failure to clarify this principle. Though the Court offers children diminished rights in many respects, it has not specified when childhood ends for constitutional purposes. University students are particularly tangled in this ambiguity because many university student fall between the age of eighteen, the current age of adulthood, and twenty-one, the historical, common law age of adulthood. The superficial similarities between secondary school and the university make it particularly easy for courts to elide the doctrines, forgetting the crucial change in the age of the student body that occurs between these two levels of schooling.

At the time of the Twenty-Sixth Amendment's ratification, nearly half of Americans between the ages of eighteen and twenty-one were enrolled in some form of higher education.[299] University students were no exception, then, to the principle that those over eighteen should be considered adults. Indeed, the role the people understood them to play in the university was a primary consideration in lowering the age of adulthood. In the fifteen years or so following the passage of the Twenty-Sixth Amendment, when the debates surrounding the Twenty-Sixth Amendment remained fresh, the Court adopted in its constitutional doctrine—as did the judiciary in its understanding of the civil relationship between the university student and the university—the principle settled by the debates: eighteen-year-olds were free adults. This principle gave students full constitutional rights against the public university, a state actor, and eliminated the university's role as *in loco parentis*. In later years, the Court appeared to forget this history as it started to waver on the place of eighteen-year-olds in the constitutional order.

The next section will cover this history and argue that the Court should resurrect it. This resurrection would clean up First Amendment (as well as Fourth Amendment) jurisprudence by recognizing that the Twenty-Sixth Amendment dictates a bright-line rule separating secondary schools from universities.

B. Legal Incorporation of the Twenty-Sixth Amendment: A History

Less than a year after the Twenty-Sixth Amendment's ratification, the Supreme Court took its first case directly addressing student First Amendment rights on a university campus. In *Healy v. James*, Central

298. It does not say, however, how much children's rights should be diminished.

299. *Hearings* 1970, *supra* note 165, at 133 (statement of Sen. Goldwater).

Connecticut State College denied university recognition to the petitioners' proposed student group.[300] School administrators feared that the petitioners' proposed group would advocate violence and disruption on campus. Without recognition, the petitioners could not use campus facilities, bulletin boards, or the student newspaper to meet and spread their message. Accordingly, they sued the school for violating their First Amendment right to association.

In their brief to the Supreme Court, the petitioners invoked the Twenty-Sixth Amendment, arguing that it gave "the maturity of college-age students . . . constitutional significance."[301] When administrators suppress student speech, they "interfere with the free exchange of political ideas" and skew "the process by which the decision" to vote is made.[302] This draws directly from the Twenty-Sixth Amendment debates, affirming the view that the Twenty-Sixth Amendment made eighteen-year-olds full citizens and equal contributors to political society; as a result, suppressing their speech deprives them of their constitutional rights and exercises illegitimate censorship in the political arena.

The *Healy* Court held in favor of the petitioners, recognizing the students as full, adult members of the university community. In so doing, the Court affirmed the Twenty-Sixth Amendment's supporters' conception of the university student and the university. Dismissing the claim that students have abrogated constitutional rights, the Court wrote, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . . The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' . . . ."[303]

In his concurrence, Justice Douglas explicitly affirmed the nexus underlying the Twenty-Sixth Amendment, students' constitutional rights, and the Athenian ideal of the university. Justice Douglas critiqued the *in loco parentis* view of the university, deriding administrators and faculty members who conceived "of the minds of students as receptacles for the information which the faculty have garnered over the years," and who saw a university education as little more than the "process of filling the receptacles."[304]

Justice Douglas accepted the petitioners' argument that the Twenty-Sixth Amendment gave the maturity of college age students "constitutional significance," thereby precluding the *in loco parentis* university. "Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community."[305] This adult status,

300. 408 U.S. 169 (1972).
301. Brief for Petitioners at 13, Healy v. James, No. 71-452 (U.S. 1972).
302. *Id.*
303. *Healy*, 408 U.S. at 180 (internal citations omitted).
304. *Id.* at 196 (Douglas, J., concurring).
305. *Id.* at 197.

maintained in its entirety on the university campus, was irreconcilable with the paternalism favored by the respondents, who sought to protect and limit speech on campus in order to protect students from "bad" influences. As students were adults with their own "values, views, and ideologies," Justice Douglas wrote, "Students as well as faculty are entitled to credentials in their search for truth."[306]

Further incorporating the Twenty-Sixth Amendment advocates' argument, Justice Douglas affirmed the Athenian university's necessity to society, claiming that if the university treats students paternalistically, then the university becomes a "useless appendage."[307] The parental university replaces society's healthy "spirit of rebellion" with a stagnant and repressive "stubborn status quo opposed to change."[308] This echoes the arguments deployed by the supporters of the Twenty-Sixth Amendment, who claimed that treating young people as adults enriches the polity with "idealism" and "energy." In contrast, treating them as children reinforces older citizens' tendency toward resignation and fixed thought.

