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REALLY LEAVING NO CHILD BEHIND:
HOW THE SUPREME COURT'S STUDENT SPEECH
DOCTRINE COMPROMISES MODERN EDUCATION
REFORM—AND HOW IT CAN USE THE *IN LOCO PARENTIS*
DOCTRINE TO CHANGE IT

*Scott J. Street**

I. INTRODUCTION

America is suffering from an education crisis. Oprah Winfrey knows it: she spent an entire show talking to Bill and Melinda Gates about how the couple hopes to revolutionize American education.¹ Business leaders know it: they constantly wonder how children in the richest country on Earth—a country that devotes billions of dollars to education each year²—can rank behind students in Estonia and Hungary on math and science exams.³ Policymakers know it: they scramble to find ways to boost student test scores, threatening to close or reorganize schools if students do not meet expectations.⁴

The crisis is particularly alarming as the economy shifts from one centered on the physical capacity of labor to one centered on its intellectual capacity.⁵ Thirty percent of American teenagers fail to

* *Juris Doctor, Loyola Law School (Los Angeles), 2008. I owe special thanks to David Burcham, former dean of Loyola Law School, for the advice and comments he gave me in writing this article.*

1. The Oprah Winfrey Show, Failing Grade, http://www.oprah.com/tows/slide/200604/20060411/slide_20060411_284_101.jhtml (last visited Apr. 23, 2008).

2. See Dep't of Educ., Fiscal Year 2008 Budget Summary and Background Information, available at <http://www.ed.gov/about/overview/budget/budget08/summary/08summary.pdf>.

3. See Justin Gillis, *Panel Sounds Alarm on Science Education*, WASH. POST, Oct. 13, 2005, at D5 (describing American math and science education as “lagging” behind the rest of the world such that American students are not being prepared for the “gathering storm” of foreign competition). In the third edition of the Trends in International Mathematics and Science Study (TIMSS), American eighth graders ranked significantly below Estonia and Hungary in both math and science performance. See generally *Highlights from the Trends in International Mathematics and Science Study 2003* (Dec. 2004), Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., available at <http://nces.ed.gov/timss/results03.asp> (last visited Nov. 5, 2007).

4. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended at 20 U.S.C. §§ 6301-7941 (Supp. V. 2005)).

5. ACHIEVE, INC., CLOSING THE EXPECTATIONS GAP 2007, at 5, <http://www.achieve.org/files/50-state-07-Final.pdf> (“About 67 percent of today’s new jobs require some postsecondary education or

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

finish high school, including nearly half of black and Latino teenagers.⁶ The numbers are worse in low income, urban areas. For example, in the District of Columbia, less than half of students finished high school in 2000.⁷ As the economy becomes more sophisticated—and requires more sophisticated workers—a significant number of young Americans are at risk of becoming unemployable because they have an inadequate education.

A number of people have offered solutions to this problem. Yet while proposals to reform the high school curriculum to emphasize math, science, and computer skills sound appealing,⁸ they will have little impact if the students at whom they are aimed do not respect the teachers who instruct them. In this sense, policymakers have overlooked the fact that the educational “crisis” in America is as much a “crisis in the legitimacy of school discipline” as anything else.⁹ High school students tend to perform better (both academically and socially) when they feel that the exercise of discipline at their schools is fair.¹⁰ Fairness, in turn, is “a function of legitimacy and moral authority.”¹¹ But the court decisions that followed *Tinker v. Des Moines Independent Community School District*¹² have “erod[ed] both student and school personnel confidence in the legitimate right of a teacher or administrator to exercise discipline.”¹³ That “hesitation, doubt, and weakening of conviction... has undermined the effectiveness of school discipline”¹⁴ and undermines efforts to reform the public school system today.

training, and that percentage is expected to rise.”).

6. *Id.* at 7.

7. PAUL E. BARTON, EDUC. TESTING SERV., ONE-THIRD OF A NATION: RISING DROPOUT RATES & DECLINING OPPORTUNITIES 18 (2005), http://www.ets.org/Media/Education_Topics/pdf/onethird.pdf.

8. See ROBERT D. ATKINSON, PROGRESSIVE POLICY INST., BUILDING SKILLS FOR THE NEW ECONOMY 6 (Apr. 2001), http://www.dlc.org/documents/build_skills2.pdf (suggesting school-to-work programs and math- and science-based magnet schools as two tools that local leaders are already using in some parts of the country).

9. See RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY x (2003). I am indebted in this endeavor to Richard Arum, whose book offers a very thorough analysis of the way courts have treated student discipline cases since the 1960s. His account is particularly interesting (and worth reading by any lawyer) because it is so personal: Mr. Arum spent five years teaching in the public schools in Oakland, Calif. That experience taught him that school discipline, moral authority, and socialization were the “core problems facing American public education.” *Id.*

10. *Id.* at 187.

11. *Id.*

12. 393 U.S. 503 (1969).

13. *Id.* at 169.

14. *Id.*

This article urges the Supreme Court to abandon the overprotective “student speech” doctrine defined by *Tinker* in favor of an *in loco parentis* standard that defers to the expertise of school officials in maintaining a safe, effective, and orderly school environment. Contrary to what its critics assume, an *in loco parentis* standard would not give school officials carte blanche to violate their students’ rights. It would, for example, prohibit school officials from discriminating against students on the basis of viewpoint. But as long as *Tinker*’s student speech doctrine survives, efforts to improve our schools and prepare our children for the rigors of the twenty-first century will suffer. The *in loco parentis* standard recognizes that these efforts are as important as protecting student speech rights and it therefore tolerates restrictions on speech to ensure the success of educational reforms.

This concept of “*in loco parentis*,” does not fully embrace the English notion that parents delegate their authority over their children to school officials. Rather, Part II describes how that concept evolved into the American concept of preparing children for their civic roles in the Republic. It also tracks the way courts treated school disciplinary policies, from the laissez-faire attitude of nineteenth century judges to the skepticism of their post-Vietnam counterparts.

Part III explains why reformulating the Court’s student discipline doctrine to emphasize a school’s *in loco parentis* responsibilities is necessary to raise academic achievement and ensure that students finish high school—the most compelling interests in modern education policy. Part IV considers the counter-arguments and explains why we should not be as concerned when the government regulates speech in its non-sovereign capacity, such as when it acts as an educator. It also describes how the *in loco parentis* standard properly defers to the authority of school officials while prohibiting them from disciplining students in a way that promotes one viewpoint over another. Finally, Part V compares how a recent student speech cases would have been decided under the *in loco parentis* standard. The comparison concludes that an *in loco parentis* standard provides as much protection for student speech rights as the current student speech doctrine without compromising the ability of educators to control their classrooms.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

II. BACKGROUND

A. The Historic Rationale for *In Loco Parentis* and Its Decline

Historically, American students did not have extensive rights once they stepped through the classroom doors. This may have derived from the fact that many early American schools (especially high schools, where we might expect students to start invoking their rights) were private and therefore not subject to the First Amendment or any other constitutional provision.¹⁵ But attendance at even public schools was mostly voluntary.¹⁶ Thus, whether public or private, these schools reflected the strict English model of education, as places that parents sent their children to learn and be disciplined.¹⁷ Even at the college level, administrators and faculty asserted total control over students “both inside and outside the classroom.”¹⁸ And through the legal doctrine of *in loco parentis*, courts mostly refused to get involved in the student-school relationship, instead deferring to the judgment of school officials in disciplining students and maintaining order.¹⁹

15. *E.g.*, TYLER COWAN, PUBLIC GOODS & MARKET FAILURES 77 (Ryler Cowan, ed., Transaction Publishers 1992) (1988). Of course, this should not suggest that all education in America was private. The first free public school in America was established in Dedham, Massachusetts in 1644; GEORGE WILLIAM HUNTER & WALTER G. WHITMAN, CIVIC SCIENCE IN THE COMMUNITY 272 (American Book Company 1922). A number of states also provided a free public education to children before the American Revolution. For example, the Massachusetts colony required that intermediate schools be established in every town that had at least fifty homes, and it required that every town of at least 100 homes have a grammar school. *Id.* But the schools we would compare to high schools were primarily private academies like Andover and Exeter. *Id.*

16. Massachusetts passed the first compulsory attendance law in 1837—fifty years after the Constitution was written. *E.g.*, Gerald Gutek, *Compulsory Education*, in HISTORICAL DICTIONARY OF AMERICAN EDUCATION, at 95 (Richard J. Altenbaugh ed., 1999).