In *Papish*, a per curiam opinion issued the following year, the Court affirmed its *Healy* analysis, rejecting the district court's holding that public universities could restrict their students' speech in order to paternalistically fix standards of decency deemed appropriate for the campus.[309] At the same time that the Supreme Court incorporated university students' adult status into its First Amendment jurisprudence, courts across the country incorporated students' adult status into tort law, recognizing that the ratification of the Twenty-Sixth Amendment ended the university's legal role as *in loco parentis*. *Bradshaw v. Rawlings,*[310] the seminal case on this point,[311] relied on Justice Douglas's *Healy* concurrence for the proposition that the Twenty-Sixth Amendment cemented eighteen-year-olds' adult status.[312]

The judiciary's shift in common law bears on the constitutional analysis of when a child becomes an adult because it reflects both a consensus of the people about the meaning of the Twenty-Sixth Amendment, as well as the current legal consensus on when a child becomes an adult. As the Court's legitimate diminishment of the constitutional rights of children has no grounding in the literal text of the Constitution, both of these factors carry weight.

The Third Circuit's *Bradshaw* opinion held that the university was not responsible for a student who became inebriated at a class picnic and

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306. *Id.*

307. *Id.*

308. *Id.*

309. Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670 (1973).

310. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).

311. Hartman v. Bethany Coll., 778 F. Supp. 286, 293 (N.D. W.Va. 1991) (referring to *Bradshaw* as a "seminal case" and stating that "virtually all cases decided since Bradshaw agree with the decision in the case.").

312. *Bradshaw*, 612 F.2d at 139-40.

injured a fellow student while driving home drunk.[313] The opinion cited and relied on Justice Douglas's *Healy* concurrence for its Twenty-Sixth Amendment analysis finding that eighteen-year-olds were now full, adult members of the constitutional order.[314] The Third Circuit explained the basis for its position at length:

> [E]ighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. . . . At one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations . . . [but] the competing interests of the student and of the institution of higher learning are much different today than they were in the past. At the risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years.[315]

The *Bradshaw* court accordingly rejected the plaintiffs' claim that the university was responsible for protecting students from themselves. Students had won "the right to define and regulate their own lives"[316] and that right came with a corresponding responsibility to live with the consequences of their choices. As an Indiana court put it in rejecting the same legal claim presented in *Bradshaw*, "College students and fraternity members are not children . . . . [T]hey are adult citizens, ready, able, and willing to be responsible for their own actions."[317]

Other courts followed suit, putting an end to the university's role as *in loco parentis* and affirming a conception of the university and the university student that played a crucial role in the Twenty-Sixth Amendment debates.[318] The Utah Supreme Court in *Beach v. University of Utah*, a leading decision, [319] wrote that the Twenty-Sixth Amendment "is a pivotal consideration in our analysis."[320] The *Beach* court explained that it could not view college students as immature wards of their college when "the people of this country have found those same students as a whole to be mature enough to exercise the most sacred right a democracy

313. *Id.* at 143.

314. *Id.* at 140.

315. *Id.* at 138-40.

316. *Id.* at 140.

317. Campbell v. Bd. of Trs., 495 N.E.2d 227, 232 (Ind. Ct. App. 1986).

318. *See, e.g.*, Freeman v. Busch, 349 F.3d 582, 587-88 (8th Cir. 2003); Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1527 (D. Utah 1994); Nero v. Kan. St. Univ., 861 P.2d 768, 778 (Kan. 1993); Booker v. Lehigh Univ., 800 F. Supp. 234, 237-41 (E.D. Pa. 1992); Graham v. Mont. St. Univ., 761 P.2d 301 (Mont. 1988); Univ. of Denver v. Whitlock, 744 P.2d 54, 59-61 (Colo. 1987) (en banc); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987); Eiseman v. State, 511 N.E.2d 1128, 1136-37 (N.Y. 1987).

319. Furek v. Univ. of Del., 594 A.2d 506, 517 (Del. 1991) (referring to *Beach* as a "leading decision").

320. 726 P.2d 413, 418 (Utah 1986) (internal citation omitted).

can bestow."[321]

The *Beach* court also recognized that the university's purpose and function arose in part from its students' status as adults. The court drew a sharp line between secondary schools, on the one hand, and universities, on the other, arguing that secondary schools have custodial duties because those who attend secondary school are overwhelmingly children. Universities, in contrast, are overwhelmingly attended by adults; as a result, universities have a purely educational purpose. Deploying the arguments raised by the supporters of the Twenty-Sixth Amendment, the court found that a university that acts in a custodial fashion wastes valuable resources on "babysit[ting] each student," and "produce[s] a repressive and inhospitable environment."[322] Such behavior is "inconsistent with the nature of the relationship between the student and the institution" and "with the objectives of a modern college education."[323]

In the decades following the Twenty-Sixth Amendment, the judiciary soundly affirmed *Bradshaw*'s holding that university students were free adults, and, as a result, the university no longer stood *in loco parentis* to its students. Following the ratification of the Twenty-Sixth Amendment, then, the civil duties of the university shifted from *in loco parentis* to the various legal relationships a university enters with its adult students,[324] like property owner, landowner, party to a contract, or employer.[325]

C. Adult Students and the First Amendment

The Twenty-Sixth Amendment and the people's understanding of its meaning as revealed in the debates over its ratification, the legislation following its ratification, its incorporation into the Court's constitutional doctrine, and the common law provides a persuasive resolution to the current ambiguity in constitutional doctrine. As detailed above, the Supreme Court has sent mixed signals about university students' constitutional rights, diverging somewhat from its initial, post-Twenty-Sixth Amendment holding that university students possess the rights of free adults. With respect to the First Amendment, the federal circuits have split, their holdings landing across the spectrum from seeing

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321. *Id.* (internal citation omitted).

322. *Id.* at 419. *See also* Univ. of Denver v. Whitlock, 744 P.2d 54, 60 (Colo. 1987) (quoting and affirming this view).

323. *Beach*, 726 P.2d at 419.

324. *See, e.g.*, Perry A. Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986); Creola Johnson, *Maxed Out College Students: A Call To Limit Credit Card Solicitations On College Campuses*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 191, 237 (2004).

325. *See* Furek v. Univ. of Del., 594 A.2d 506, 522 (holding that the university no longer stands *in loco parentis* and that the university has an obligation arising out of land ownership).

university students as possessing adult rights to seeing them as possessing the diminished rights of secondary school students.[326]

If one reads the Twenty-Sixth Amendment with its attendant history, then people aged eighteen-years and older participate in the polity as full, adult citizens, with all the attendant responsibilities and rights. While this reading exceeds the literal meaning of the text, it provides a greater textual basis than a reading that denies them that status. The abrogation of university students' constitutional rights does not stem from any provision in the Fourteenth or First Amendment, which guarantees rights to all "persons" and "citizens." Rather, it stems from a judge-made rule arising out of the traditional practice of affording children diminished rights on account of their immaturity.

One would have to subscribe to a particularly narrow version of originalist constitutional interpretation in order to think that the people's understanding of the Twenty-Sixth Amendment—as well as that understanding's subsequent incorporation into constitutional, legislative, and common law—should not affect the Amendment's interpretation. As Justice Thomas pointed out in his concurrence to *Morse*, at the time the Fourteenth Amendment passed,[327] universities treated their students as older children. The average age of a university freshman, however, was in the process of rising to eighteen, and the age of majority, as well as the age of suffrage, was twenty-one. The consensus in society was that the age at which a person became a full adult member of the polity was twenty-one, and as a result, the majority of people at universities was seen as older children. One might then read the original understanding of the Fourteenth and First Amendment, to the degree that there was one as applied to universities, to say, "A public institution whose functions include children's attendance in the absence of their parents may abrogate the children's constitutional rights in order to fulfill its custodial duty." This level of originalist reading can incorporate the Twenty-Sixth Amendment and the subsequent sea of legal changes by allowing the content of "child" to be altered by constitutional and legal enactments brought about by the people.

Alternatively, one might adopt a narrower reading of the original practice that specifies the same principle, but instead of writing that "children" have diminished rights, put in its place "those under the age of twenty-one," the age of adulthood at the time. This narrow originalist reading lacks persuasive justification. When a principle is read into the Constitution from outside the literal text (in this case, diminishing the constitutional rights of children), it should have less legitimacy than a principle laid out explicitly in the text. If any confusion lies between

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326. *See supra* notes 82-122 and accompanying text.

327. The Court held that the Fourteenth Amendment incorporated the First Amendment's free speech clause against the states fifty-seven years after the passage of the Fourteenth Amendment, in *Gitlow v. New York*, 268 U.S. 652 (1925). The same analysis applies regardless of whether one looks to 1868 or 1925 for an original understanding.

setting the age at twenty-one or eighteen, judges should resolve it in favor of expanding rights, thereby coming closer to the broad textual guarantee of the Fourteenth Amendment, which, on its face, grants rights to all persons.