17. *See* *Morse v. Frederick*, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring) (“Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800’s, no one doubted the government’s ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled ‘a core of common values’ in students and taught them self-control.”); *see also* *Patterson v. Nutter*, 78 Me. 509, 7 A. 273, 274 (Me. 1886) (“Free political institutions are possible only where the great body of the people are moral, intelligent, and habituated to self-control, and to obedience to lawful authority. The permanency of such institutions depends largely upon the efficient instruction and training of children in these virtues. It is to secure this permanency that the state provides schools and teachers.”).

18. Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1140 (1991).

19. *Morse v. Frederick*, 127 S. Ct. 2618, 2630–31 (2007) (Thomas, J., concurring); *see also* *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837) (describing the *in loco parentis* rationale and explaining that judicial review “has confided the graduation of punishments, within the limits of this grant, to the

Every state in the union had made education mandatory by 1918.²⁰ That change in the source of school power undercut the argument that parents had delegated their disciplinary authority to schools and teachers.²¹ After all, how could a parent voluntarily *delegate* her authority to discipline her child to a school when the government said she *had* to send the child to school? Nevertheless, the *in loco parentis* doctrine had become so entrenched that, even after every state had passed a compulsory attendance law, courts still invoked the doctrine when refusing to second-guess disciplinary rules and disciplinary decisions made by school administrators.²²

The law's reliance on *in loco parentis* surprised a number of legal scholars, who believed that a change in the source of school authority would trigger its demise.²³ But what these scholars failed to appreciate was that courts had largely abandoned the English rationale for the doctrine in favor of a uniquely American view that justified continued use of the *in loco parentis* doctrine as an aspect of the school's role in "educating the young for citizenship."²⁴ This political view of *in loco*

discretion of the teacher."); *Patterson v. Nutter*, 7 A. at 274 (restating that, under *in loco parentis*, "[a] schoolmaster has the right to inflict reasonable corporal punishment"). One author has noted that judicial deference to school officials under the *in loco parentis* doctrine was so broad that it "amounted to blanket judicial approval for all disciplinary actions against students . . . Any rule or regulation, however broad, was enforced." *Lingering Legacy of In Loco Parentis*, *supra* note 19, at 1147.

20. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 71 & n.150 (1996); see also Victoria J. Dodd, *American Public Education and Change: Not An Oxymoron*, 17 ST. LOUIS U. PUB. L. REV. 109, 112 (1997).

21. See Paul O. Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 726–29 (1959) (challenging use of the *in loco parentis* rationale to justify corporal punishment in public schools where the law mandates attendance).

22. Dupre, *supra* note 21, at 71–72; see also *Gonyaw v. Gray*, 361 F. Supp. 366, 369 (D. Vt. 1973) ("Of necessity, parents must delegate some disciplinary authority over their school children to the teachers who, among other things, are responsible for maintaining the order necessary to the educational process."); cf. *People v. Jackson*, 319 N.Y.S.2d 731, 736 (N.Y. App. Term 1971) (referring to *in loco parentis*, in the Fourth Amendment context, as a doctrine "so compelling in light of public necessity . . . that any action, including a search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable.").

23. See, e.g., Proehl, *supra* note 22, at 726–27 (arguing that *in loco parentis* "hardly fits a system of compulsory public education, when neither parent nor child has any choice in the matter, and where, if order is to be maintained, an implied and irrevocable delegation of authority would have to be wrested from the parents by some legal fiction").

24. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). This view of the *in loco parentis* doctrine seems to have arisen out of the "social reproduction" model of schooling that education reformers promoted in the early twentieth century; see Dupre, *supra* note 23, at 67–68 ("In fact, the student depends on his relationship with school and teacher, much like his relationship with his parents, to provide him with the qualities necessary to be a responsible citizen in the social compact and to participate in our popular form of government.").

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

parentis mimicked the “social reproduction” model of education promoted by twentieth century education reformers, who argued that “the student depends on his relationship with school and teacher, much like his relationship with his parents, to provide him with the qualities necessary to be a responsible citizen.”²⁵ And it must have seemed particularly appealing to courts in the 1940s and 1950s, as Americans fought fascism abroad and communism at home—institutions that government officials believed would threaten the very foundation of American democracy.²⁶

Then came the 1960s. A decade well known for its dramatic political and cultural changes, the ‘60s also saw a dramatic increase in educational litigation.²⁷ Prior to 1965, few individuals used the legal system to challenge school disciplinary rules, especially at the appellate level.²⁸ More tried from 1965 to 1968, perhaps inspired by the Fifth Circuit’s decision to enjoin Mississippi school officials from punishing students

25. See Dupre, *supra* note 23, at 67–68, 72 (arguing that the Supreme Court’s pre-*Tinker* interpretation of *in loco parentis* reflected the social reproduction model of education). Professor Dupre’s analogy of the student-school relationship to the child-parent relationship should not confuse you. This political vision of *in loco parentis* differs from the source of power theory driving courts in the nineteenth century: rather than stressing the source of power, it stresses the nature of the school’s responsibility to “maintain[] the existing democratic order.” V.T. THAYER, FORMATIVE IDEAS IN AMERICAN EDUCATION: FROM THE COLONIAL PERIOD TO THE PRESENT 323 (1965). As Dupre notes, the social reproductionists were largely influenced by Horace Mann, the “Father” of the American public school, who said that “[t]he theory of our government is---not that all men, however unfit, shall be voters---but that every man, by the power of reason and the sense of duty [obtained through education], shall become fit to be a voter.” Dupre, *supra* note 23, at 69 (quoting Horace Mann, The Lecture on Education in JOY ELMER MORGAN, HORACE MANN: HIS IDEAS AND IDEALS 97-98 (1936) (alteration in original)).

26. Cf. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (concluding that the federal government could intern Japanese-Americans during World War II so long as the government’s reason for doing so did not fall short of “apprehension by the proper military authorities of the gravest imminent danger to the public safety,” a judgment that the Court deferred to). Other officials used the *in loco parentis* doctrine to specifically exclude Communist speakers from public schools. For example, officials at Queens College in New York used the doctrine of *in loco parentis* to justify banning the appearance of John Gates, editor of the socialist *Daily Worker*; see SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWEMER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI 101 (1988). Indeed, in the facts that gave rise to the *Tinker* case, athletic coaches at one of the Des Moines high schools suggested that the students who wore black armbands to class were Communist sympathizers who might be attacked at school for showing a “lack of patriotism.” JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER V. DES MOINES* AND THE 1960S 8 (1997). And in 1950, the president of the Chicago Board of Education formed a committee to study ways that teachers could promote patriotism and fight Communism in the classroom. John F. Lyons, *Cold War and Anti-Communism*, in THE ENCYCLOPEDIA OF CHICAGO 184 (James R. Grossman, et al., eds., 2004).

27. See ARUM, *supra* note 10, at 8.

28. *Id.* at 17.

who wore “freedom buttons” at school.²⁹ And in 1965, Congress established the Office of Economic Opportunity to lead President Lyndon B. Johnson’s War on Poverty.³⁰ Although Congress did not initially refer to legal services when it created the OEO, the agency immediately started funding legal services for the poor³¹ and Congress emphasized the provision of legal services when it amended the Economic Opportunity Act in 1966 and 1967, creating a discrete Legal Services program in the 1967 amendments.³²

Congress did not simply authorize the provision of legal services to help poor Americans; it directed the Legal Services program to “further the cause of justice among persons living in poverty” by generally “mobilizing the assistance of lawyers and legal *institutions*.”³³ And the men who led the program interpreted their mandate broadly, as a mission to “uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope, and ambition.”³⁴

In the late 1960s and early 1970s, the Legal Services program and the public interest law firms that it funded increasingly challenged school rules and administrators whose disciplinary decisions infringed students’ speech rights.³⁵ Their efforts were largely fueled by young attorneys who had recent experience with the education system³⁶ and rules that had become particularly strict and arbitrarily enforced during the first

29. See *Burnside v. Byars*, 363 F.2d 744, 748–49 (5th Cir. 1966).

30. Economic Opportunity Act of 1964, Pub L. No. 88-452, 78 Stat. 508, 528.

31. See ALAN W. HOUSEMAN & LINDA E. PERLE, CENTER FOR LAW & SOCIAL POLICY, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 7 (2003) (noting that the OEO’s first director, Sargent Shriver, funded legal services in the early days of the OEO, even though the Economic Opportunity Act did not mention such services).

32. *Id.*; see also Economic Opportunity Amendments of 1966, Pub L. No. 89-794, 80 Stat. 1451, 1461-62 (1966) (directing OEO to develop legal services programs for the poor); Economic Opportunity Amendments of 1967, Pub L. No. 90-222, 81 Stat. 672, 698–99 (1967) (creating the “Legal Services” program).

33. Economic Opportunity Amendments of 1967, 81 Stat. at 698 (emphasis added).

34. E. Clinton Bamberger, Former Dir. Of OEO Legal Services, Address to the National Conference of Bar Presidents (Feb. 19, 1966), reprinted in Harry P. Stumpf, *Law & Poverty: A Political Perspective*, 1968 WIS. L. REV. 694, 711–12 (1968). Clinton Bamberger was the first national director of the OEO’s Legal Services program. ARUM, *supra* note 10, at 8.

35. ARUM, *supra* note 10, at 17.

36. These young attorneys included Hillary Rodham, who advocated using legal challenges as a means of children’s advocacy when she worked as an attorney for the Children’s Defense Fund. See generally Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

part of the Cold War and the civil rights movement.³⁷ They flooded the nation's appellate courts with litigation over school discipline rules. While few cases challenging those rules existed before 1960, and only seventy-two appeared between 1960 and 1968, seventy-six school discipline cases *per year* were argued in the federal and state appellate courts between 1969 and 1975.³⁸ As one scholar has noted, “[t]here were likely more challenges to school discipline in the case law records of 1969 and 1970 alone[] than in all of American history combined.”³⁹

B. *Tinker v. Des Moines* and The Fall of the In Loco Parentis Doctrine

Despite the zealous advocacy of law firms funded by the Legal Service program, the case that sparked the decline of the *in loco parentis* doctrine was not brought by an organization affiliated with that program. Rather, the case that would become known as *Tinker v. Des Moines Independent Community School District* was filed by Dan Johnston, a young Iowa attorney who worked in a two-person Des Moines law firm and was active in the Iowa Civil Liberties Union (“ICLU”).⁴⁰ Johnston’s fee amounted to no more than a few hundred dollars, but he would become famous as the public face of the *Tinker* plaintiffs when the case made its way to the Supreme Court.⁴¹

Tinker arose out of the defining event of the 1960s: The Vietnam War. The United States began fighting in Southeast Asia in 1961, and by the end of 1965, 170,000 American soldiers were stationed in Vietnam and over 1,000 soldiers had died in the conflict.⁴² In November 1965, an estimated 25,000 people descended on Washington, D.C., to protest America’s continued involvement in Vietnam.⁴³ The protest was noteworthy for its moderation: Speakers included civil libertarians and civil rights leaders like Coretta Scott King, not militants or

37. For example, the Fifth Circuit noted in *Burnside* that while the school prohibited students from wearing “freedom buttons,” it did not prohibit the wearing of other buttons, including buttons that promoted the Beatles rock band and buttons that contained the initials of students. *Burnside v. Byars*, 363 F.2d 744, 746 n.2 (1966). In *Tinker*, the Supreme Court noted that the Des Moines schools allowed students to wear all kinds of propaganda, including political campaign buttons and even the Nazi Iron Cross. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

38. Arum, *supra* note 10, at 17-18.

39. *Id.*

40. JOHNSON, *supra* note 27, at 62.

41. *See id.* at 3

42. *See generally id.* at 1.

43. *Id.*

extremist student leaders.⁴⁴ Protest monitors urged marchers to hide signs that called for such extreme positions as “American surrender or withdrawal.”⁴⁵ Instead, the activists championed more moderate ideas, including a call by New York Senator Robert F. Kennedy to extend the planned Christmas truce to allow additional time for peace negotiations.⁴⁶

Among the 25,000 marchers were Iowa teenagers Christopher Eckhardt and John Tinker.⁴⁷ Eckhardt and Tinker returned from the march energized. Their parents held a meeting with other community activists on December 11, 1965, to find a way for the students to express their disagreement with the nation’s Vietnam policy.⁴⁸ They ultimately decided to wear black armbands to school as a sign of protest.⁴⁹ The protest was scheduled to occur on Thursday, December 16, 1965—and a fellow student who attended the Tinker/Eckhardt meeting wrote an article for one of the school’s newspapers announcing the plan.⁵⁰ The student’s journalism teacher refused to publish the article; however, until the students talked with the principal or another school official.⁵¹ The student eventually spoke with two Des Moines school district officials, who said they would not allow the article to be published.⁵²

It turned out the article was not necessary to alert students to the protest, and word about the black armbands spread throughout the Des Moines schools.⁵³ On Tuesday, December 14, the principals of five Des Moines high schools—at the urging of the district’s superintendent—hastily called a meeting to determine how they would respond to the protests.⁵⁴ They decided to ban the armbands in Des Moines’s secondary schools.⁵⁵ Notably, the school district had never adopted a policy regarding the wearing of armbands specifically or political symbols generally: In fact, the Des Moines school board had to hold

44. *Id.* at 2.

45. *Id.*

46. JOHNSON, *supra* note 27, at 2.

47. *Id.*

48. *Id.* at 3.

49. *Id.* at 4.

50. *Id.* at 5.

51. *Id.* at 6.