Secondarily, the original practice—allotting children diminished rights because of their immaturity and role in society—retains sense only as a principle. Unless there is evidence that the people intended to the contrary, judges should maintain the *reasons* for the diminishment (in this case, society's understanding of when childhood immaturity ends as evinced by a bundle of rights and responsibilities) rather than the specific age the reasons produced at the time. Consider, for example, a forced retirement age. If society once put it as a matter of practice at, say, fifty-five, because that was the age at which most people faced a significant physical and mental decline, as well as facing a life with only a few years remaining, then it would make little sense for judges to write the specific age into the Constitution when the conditions producing that age changed over time (namely, if sixty-five became the age at which people faced the same decline they had previously encountered at age fifty-five). When judges use historical practices to interpret the text of an amendment, they should apply the logic of the historical practices rather than the specific outcome obtained at the time.[328] Not only does the latter project skewer the logic of the practice, it skewers the original intent: the people, no doubt, did not intend for the specific outcome of their unwritten practice to rule for the duration of the nation's lifespan.[329]

Unless one adopts the narrowest version of originalism, the evidence is resoundingly in favor of reading the Constitution in line with the Twenty-Sixth Amendment debates and the subsequent legal developments to set eighteen as the age at which constitutional rights can no longer be diminished on account of childhood. The Court's recent jurisprudence, without explicitly saying so, implies that it subscribes to this reading. In *Roper v. Simmons*, the Court held that executing people under the age of eighteen was cruel and unusual punishment.[330] In reaching that conclusion, the Court recognized that American society draws the line between childhood and adulthood at age eighteen.[331] In listing the reasons for drawing the line at eighteen, the Court echoed the arguments proffered in the Twenty-Sixth Amendment debates. The

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328. The Twenty-Sixth Amendment itself is an example where a specific age was written into law. In its text, the Twenty-Sixth Amendment specifies that the vote starts at age eighteen, not at the age of maturity. In contrast, the Fourteenth Amendment, for example, guarantees "equal protection," but it does not specify what characteristics are the same and thus must be treated the same in order to receive equal treatment, leaving it so that the application of the principle will shift with the changing conditions of society (so that what was the same in 1870 might no longer be so in 1970).

329. In this case, in the absence of any evidence to the contrary, it is safe to assume that the People did not intend for the specific age of twenty-one to dictate the age of constitutional majority for the rest of American history. As such, age twenty-one was never written into the Constitution.

330. 543 U.S. 551, 574 (2005).

331. *Id.*

Court found that those under eighteen possessed "a lack of maturity and an underdeveloped sense of responsibility," were "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and, finally, lacked a "well formed" character.[332]

These reasons, indeed, are the same reasons that children have diminished constitutional rights. The Twenty-Sixth Amendment provides a textual and historical basis for drawing the line where that diminishment must end.[333] Applying the Twenty-Sixth Amendment and its subsequent legal history to the Constitution produces a bright line rule prohibiting the diminishment of rights for those over the age of seventeen. This, in turn, creates a bright line rule between secondary school and the university for the purpose of free speech.

The Court's diminishment of student rights in high school is justified exclusively by the fact that high school is a forum for children. In the Court's view, a secondary school must "inculcate the habits and manners of civility"[334] in its students, fulfilling its "role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'"[335] Banning disapproved speech accomplishes that end, "teach[ing] by example the shared values of a civilized social order"[336] and "the boundaries of socially appropriate behavior."[337] In sum, "[t]he nature of [public secondary and primary schools'] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults . . . . School authorities act *in loco parentis*, with the power and indeed the duty to inculcate the habits and manners of civility."[338]

Over eighty-eight percent of those enrolled in public high school are under the age of eighteen.[339] Additionally, high schools often operate in the same building or campus as primary schools, which only rarely have a student over the age of seventeen.[340] In contrast, just over one percent of those enrolled in public universities and colleges are under the age of eighteen.[341] Public colleges often share buildings, classes, and

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332. *Id.* at 569-70.

333. To what extent and when children's constitutional rights should diminish is a controversial question and an entirely different one from the question addressed here, which is "When does a person become an adult in the eyes of the Constitution?" For an analysis of children's rights, see generally Teitelbaum, *supra* note 9.

334. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

335. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

336. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

337. *Id.* at 681.

338. *Acton*, 515 U.S. at 655-56 (internal citations omitted).

339. U.S. CENSUS BUREAU, SCHOOL ENROLLMENT—SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS: OCT. 2002 at Table 6, Table 9 (Oct. 2002), *available at* http://www.census.gov/population/www/socdemo/school/cps2002.html.

340. *Id.* at Table 2.

341. *Id.* at Table 9 (finding students fifteen, sixteen and seventeen years of age compose just over one percent of the public college enrollees); U.S. CENSUS BUREAU, SCHOOL ENROLLMENT—SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS: OCT. 2005 at Table 1 (Oct. 2005), *available at*

campuses with professional and graduate schools, which rarely have students under eighteen.

The standard lifecycle in American society has people coming of age around the time that they graduate from secondary school. The median first grader is six years old, and the median senior in high school is seventeen.[342] Secondary school is overwhelmingly filled with children; college is overwhelmingly filled with adults. The fact that a free adult is enrolled in high school does not diminish his constitutional right to free speech; rather, his right is defined by the fact that he is in a state-run forum whose purpose is to care for children. For example, if a parent walks into a state-run kindergarten to discuss something with a teacher, the parent maintains his full rights to free speech; this does not mean, however, that he is entitled to say anything he wants in this particular forum.