52. JOHNSON, *supra* note 27, at 6.

53. *Id.*

54. *Id.*

55. *Id.*

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

several meetings in December 1965 and January 1966 to ratify the armband ban.⁵⁶ Rather, the high school principals based their decision on the “general school policy against ‘anything that... [presents] a disturbing situation within the school.’”⁵⁷

That did not dissuade the Eckhardts or Tinkers, though. Chris Eckhardt went to school on December 16 wearing the black armband.⁵⁸ Knowing that the high school principals had resolved to punish anybody who wore an armband to school that day, Eckhardt immediately turned himself in to the principal’s office.⁵⁹ One of the school officials who spoke with him tried to convince Eckhardt to remove the armband, saying that the suspension would look bad on his record, that he was “too young to have opinions,” and that “colleges didn’t accept protestors so if... [he] planned to go to college that... [he’d] better take it off.”⁶⁰ When Eckhardt refused to remove the armband, the school suspended him.⁶¹ A similar scenario played out at Harding Junior High School, where John Tinker’s sister Mary Beth was suspended for wearing a black armband to school and refusing to remove it.⁶² Finally, on Friday, December 17, John Tinker was not permitted to attend his high school after wearing a black armband to class and refusing to remove it.⁶³

The Tinkers and Eckhardts did not immediately sue the school district for violating their constitutional rights.⁶⁴ After all, the school district did not have a formal policy that governed the wearing of armbands—the high school principals had informally decided to prohibit the wearing of armbands to protest the Vietnam War and to suspend any student who defied them as violating a school order.⁶⁵ The school board had to ratify the decision before the families took any legal action.⁶⁶ It did so early

56. *Id.* at 34 (noting that the school board “had not conceived the policy prohibiting armbands. The high school principals and the director of secondary education had crafted it without consultation with the board”).

57. *Id.* at 6 (alteration in original).

58. JOHNSON, *supra* note 27, at 16.

59. *Id.* at 16–17.

60. *Id.* at 17 (omissions and alterations in original) (additional quotation marks omitted).

61. *Id.* at 18.

62. *Id.* at 19–20.

63. *Id.* at 24–25.

64. *See id.* at 34.

65. JOHNSON, *supra* note 27, at 34.

66. *See id.* at 30 (noting that “no legal challenge to school policy on armbands could be mounted until the school board had officially had the opportunity to vote on the ban”).

the next month, holding two open meetings to consider the ban before upholding the policy by a 5-2 vote on January 3, 1966.⁶⁷ The Tinkers and Eckhardts, assisted by the ICLU, filed a complaint against the Des Moines Independent Community School District in federal court on March 14, 1966, arguing that the school district's armband policy violated the First Amendment.⁶⁸

The district court in the Southern District of Iowa dismissed the complaint.⁶⁹ It reasoned that, while the armband wearing constituted protected symbolic speech, the school district could prohibit it.⁷⁰ Interestingly, to reach that decision, the court relied on the deferential clear and present danger test that the Supreme Court used to uphold the convictions of Communist Party leaders in *Dennis v. United States*.⁷¹ That test asks "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁷² The district court easily found that the school district's actions, which it viewed as necessary to "maintaining a scholarly, disciplined atmosphere within the classroom," satisfied the clear and present danger test, and were not patently unreasonable.⁷³ It also rejected the Fifth Circuit's judgment, delivered in *Burnside*, that a school official should not infringe a student's right to speak unless the exercise of the right "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."⁷⁴ In the district court's opinion, "[s]chool officials must be given a wide discretion and if, under the circumstances, a disturbance in

67. *Id.* at 45. The school board also held an informal (some would say "secret") meeting between the two public hearings, where it discussed the armband policy with its attorney, Allan Herrick. *Id.* at 41-42. For a thorough description of all three meetings, see John Johnson's elaborate account of the *Tinker* controversy. *Id.* at 31-47.

68. *Id.* at 67-68.

69. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972-73 (S.D. Iowa) ("*Tinker I*"), reversed by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). For the purposes of this section, I refer to the district court's *Tinker* decision as *Tinker I*, the Eighth Circuit's decision as *Tinker II*, and the Supreme Court's decision as *Tinker III*. In the rest of the article, any references to "*Tinker*" refer to the Supreme Court's opinion in the case.

70. *Tinker I*, 258 F. Supp. at 972-73.

71. *Id.* at 972; see also ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS, § 8.3.2, at 340 (4th ed. 2007) (noting that, in *Dennis*, the "clear and present danger test seemed to veer away from the speech-protective model" and "applied a formula that was more deferential to governmental interests").

72. *Dennis v. United States*, 341 U.S. 494, 510 (1951) (Vinson, C.J., plurality opinion) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)) (additional quotation marks omitted).

73. *Tinker I*, 258 F. Supp. at 972-73.

74. *Id.* at 973 (quoting *Burnside*, 363 F.2d at 749).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court.”⁷⁵ A divided en banc panel of the Eighth Circuit Court of Appeals affirmed that decision.⁷⁶

The Tinkers and Eckhardts filed their petition for certiorari in the Supreme Court on January 17, 1968.⁷⁷ The Court granted the petition on March 4.⁷⁸ Notably, two of the Court’s strongest civil libertarians, Justices Hugo Black and Abe Fortas (who would eventually write the *Tinker* opinion), voted to deny certiorari.⁷⁹ Fortas, for one, was not convinced at the time that the courts should second-guess disciplinary decisions made by school officials, unless the decision was clearly arbitrary or discriminatory.⁸⁰ He would change his mind after the case was argued though and, on February 24, 1969, the Supreme Court reversed the district court’s decision.⁸¹ Justice Fortas wrote the majority opinion.⁸²

For a case that is almost universally regarded as destroying the *in loco parentis* doctrine, it is interesting that the *Tinker* opinion never uses that phrase. Perhaps the Court did not need to mention it. After all, it did say that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate.”⁸³ Many commentators interpreted that language as destroying the *in loco parentis* doctrine *sub silentio*.⁸⁴ In reality, *Tinker*’s message was more subtle than that. The test it developed did not seem overly

75. *Id.*

76. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988, 988 (8th Cir. 1967) (per curiam) (“*Tinker I*”), reversed by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). There is no transcript of either oral argument that occurred before the Eighth Circuit in the *Tinker* case; however, John Johnson’s description of the controversy provides an excellent account of the arguments. His account is drawn from interviews with the attorneys and parties, the few newspaper reports that covered the events, and the parties’ appellate briefs. See JOHNSON, *supra* note 27, at 110–20.

77. Johnson, *supra* note 27, at 123.

78. *Id.* at 128.

79. *Id.*

80. *Id.* at 129.

81. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (“*Tinker III*”).

82. *Id.* at 504.

83. *Id.* at 506.

84. See Dupre, *supra* note 21, at 60 (“When the *Tinker* Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common law doctrine of *in loco parentis*—slipped out the back door.”); see also Harvard Law Review Ass’n, *The Supreme Court, 1984 Term: School Searches*, 99 HARV. L. REV. 120, 235 & n.13 (1985) (recapping the Court’s “rejection of the *in loco parentis* doctrine”).

restrictive. It did not inquire into the motivation that school officials had for prohibiting certain speech. It did not even purport to challenge a school's ability to prohibit group demonstrations,⁸⁵ which are at the very heart of the First Amendment.⁸⁶ *Tinker* merely required that a school show that the activity it was punishing "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"⁸⁷ The school need not prove those by clear and convincing evidence or even a preponderance: the Court simply demanded that school officials show that they "had *reason to anticipate* that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."⁸⁸ The Des Moines schools failed that test because they punished the Tinker and Eckhardt children "for a silent, passive expression of opinion, unaccompanied by *any* disorder or disturbance."⁸⁹

Moreover, the *Tinker* decision was as much a product of its time as anything else, a reaction against blatant viewpoint-based discrimination regarding a sensitive topic. For example, the Court noted that the school district had not prohibited the wearing of other symbols at school, but rather convened quickly to prohibit the expression of a politically unpopular opinion regarding the Vietnam War.⁹⁰ And the school district apparently had no problem with student expression that *promoted* American involvement in the Vietnam War. Christopher Eckhardt recalled that the gym teachers and coaches at Roosevelt High School encouraged students to chant "Beat the Vietcong" during their calisthenics exercises after news broke of the armband plan.⁹¹ The majority criticized the Des Moines school district for the double-standard, stating that schools "may not be enclaves of totalitarianism," where school officials have total control over their students and transform them into "closed-circuit recipients of only that which the State chooses to communicate" those messages which are "officially

85. See *Tinker III*, 393 U.S. at 508.

86. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) ("[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.") (additional quotation marks omitted).

87. *Tinker III*, 393 U.S. at 509 (quoting *Burnside*, 363 F.2d 744, 749 (1966)).

88. *Id.* (emphasis added).

89. *Tinker III*, 393 U.S. at 508 (emphasis added).

90. *Id.* at 510–11.

91. JOHNSON, *supra* note 27, at 7–8. One of the coaches later said that this chant "sprang from the students themselves," but that the coaches decided not to stop the chant because the students were "proving their Americanism." *Id.* at 8 (additional quotation marks omitted).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

approved.”⁹² This country did not develop its school systems to “foster a homogenous people.”⁹³

Nonetheless, most courts construed *Tinker* in the broadest possible terms.⁹⁴ Nowhere was that more apparent than in a case in the Ninth Circuit called *Fraser v. Bethel School District No. 403*.⁹⁵

C. *Fraser’s* Attempt to Revive *In Loco Parentis*

Fraser arose out of a high school assembly speech filled with sexual innuendo. The facts of the case were very simple. The student, a seventeen year-old high school senior named Matthew Fraser, delivered the following speech to nominate a classmate for a student government position:

I know a man who is firm-he’s firm in his pants, he’s firm in his shirt, his character is firm-but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts-he drives hard, pushing and pushing until finally-he succeeds.

Jeff is a man who will go to the very end-even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president-he’ll never come between you and the best our high school can be.⁹⁶

Predictably, some students responded to the speech in a raucous manner. Some “hooted and yelled.”⁹⁷ Some graphically simulated the

92. *Tinker III*, at 511.

93. *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

94. *See, e.g.*, *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977) (arguing that *Tinker* put the burden on school officials to show a “reasonable basis for interference with student speech” where “bare allegation that such a basis existed” will not suffice and concluding that, in a situation that involves potential *psychological* disruption, *Tinker* required that the school demonstrate that the psychological harm would have been “*significant*” (emphasis added)).

95. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356 (9th Cir. 1985) (“*Fraser II*”).

96. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1357 (9th Cir. 1985) (“*Fraser II*”). As with the previous section, I refer to the district court’s decision in *Fraser* as *Fraser I*, the Ninth Circuit’s decision as *Fraser II*, and the Supreme Court’s decision as *Fraser III*. Unless otherwise noted, all other references to “*Fraser*” in this article refer to the Supreme Court’s decision.

97. *Id.* at 1359.

sexual acts that Fraser's speech alluded to.⁹⁸ Others just seemed bewildered and embarrassed by Fraser's remarks, causing at least one teacher to cancel part of her lesson the next day to discuss the speech.⁹⁹

The day after he delivered his speech, Fraser was called to the assistant principal's office and given notice that the school would suspend him for violating its disruptive conduct policy.¹⁰⁰ That rule prohibited students from engaging in conduct that materially and substantially interfered with the educational process, "including the use of obscene, profane language or gestures."¹⁰¹ The assistant principal gave Fraser an opportunity to explain his conduct, then suspended him for three days and denied him a chance to speak at his commencement ceremony.¹⁰²

After filing a grievance action with the superintendent of the school district (which was denied), Fraser sued the Bethel School District.¹⁰³ The district judge determined that the school district had violated Fraser's First Amendment rights by punishing him for delivering the speech.¹⁰⁴ The Ninth Circuit affirmed that decision. In its view, the school district "failed to carry its burden of demonstrating that Fraser's use of sexual innuendo in the nominating speech substantially disrupted or materially interfered in any way with the educational process."¹⁰⁵ Although Fraser's speech had elicited a lively response from the student audience, the court seemed to think that most school assemblies produce some kind of response from their audience, and it found no evidence to suggest that Fraser's speech caused disorder or delayed the assembly in any way.¹⁰⁶ The fact that several teachers and school officials found Fraser's speech "inappropriate" did not concern the court: "The mere fact that some members of the school community considered Fraser's speech to be inappropriate does not necessarily mean it was disruptive of the educational process. The First Amendment standard *Tinker* requires us to apply is material disruption, not inappropriateness."¹⁰⁷ The court

98. *Id.*

99. *Id.* at 1360.

100. *Id.* at 1357.

101. *Id.* at n.1.

102. *Fraser II*, 755 F.2d at 1357.

103. *Id.* at 1358.

104. *Id.*

105. *Id.* at 1359.

106. *Id.* at 1360.

107. *Id.* at 1361.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

also refused to give the school district the authority to prohibit “indecent” speech in the school setting, saying that it “fear[ed] that if school officials had the unbridled discretion to apply a standard as subjective and elusive as ‘indecency’ in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.”¹⁰⁸

The Supreme Court, which had not decided a student speech case in the sixteen years since *Tinker*, reversed the Ninth Circuit’s decision. It corrected the broad interpretation of *Tinker* that courts like the *Fraser* panel had drawn, saying that *Tinker* does not preclude all discipline of students for speaking.¹⁰⁹ For example, it contrasted the “political message” of the speech that was punished in *Tinker* and the “sexual content” of the speech at issue in *Fraser*.¹¹⁰ In a sense, the Court viewed the sexual content of *Fraser*’s speech, delivered to a captive assembly audience, to be inherently disruptive and open to punishment under the *Tinker* standard.¹¹¹

But rather than simply justify its decision under *Tinker*, as Justices Blackmun and Brennan would have done,¹¹² the Court wrote sweepingly about the school’s authority to promote “‘fundamental values necessary to the maintenance of a democratic political system.’”¹¹³ These values included consideration of the “*sensibilities* of others, and, in the case of a school, the *sensibilities* of fellow students.”¹¹⁴ Why give the school boards the authority to operate a heckler’s veto system?¹¹⁵ The Court

108. *Fraser II*, 755 F.2d at 1363. In this way, Bethel School District tried to convince the court that it should extend the Supreme Court’s decision in *FCC v. Pacifica*, 438 U.S. 726 (1978), to the school setting but the Ninth Circuit rejected those efforts, finding no analogue between the rationale for restricting indecent speech in broadcasting and the rationale for restricting such speech in the school setting. *Fraser II*, 755 F.2d at 1363.

109. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (“*Fraser III*”).

110. *Id.*

111. *See id.* at 688–89 (Brennan, J., concurring) (“[H]igh school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school’s educational mission.” (footnote omitted)).

112. *See id.*

113. *Id.* at 681 (majority opinion) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

114. *Id.* (emphasis added).