The forums of the secondary and primary school thus differ markedly from the university forum because of its occupants. Two lines of First Amendment cases provide ample support for this distinction. The first line of cases, which one might characterize as academic freedom cases,[343] dictates the special importance of First Amendment rights in the university forum.[344] Because the university's purpose as a forum is to seek the truth and not to inculcate its students, restrictions on faculty or student speech are particularly egregious. As early as 1952, Justice Frankfurter, in a concurring opinion joined by Justice Douglas, quoted "leading educator" Robert M. Hutchins to endorse this view: "[A] university is a place that is established and will function for the benefit of society, provided it is a center of independent thought . . . . [Y]ou must . . . guarantee those men the freedom to think and to express themselves."[345] *Sweezy* in 1957 and *Keyishian* in 1967 eloquently affirmed the university's function in society as "the marketplace of ideas."[346] In 1964, the Court noted that students as well as faculty might have a constitutional interest in the university operating as a marketplace of ideas.[347]

The Twenty-Sixth Amendment, in cementing the status of university students as adults, precluded the previous English *in loco*

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http://www.census.gov/population/socdemo/school/cps2005/tab01-01.xls (finding students between three and fourteen years of age compose less than two-tenths of a percent of college enrollees).

342. U.S. CENSUS BUREAU, *supra* note 339, at Table 2.

343. For competing accounts of this subject, see ACADEMIC FREEDOM AFTER SEPTEMBER 11 (Beshara Doumani ed., 2006).

344. Saying First Amendment rights are particularly important in the university forum is not to say that professors and students have special rights that others do not have. It is only to say that the forum of the university, like a public park designed for community dialogue, but unlike many other institutions, has a purpose defined by free speech and expression.

345. Wieman v. Updegraff, 344 U.S. 183, 197-98 (1952).

346. *See supra* Part III, D.

347. Baggett v. Bullitt, 377 U.S. 360, 366 n.5 (1964) (noting that the Court did not need to determine if students had standing to sue when a school required a loyalty oath for professors since their interest in academic freedom was covered by the holding).

parentis model of the university that the marketplace-of-ideas model had already moved to replace. It thus affirmed *Sweezy* and *Keyishian*'s conception of the university forum as the marketplace of ideas. The Court reiterated this finding in subsequent cases—from *Healy*, immediately following the Twenty-Sixth Amendment, to *Rosenberger*, where Justice Kennedy, writing for the Court, classified universities as places "of thought and experiment" and "vital centers for the Nation's intellectual life" where students' ability to speak and write freely measured the schools' success as an institution.[348] The Twenty-Sixth Amendment connected with this line of cases in two ways. It first wiped out the competing *in loco parentis* model of the university, ensuring the transition to the marketplace-of-ideas model. Second, it ensured that students, like faculty, had First Amendment rights in the university forum and were therefore participants in, rather than recipients of, the marketplace of ideas.

Another line of cases delineates this distinction. According to well established free speech doctrine, "protecting the physical and psychological well-being of minors" is a compelling state interest that "extends to shielding minors from the influence of literature that is not obscene by adult standards."[349] In pursuing that compelling interest, the state may restrict the free speech of adults as long as it does so in a "carefully tailored" way.[350] In *Ginsberg v. New York*, the Court upheld New York's conviction of a man for selling a "girlie" magazine to a sixteen-year-old boy: "Because of the state's exigent interest in preventing distribution to children of objectionable material, it can . . . [bar] the distribution to children of books recognized to be suitable for adults."[351] In other words, the state can constitutionally limit adults' speech *to children* even when the state cannot restrict the same speech made *to other adults*.

This doctrine explains the bright-line distinction between secondary school and the university. As the "[g]overnment, of course, may punish adults who provide unsuitable materials to children,"[352] it can restrict adult speech in a forum with an audience composed of almost ninety percent, if not more, captive children. While this restricts the speech of adult students, it is well within the rule: adult speech can be restricted if it will reach children and the restriction is narrowly tailored toward the end of protecting children. Children have no choice but to attend school, because either the state requires it or, if they are over sixteen in a state that only requires attendance to sixteen,[353] their parents require it. It is

348. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835-36 (1995); Healy v. James, 408 U.S. 167 (1972).

349. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

350. *Id.*

351. Ginsberg v. New York, 390 U.S. 629, 636 (1968) (quoting New York Court of Appeals).

352. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251-252 (2002).