115. *Id.* Under the heckler’s veto theory, courts have refused to give the government authority to prohibit or punish speech based solely on the reaction of third parties to the speech. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 32 (2004) (Rehnquist, C.J., and O’Connor, J., concurring) (“[T]he mere fact that he disagrees with this part of the Pledge [of Allegiance] does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress.”).

justified its decision under the modern *in loco parentis* doctrine, the version that reflected the reproductive model of “[p]ublic education [as] prepar[ing] pupils for citizenship in the Republic... inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government.”¹¹⁶ Under that doctrine, the Court deferred to the schools’ authority in “teach[ing] by example the shared values of a civilized social order,” including the determination that “civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct...”¹¹⁷

Fraser’s revival of the *in loco parentis* doctrine marked an important step in the Court’s treatment of student rights cases. Although the Court had discussed the doctrine a year earlier when it upheld the right of schools to search students for drugs based only on reasonable suspicion and without a warrant,¹¹⁸ it rejected the doctrine as “in tension with contemporary reality and the teachings of this Court.”¹¹⁹ Chief Justice Burger’s majority opinion in *Fraser* challenged that statement and instead “recognize[d] the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”¹²⁰

Unfortunately, while invoking the *in loco parentis* rationale, the Chief Justice’s opinion seemed more concerned with the sexual character of *Fraser’s* speech, perhaps reflecting the Chief Justice’s personal concerns about teaching human sexuality in the classroom. For example, the Chief Justice described *Fraser* as a “confused boy” whose “plainly offensive” speech was “acutely insulting to teenage girl students” and potentially “damaging” to the assembly’s less mature audience.¹²¹ He compared the sexual *innuendo* in *Fraser’s* speech to sexually *explicit* speech, which the Court has given States broad authority to regulate with

116. *Fraser III*, 478 U.S. at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

117. *Id.* at 683.

118. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339–42 (1985).

119. *Id.* at 336.

120. *Fraser III*, 478 U.S. at 684.

121. *Id.* at 683.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

respect to minors,¹²² although another justice noted that Fraser’s speech did not come near the explicitness of speech regulated in cases like *Ginsberg v. New York* and *FCC v. Pacifica Foundation*.¹²³

Burger’s obsession with the sexual character of Fraser’s speech trivialized his revival of the *in loco parentis* doctrine. It also caused enormous confusion in the lower courts. Some courts read *Fraser* to only apply to lewd or indecent speech, speech characterized by its sexual and offensive content.¹²⁴ Others read *Fraser* as hinging not on the content of the message being conveyed but on the manner and location of its delivery, more tied to the inherent disruptiveness of the speech than the message delivered.¹²⁵ Some read *Fraser* both ways. The Ninth Circuit panel in *Morse v. Frederick*, for example, construed *Fraser* as allowing schools to prohibit “sexual speech,” but it never seemed to figure out whether that inquiry focused on the content or the manner of the speech, highlighted by the fact that the panel distinguished the “sexual nature” of the speech that disrupted the school assembly and thus was not protected in *Fraser* with the “political viewpoint of the speech protected in *Tinker*.”¹²⁶

Of course, a few judges recognized that the Fraser analysis, with its revival of *in loco parentis*, suggested that “the Government’s interest in protecting children extends beyond shielding them from physical and psychological harm” and encompasses protecting children “from exposure to materials that would ‘impair[] [their] ethical and moral development.’”¹²⁷ But those judges were the exception to the rule.

122. *Id.* at 684–85.

123. *Fraser III*, 478 U.S. at n.2 (Brennan, J., concurring) (citing *Ginsberg v. New York*, 390 U.S. 629 (1968) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

124. *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001) (“According to *Fraser*, then, there is no First Amendment protection for ‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech in school.”).

125. *See E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) (“*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.”); *see also* Brief of Respondent at 26, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278) (“In short, *Fraser* is a case about lewd speech that caused actual disruption in a school-sponsored assembly containing a captive audience of adolescent students. None of those factors is present here. Frederick’s speech was not lewd or sexually suggestive. It did not cause actual disruption, and it did not take place in a school-sponsored speech forum.”).

126. *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006) (emphasis added) (additional quotation marks omitted).

127. *See Action for Children’s Television v. FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc) (citing *Fraser*, 478 U.S. at 684, and quoting *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)) (alterations and emphasis in original).

Indeed,

just two years after the Court decided *Fraser*, in the final installment of the Court's student speech trilogy, Justice Byron White interpreted *Fraser* in extremely narrow terms, holding

a student could be disciplined for having delivered a speech that was 'sexually explicit' but not legally obscene at an *official school assembly*, because the school was entitled to '*disassociate itself*' from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education."¹²⁸

He never mentioned the words *in loco parentis*.

D. How Drugs Got *In Loco Parentis* Back on the Supreme Court's Good Side

Although few judges used Chief Justice Burger's *in loco parentis* rationale in student speech cases, the Supreme Court seized on it to give schools more power to attack the growing problem of student drug use. The drug cases offer guidance to school officials who would like to convince the Court that they need a legal standard like *in loco parentis* to attack the broad social problems being confronted in modern public schools.

Drug use by high school students peaked in the 1970s and early 1980s: in 1985, more than a quarter of children between the ages of twelve and seventeen reported using an illicit drug, thirteen percent within the previous month.¹²⁹ Particularly alarming was the changing *character* of drug use by high school students and the ease with which they could obtain and use drugs. While children in the 1970s might have retreated to their basements to smoke pot and burned incense to cover up the strong smell,¹³⁰ children in the 1980s and 1990s could achieve a similar high by quickly ingesting cocaine or amphetamines. Students

128. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988) (emphasis added).

129. Office of Nat'l Drug Control Policy, *Drug Use Trends* (2002), available at <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/drugusetrends.pdf>.

130. *See, e.g., State v. Hughes*, 607 N.W.2d 621, 627 (Wis. 2000) ("When the strong smell of marijuana is in the air, there is a 'fair probability' that marijuana is present. This is common sense.").

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

increasingly used and *dealt* drugs at school—a situation that the Supreme Court responded to by allowing school officials to conduct warrantless searches of their students on less than probable cause.¹³¹ Of course, it was easy to understand the Court’s decision to downplay the privacy rights of children in *New Jersey v. T.L.O.*: Drug use and drug dealing that occurred on school grounds was illegal and few people believed that a school district should not have the authority to combat illegal activity on school grounds based on reasonable suspicion.¹³² But what about drug use that occurs in the family basement, with drugs that the students bought on the street, not in the school halls? In Vernonia, Oregon, for example, school officials maintained that drug use *generally* led to an increase in discipline problems: Students acted more violently at school and became increasingly rude during class.¹³³ Football players, who coaches feared were leading the drug culture, seemed to suffer more severe injuries than normal and react more slowly on the playing field.¹³⁴ Searching those students for drugs did not solve anything since the drugs were rarely used or dealt at school.¹³⁵ But did the school’s concerns for the health of those student athletes give the school the right to test them for drugs without any suspicion whatsoever?

The Supreme Court said yes. In doing so, it relied on the reduced expectation of privacy that students have when they participate in

131. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339–42 (1985). In *T.L.O.*, a teacher had found two girls smoking cigarettes in a school restroom during school hours. *Id.* at 328. A subsequent search of T.L.O.’s purse revealed marijuana, a pipe, several small plastic bags used to distribute marijuana, and a “substantial quantity” of money in dollar bills. *Id.*

132. See *T.L.O.*, 469 U.S. at 339 (weighing the student’s privacy interest against the “substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds”); cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (suggesting that schools can regulate student speech that “would materially and substantially interfere with the requirements of appropriate *discipline* in the operation of the school” (additional quotation marks omitted) (emphasis added)).

133. See *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 648–49 (1995) (listing these conclusions offered by school officials in Vernonia, Oregon). The Supreme Court suggested that some teachers and staff in Vernonia observed students using drugs at school, *see id.* at 649, although the briefs suggest that the officials actually saw them using drugs at a restaurant near the high school, *see* Brief of Petitioner at 5, *Vernonia*, 515 U.S. 646 (No. 94-590). While school officials confiscated drug *paraphernalia* on school grounds, overheard students boasting about their drug use on school grounds, and listened to some students admit that they had used drugs, it appears that much of the actual drug dealing and drug use in Vernonia occurred off-campus. *See id.* at 5–6 (noting, for example, that “five of the high school’s best athletes cut classes to hold a party and were arrested for drinking alcohol and using marijuana”).

134. *Id.* at 649.

135. *See id.* (noting that the Vernonia school officials brought a drug-sniffing dog into its schools but the drug problem persisted).

interscholastic athletics.¹³⁶ After all, “[s]chool sports are not for the bashful,” the Court said. “They require ‘suited up’ before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.”¹³⁷ Of course, the fact that student athletes got naked in the locker room seems to have little bearing on whether they had a legitimate expectation in not having their urine tested for drugs. So Justice Antonin Scalia, who wrote the majority opinion in *Vernonia*, relied on more than that. He argued that, while the Court had “rejected the notion that public schools, like private schools, exercise only parental power over their students,” it had “emphasized[] that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”¹³⁸ And he reformulated the *in loco parentis* debate, stating that, while schools do not have a general “‘duty to protect’” their students,¹³⁹ they frequently must act “*in loco parentis*, with the power and indeed the duty to ‘inculcate the habits and manners of civility.’”¹⁴⁰ That interest justified the school’s decision to take reasonable steps to prevent drug use among its students.

Interestingly, Scalia’s discussion of the *in loco parentis* rationale was probably unnecessary to resolve *Vernonia*: students who wished to play football at the high school had to submit to a preseason physical exam and give a urine sample, and they had to comply with all sorts of rules governing their conduct, grades, dress, and insurance coverage.¹⁴¹ In that sense, they had voluntarily chosen to participate in a heavily regulated industry, to which the Court has traditionally given more leeway in search and seizure cases.¹⁴² But Scalia’s opinion sent a clear message. The Court would not just defer to school policies that combated drug use because drug use *disrupted* the educational process. Rather, schools had an interest in deterring drug use by children because

136. *Id.* at 657.

137. *Id.*

138. *Id.* at 655.

139. *Id.* at 655 (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

140. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 684 (1986)) (additional quotation marks omitted).

141. *Id.* at 657.

142. *Id.*; see also *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 627 (1989) (“[T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety.”).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

drugs were bad for them.¹⁴³

III. USING *IN LOCO PARENTIS* TO IMPROVE ACADEMIC ACHIEVEMENT
AND BETTER PREPARE STUDENTS FOR THE NEW ECONOMY

Of course, most Americans believe that drug use is a serious problem that school officials should have leeway to combat.¹⁴⁴ But why give school officials greater discretion in disciplining students generally? That could compromise an important goal of our public education system at the high school level: Instilling in teenagers the constitutional values that define American democracy.¹⁴⁵ But the way the courts have protected student speech rights—by second-guessing school officials and placing a high burden on them to justify discipline—has eroded the moral authority that teachers and administrators have to control their classrooms.¹⁴⁶ That erosion of authority has made public high schools a more difficult place to learn and has compromised the ability of public schools to adequately prepare American children for the challenges they will face in the twenty-first century.

A. Cause for Concern: How American Students Are Falling Behind Their
International Counterparts Academically at the Worst Possible
Time

To be fair, there is some dispute in social science and policy circles about whether American education is really suffering from a “crisis.” On the one hand, Jay Greene and Marcus Winters—respected researchers at the Manhattan Institute who have been studying and writing about education issues for years—report that nearly thirty percent of teenagers failed to earn a high school diploma in 2002, including nearly

143. *Vernonia*, 515 U.S. at 661–62.

144. See Robert J. Blendon et al., *Americans' Views on Children's Health*, 280 JAMA 2122, 2122 (Dec. 23, 1998) (describing how, in a 1997 study, 56 percent of respondents identified drugs or drug abuse as one of the two or three most serious problems facing children in the United States, by far the most common response).

145. See, e.g., *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1365 (9th Cir. 1985) (“‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the ‘marketplace of ideas.’ The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487, 603 (1960)) (alteration in original)).

146. ARUM, *supra* note 10, at 13.

half of African-American and Hispanic students.¹⁴⁷ But an economist at the Economic Policy Institute has criticized those figures and called the conventional belief that America is in an education crisis “exaggerated.”¹⁴⁸ He cites U.S. Census Bureau data that indicates that eighty to ninety percent of Americans have a high school diploma, including seventy to eighty percent of African-Americans.¹⁴⁹

Regardless of who has more accurate data, the fact remains that American teenagers do not demonstrate the same level of academic achievement as their international counterparts.¹⁵⁰ For example, the Organisation for Economic Co-operation and Development (OECD), a consortium based in Paris that studies and compares economic and social statistics in its 30 member countries,¹⁵¹ calculates the secondary school completion rate at 76 percent for American students.¹⁵² That ranks lower than the 82 percent average in OECD member countries and significantly lower than the 87 percent average in the OECD’s European Union members.¹⁵³ The percentage of American students finishing secondary school surpassed just four of the twenty-two OECD nations that reported secondary-school completion rates: Mexico, New Zealand, Spain, and Turkey.¹⁵⁴ And those graduation rates capture only part of the problem: A recent study showed that just thirty-four percent of American students who entered high school as the Class of 2002 finished high school *ready* to attend college.¹⁵⁵

147. JAY P. GREENE & MARCUS A. WINTERS, PUBLIC HIGH SCHOOL GRADUATION & COLLEGE READINESS RATES: 1991–2002 1 (Manhattan Inst. for Policy Research, Educ. Working Paper No. 8), available at http://www.manhattan-institute.org/pdf/ewp_08.pdf.

148. Lawrence Mishel, *The Exaggerated Dropout Crisis*, EDUC. WEEK, Mar. 8, 2006, at 40, available at http://www.epinet.org/content.cfm/webfeatures_viewpoints_dropout_crisis.

149. *See Id.*

150. *See* Int’l Comparisons of Academic Achievement, Alliance for Educ., Sept. 2007, available at http://www.all4ed.org/files/IntlComp_FactSheet.pdf (“In virtually every international assessment of academic proficiency, the United States’ performance varies from mediocre to poor [], particularly for secondary school students.”).

151. *See generally* About the OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Nov. 14, 2007).

152. Org. for Econ. Co-operation & Dev., *Education at a Glance 2007*, at 50 (2007), available at <http://www.oecd.org/dataoecd/4/55/39313286.pdf>.

153. *Id.*

154. *Id.*

155. Greene & Winters, *supra* note 150, at 8. By “college-readiness,” Greene and Winters mean that a student cleared three hurdles. First, she must have received a regular high school diploma. Second, she must have passed four years of English, three years of math, and two years each of a natural science, social science, and foreign language. Finally, the student must have been “basically literate,” demonstrated by testing at least at the basic level of the reading assessment offered by the National

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

The gap between American students and their international counterparts is particularly alarming because the global economy has shifted from one based on the physical capacity of the workforce to one based on intellectual capacity. According to one report, sixty-seven percent of today's new jobs require some sort of post-secondary education or training—a number that is only expected to rise.¹⁵⁶ As a result, “meeting high educational standards has become a prerequisite for economic growth and social inclusion in the 21st century” and the failure to meet those standards leaves workers with little chance of finding a good-paying job.¹⁵⁷ The OECD found that in

2005, just fifty-seven percent of the American workforce had less than a high school education.¹⁵⁸ And even those who did find jobs face a less stable economic environment.¹⁵⁹

These trends are alarming on a theoretical level, but their most serious consequence could be the destruction of the American middle class, long regarded as the backbone of the dominant American economy. As one report has noted, “jobs that pay well and support a middle-class lifestyle now require higher-level skills than ever before. If U.S. workers cannot meet the demand, U.S. competitiveness will diminish, negatively affecting the living standards of millions of citizens.”¹⁶⁰

B. The Connection Between Academic Achievement and Student Discipline

Policy makers have offered a number of solutions for narrowing the achievement gap between American teenagers and their international counterparts. They have thrown money at the problem: In 2004, for example, the United States spent more than \$8,000 per student at the

Assessment of Educational Progress (NAEP). *Id.* at 6–7.