353. As of 2005, twenty-eight states require school attendance until age sixteen. The remaining states require attendance until seventeen or eighteen. Almost all explicitly release the child from the

only at age eighteen that people can make their own choice to attend school. As a result, secondary students form a captive audience. Insofar as the state provides public education for secondary students, secondary schools will be composed largely of children. As this service is considered vital and necessary to the pursuit of fundamental political values such as equal opportunity and the development of democratic citizenship, it is compelling enough to justify the limited restrictions on adult students still participating in the forum.

Although the Court did not mention this fact in its opinion, the secondary student punished for flying his "pro-drug" banner in *Morse v. Frederick* was eighteen, and accordingly an adult, at the time of the incident. Justice Thomas referred to this fact in his concurrence, claiming that the student's status as an adult was irrelevant because courts have not historically granted secondary students of age an exception to the school's normal role as *in loco parentis*.[354] The Court's deferential rule toward secondary schools' speech control, which applies regardless of the age of the speaker in question, derives from the historical practice Justice Thomas cites, as well as from the Court's clear line of cases recognizing the State's power to restrict adult speech in order to shield its transmission to children.

Turning to the university, one finds a forum with a starkly different composition. The students are overwhelmingly voluntarily-attending adults. As less than one percent of university students are underage, restricting speech at a university for the purpose of shielding those few children from bad influences fails to meet the Court's narrow-tailoring standards. The Court has held that the legitimate "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[355] In trying to protect children, the state cannot "reduce the adult population . . . to reading only what is fit for children."[356] The university is an adult forum; the speech that takes place there is largely from adults to other adults. While a small number of older children participate in the forum actively, restrictions based on their limited presence imposes too great of a burden on protected speech. As Justice Frankfurter put it in overturning a Michigan state law that banned the general sale of books that exercised a harmful influence on minors, "[s]urely, this is to burn the house to roast the pig."[357]

In *Reno v. ACLU*, the Court addressed a federal law that prohibited anyone from using an "interactive computer service" to knowingly display an "indecent" or "patently offensive" message to a person under

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obligation upon graduation from high school. For a compilation of state laws as of 2005, see Education Commission of the States, COMPULSORY SCHOOL AGE REQUIREMENTS, *available at* http://www.ecs.org/clearinghouse/50/51/5051.htm.

354. Morse v. Frederick, 127 S. Ct. 2618, 2631 n.3 (2007) (Thomas, J., concurring).

355. Reno v. ACLU, 521 U.S. 844, 875 (1997).

356. Butler v. Michigan, 352 U.S. 380, 383 (1957).

357. *Id.*

the age of eighteen.[358] The law provided an affirmative defense of making a "good faith" effort to prevent minors from seeing the communication, by, among other undefined methods, "requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code" to enter one's website.[359]

The *Reno* Court found this law unconstitutional, holding that, while it served the legitimate government end of shielding minors from bad speech, it suppressed too much protected adult-to-adult speech in the process. The law prevented adults who could not afford to pay for the credit card or similar verification process, as well as those who did not have a credit card or another form of proving their age online, from speaking in the forum.[360] The Court found that the adult verification process was insufficient because its monetary cost and lack of anonymity would "discourage [adult] users from accessing" sites.[361]

Likening many chat rooms to public squares composed largely of adults, the Court pointed out that

> [g]iven the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.[362]

The *Reno* Court saw it as vital to free speech to retain the open forums of the Internet. Blanket restrictions on the largely adult forum—imposing, for example, a financial cost on adults seeking to speak to other adults—pose too much of a burden on adult speech, and accordingly, must be overturned.

In *United States v. Playboy Entertainment Group, Inc.*, the Court found that a federal law requiring adult entertainment channels to either spend more money to ensure that their signal does not reach the televisions of non-subscribers, or to limit their broadcast to between 10 PM and 6 AM, imposed too much of a burden on adult speech.[363] This case affirmed *Reno*'s holding that largely adult forums, such as those composed of television producers and watchers, cannot be burdened with blanket regulations aimed at protecting the relatively few minors participating in the forum.

Universities and secondary schools clearly fall on different sides of

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358. *Reno*, 521 U.S. at 859-60.
359. *Id*. at 860-61.
360. *Id.* at 856.
361. *Id.* (quoting and affirming District Court's findings).
362. *Id.* at 876.
363. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826 (2000).

the line drawn by this set of cases. The university is an overwhelmingly adult forum. Applying any speech restriction to the forum, such as restrictive zones, discriminatory funding, or civility codes, in order to protect the few minors participating in the forum, imposes too much of a burden on adult speech. Secondary school, on the other hand, is overwhelmingly full of children, and as a result, restricting speech in this forum imposes a relatively minor burden on the small number of adult students. Accordingly, if no other constitutional restrictions exist, secondary schools can regulate their students' speech in order to care for the moral and social welfare of children.[364]

D. Banning the *In Loco Parentis* University

In the start of this article, I offered a series of ways in which universities routinely violate their students' First Amendment rights. This list included civility codes prohibiting "offensive" speech on and off-campus, limiting student speech to tiny "free speech" zones, denying funding to independent student groups with disfavored viewpoints, and censoring school newspapers.[365] Notably absent from this list is professors sanctioning sloppy, off-topic, poorly reasoned, or false classwork. Making the *in loco parentis* university unconstitutional means that a public university must treat its students like adults, and therefore cannot perform the paradigmatic duties of an *in loco parentis* institution: reproducing and inculcating the current morals and manners of society in its charges. Prohibiting the *in loco parentis* university does not mean, however, that the university cannot restrict students' speech at all. Rather, it means the university cannot restrict speech for the purpose of instilling students with morals, manners, and good citizenship. To do so would be to treat students as children, rather than as autonomous, responsible, free-thinking adults.

As others have pointed out, "the marketplace of ideas" is a partially misleading metaphor for the university. The university's function was once, in large part, to inculcate values and morals in its students. That function diminished over time and, as argued in this article, became constitutionally illegitimate with the passage of the Twenty-Sixth Amendment. The function that took its place has always been part of the university: the pursuit and accumulation of knowledge. The institutional

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364. I take no position on the proper constitutional rights of children here, and only note that older children may have more robust constitutional rights than younger children. If they do, then secondary schools, like universities, accordingly should be restricted in their ability to suppress their students' speech. For coverage of this issue, see, for example, Teitelbaum, *supra* note 9; Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519 (1997); Jennifer L. Specht, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313 (2006).

365. *See supra* notes 20-32 and accompanying text.

pursuit of knowledge is not structured as a marketplace in the sense that the public is the adjudicator of which ideas are true. It is a marketplace only in the sense that ideas cannot be dictated from the top down; new ideas, abiding by the methods of scholarly inquiry, must be allowed to arise and compete with what is currently believed to be true. A university cannot, whether acting as an institution, department, or through a professor, enforce and legislate dogma.

It is constitutional for a professor to sanction incoherent or off-topic essays with failing grades because such a regulation of speech is in service of the institution's legitimate function. It is not, however, constitutional for a professor to grade a paper poorly *because* the student refused, for example, to *personally* endorse the claim that "killing animals for food is immoral." The latter is unconstitutional because it is an attempt for the professor to inculcate students with a particular moral view, a paradigmatic function of the *in loco parentis* educational institution.

The common regulations of speech I listed above each seek to perform the *in loco parentis* function. Enacting civility and harassment codes that ban "offensive" speech transmitted to another member of the university community, regardless of where or when it is said, are clear attempts at moral inculcation. The *in loco parentis* university decides and legislates what it considers offensive and then prevents students from expressing those offensive ideas at any time, including in public parks, private apartments, sidewalks, stores, restaurants, and more recently, Internet message boards. These codes patronize both by proscribing what is offensive and by seeking to protect students from having their feelings hurt by other students.[366] While this is a legitimate function of primary schools, which may properly seek to regulate students' morals and psychological well-being, it is not a legitimate function of universities.

Universities with free speech zones in effect prohibit speech on most of their campuses, which include sidewalks, parks, lawns, and other public spaces. The only justification for such wide-reaching bans is that the universities believe that students, if allowed to speak freely in public spaces, will either react poorly, be unduly offended, or be persuaded to adopt harmful beliefs.[367] This reasoning is not legitimate. Ensuring that

366. Robert Post provides a more thorough analysis of this issue in his article on racist speech. Post sketches the various functions the Court has ascribed to schools, including the *in loco parentis* function (which Post refers to as civic education, defined as "a process of cultural reproduction, whereby community values are authoritatively handed down to the young") and the "critical education," which teaches students to think independently. He argues that a policy prohibiting racist speech on campus would have to be justified under the civic education (i.e. the *in loco parentis* education). Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 318-325 (1991).

367. Like other government entities, universities may put reasonable time, place and manner restrictions on the campus; for example, no shouting in front of dormitories at 3 AM or no speaking off-topic or aggressively (applied in a viewpoint-neutral manner) in class. As discussed, free speech zones, in contrast, ban all public speaking on most of the campus 24 hours a day, 7 days a week—

students walking in public spaces are not confronted with speech they may dislike treats them as incapable of responding maturely to the expression of ideas, and keeps them from acting as adult citizens who are fully capable of speaking to fellow citizens in public spaces.

Like other public institutions, the university must justify its restrictions on student speech by reference to its institutional function.[368] This article has not attempted to define the specifics of the university's legitimate function and thus, for example, does not detail the specific parameters bounding a professor's sanctioning of in-class student speech. Nor does it address students who are also employees, who, insofar as they are acting in their capacity as employees, will face other legitimate speech restrictions.[369] Instead, this article has argued that the ratification of the Twenty-Sixth Amendment rendered it unconstitutional for the university to regulate speech for the purpose of acting *in loco parentis*. *In loco parentis* paradigmatically refers to attempts to reproduce and inculcate morals, manners, and good citizenship in students; thus, when universities regulate speech for that reason, whether in-class or out of class, such regulation is unconstitutional.

V. CONCLUSION

The history of the Twenty-Sixth Amendment provides a clear answer to a difficult constitutional question: "When does the childhood diminishment of constitutional rights end?" Or, to phrase the same question another way, "When does a young person leave political dependency, becoming a full-fledged member of political society?" The university, with its large population of students between the ages of eighteen and twenty-one, is particularly vested in the answer to this question.

Despite the clear, albeit marginalized, history detailed in this paper, some federal circuits have persisted in treating university students as

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which can only be explained by a desire to shelter students from speech.

368. The Court relies on an institution's function in order to determine if the space in question (whether a literal or figurative space) is a public forum, designated public forum, or nonpublic forum, which in turn governs how deferential the Court will be to the regulation. The lawns of military bases and prisons, for example, because of their institutional function, are classified as nonpublic fora. Once the *in loco parentis* university is banned, the university campus-at-large becomes, like a public park, a designated public forum. The classroom, on the other hand, would be a limited or nonpublic forum, where speech can be restricted insofar as the restrictions are in furtherance of the university's institutional function of providing a liberal education. For a detailed account of how public institutions' functions affect the First Amendment analysis, see Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998), and for an analysis in the context of the university, see Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461 (2005).

369. For a summary and critique of the Court's current doctrine governing public employee speech, see Julie A. Wenell, Garcetti v. Ceballos*: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623 (2007).

children. Drawing on this history, the Court should definitively resolve the federal circuit split by adopting the people's decision to treat eighteen-year-olds as full-fledged citizens.

It may be worth noting that the normative arguments proffered during the Twenty-Sixth Amendment debates remain relevant today. The responsibilities of citizenship that eighteen-year-olds bear have only increased since the ratification of the Twenty-Sixth Amendment. The brutal fact that young soldiers are fighting and dying for the country is no less true today. In the ongoing Operation Iraqi Freedom, 17.3 percent of the dead American soldiers are under the age of twenty-one.[370] Not only do eighteen-year-olds fight and die for the country, face the adult penal code, pay taxes, legally consent to sex, and marry as they did in 1971; they now, with a few state exceptions,[371] also take full civil responsibility for their actions. Those who bear the responsibilities of adult citizenship should enjoy the corresponding rights.

Additionally, since 1971, the ability of young people to acquire knowledge has only become easier. Young people have access to almost unlimited information on the Internet, which they can access with increasing frequency at home or in a school library. Treating eighteen-year-old students like children stunts their ability to think independently and hobbles the university, which in its best manifestation is a "marketplace of ideas" dedicated to open discourse and the free flow of ideas, limited only by the principles of reason and scholarly inquiry.

The Supreme Court's failure to clearly adopt this constitutional principle has resulted in a federal circuit split, with some federal circuits resurrecting and adopting the perspective of the Twenty-Sixth Amendment's opponents. This perspective, soundly discarded by the people with the ratification of the Twenty-Sixth Amendment, sees university students as dependent children in need of the gentle guidance of the university. These circuits enable university administrators and faculty who seek to treat students as "receptacles"[372] for the wisdom they have accumulated, thereby undermining the university's ability to pursue knowledge and the ability of young people to develop their critical faculties and sense of personal responsibility. The Court should issue a clear ruling invalidating this approach, affirming the approach taken by federal circuits that have embraced the constitutional principle evident in the history of the Twenty-Sixth Amendment: eighteen-year-olds are free, adult members of the polity. Embracing this principle honors the will of

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370. *Iraq Coalition Casualty Count*, http://icasualties.org/oif/, accessed on January 2, 2008, statistics up current as of December 31, 2007. These statistics were compiled using the Department of Defense's releases on soldiers and checked for accuracy by Emily Buzell and Samuel H. Preston. Emily Buzell & Samuel H. Preston, *Mortality of American Troops in the Iraq War*, 33 POPULATION & DEV. REVIEW 555 (2007).

371. The age at which tortuous and contractual liability attaches in full for Alabama is 19 (18 if married). ALA. CODE § 26-1-1 (1975); § 30-4-15 & 16 (1975). For Nebraska it is 19 (emancipated on marriage). NEB. REV. STAT. § 43-2101 (1943). For Mississippi it is 21. MISS. CODE ANN. §§ 93-5-23, 93-11-65 (2006); § 1-3-27 (1943). All other states are set at 18.

372. Healy v. James, 408 U.S. 169, 196 (1972) (Douglas, J., concurring).

the people and allows the university to flourish as a free marketplace of ideas, properly educating its students and contributing to humanity's accumulation of knowledge.