156. Achieve, *supra* note 6, at 5.

157. ANTHONY P. CARNEVALE & DONNA M. DESROCHERS, EDUC. TESTING SERV., STANDARDS FOR WHAT? THE ECONOMIC ROOTS OF K-16 REFORM 2–3 (2003), available at http://www.transitionmathproject.org/assets/docs/resources/standards_for_what.pdf.

158. OECD, *supra* note 155, at 137.

159. *Id.* at 125.

160. Achieve, *supra* note 6, at 5.

elementary level and more than \$10,000 per student at the secondary level.¹⁶¹ Only Luxembourg spent more at both levels.¹⁶² Policy makers have designed rigorous curricula and graduation requirements, asking that all students complete a program that adequately prepares them for either college or knowledge-based work.¹⁶³ And they have demanded more from elementary educators,¹⁶⁴ believing that the best way to improve high school achievement is to make younger kids smarter.¹⁶⁵

But policymakers have often overlooked the connection between student discipline and achievement at the high school level. On one level, “school discipline can generate student compliance and peer pressure toward academic performance.”¹⁶⁶ Conservative education scholars, for example, have consistently argued that schools need the authority to discipline students and maintain order in the classroom in order to provide students with a quality education.¹⁶⁷ Others have argued that private schools outperform public schools academically because they maintain stricter disciplinary policies.¹⁶⁸

Of course, the connection is not as clear-cut as some of those scholars suggest. Discipline does not necessarily equate with higher achievement in part because “discipline” is so ill-defined. For instance, some scholars have suggested that using “*strict* disciplinary practices, such as corporal punishment, could lead to *lower* educational achievement and higher rates of delinquency.”¹⁶⁹ And, in fact, studies have shown that authoritarian disciplinary practices often alienate students, weakening their intellectual curiosity, deadening their interest in educational subject matter, and suppressing their desire to learn.¹⁷⁰ Recall the final scene of *Dead Poets Society*, where students read dryly from a book of nineteenth-century poetry after an authoritarian school official fired

161. OECD, *supra* note 155, at 173.

162. *Id.*

163. *See* Achieve, *supra* note 6, at 5 (describing the American Diploma Project, which 29 states have pledged to implement).

164. *See generally* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

165. *See, e.g.*, Greene & Winters, *supra* note 150, at 10 (“[W]e cannot increase participation at four-year colleges without addressing the problems of the K-12 education system.”).

166. ARUM, *supra* note 10, at 32.

167. *Id.*

168. *Id.* (citing JAMES SAMUEL COLEMAN & THOMAS HOFFER, PUBLIC & PRIVATE HIGH SCHOOLS (1987)).

169. *Id.* at 33 (citing WAYNE WELSH, PATRICIA JENKINS, & JACK GREENE, CENTER FOR PUBLIC POLICY, BUILDING A CULTURE AND CLIMATE OF SAFETY IN PUBLIC SCHOOLS IN PHILADELPHIA: SCHOOL-BASED MANAGEMENT & VIOLENCE REDUCTION (1997)).

170. *See id.* at 32–33.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

their beloved teacher, seeming to care less about a subject that had enthralled them.¹⁷¹

In fact, students accept some form of discipline as necessary and will often tolerate strict disciplinary policies,¹⁷² but they will not accept unfair disciplinary policies.¹⁷³ Thus, education scholars have missed the more important question in these cases: Whether school discipline, regardless of its strictness, is effective. The *effectiveness* of discipline often hinges on the degree to which students accept and internalize school rules.¹⁷⁴ Richard Arum's research, for example, shows that students are most responsive when they perceive discipline as both "fair and relatively strict."¹⁷⁵ These students' schools succeeded "in promoting educational achievement and youth socialization. Students... were more likely to demonstrate commitment to the educational process, and had better grades and higher test scores. They were also less likely to assert that it was acceptable to disobey rules or to report being arrested as adolescents."¹⁷⁶ On the other hand, students in overly strict schools who considered disciplinary practices authoritarian, unfair, and illegitimate "yielded negative consequences in certain areas: Students... had lower grades, were more apt to report a willingness to disobey rules, and [had] a higher incidence of arrests."¹⁷⁷

Even more disturbing, Arum's studies also show that variations in discipline has a more profound effect on racial minorities, especially African Americans.¹⁷⁸ On the one hand, African Americans "were more likely than white students to experience school settings that were either the most lenient or the strictest—settings often perceived as unfair and thus poorly designed for cognitive development."¹⁷⁹ In the schools that

171. DEAD POETS SOCIETY (Touchstone Pictures 1989).

172. See ARUM, *supra* note 10, at 31–32 ("As students reported increasing levels of the strictness of school discipline, higher levels of fairness were also reported up to a certain point.").

173. See *id.* at 31. Arum's research shows that, "[a]s students reported increasing levels of the strictness of school discipline, higher levels of fairness were also reported up to a certain point. When students reported the highest levels of school strictness, however, they said that discipline was applied less fairly than when school discipline was reported at a more moderate level of strictness. This curvilinear association suggests that students believed that increased strictness was legitimate at moderate levels; if discipline became too strict, however, it was often viewed as authoritarian and lost some of its legitimacy." *Id.*

174. *Id.* at 33.

175. *Id.* at 34.

176. *Id.* at 34.

177. *Id.*

178. ARUM, *supra* note 10, at 179.

179. *Id.* at 180.

were considered lenient (but unfair), “African-American students performed considerably worse than white students on their twelfth-grade test even after considering their prior tenth-grade test performance and other environmental factors.”¹⁸⁰ It was “when students reported that their schools were both strict and fair[] [that] there were no negative effects of race” on academic performance.¹⁸¹

Those findings pose significant hurdles for a country trying to shrink the achievement gap that exists not only between American students and their international counterparts abroad, but between racial groups at home.¹⁸² In order to eliminate those trends, we need to understand why school discipline is ineffective. The Supreme Court can answer that question by looking in the mirror. As Arum explains, “discipline is often ineffective—and at times actually counterproductive or detrimental to students—because the schools’ legitimacy and moral authority have been eroded.”¹⁸³ Court rulings that overturned school disciplinary decisions have driven that erosion in authority.¹⁸⁴

C. *Tinker*’s Unintended Consequences: How the Student Speech Doctrine Has Eroded the Legitimacy and Moral Authority of Schools

The Supreme Court stated sound law in *Tinker*. The Des Moines school board’s decision to punish a few good kids for passively expressing themselves on the most important social issue of the day seemed arbitrary and unjust—a view reinforced by the fact that the rule the students violated was surreptitiously drawn up by high school principals after they learned of the armband plan.¹⁸⁵ But the disruption standard that the *Tinker* majority used to invalidate the suspensions sent the wrong signals to students and lower courts. It seemed to say that school officials could *only* prohibit speech (or expressive conduct) when the speech would disrupt the educational process. And mere disruption

180. *Id.* at 180–81.

181. *Id.* at 181.

182. See, e.g., Harold Berlak, *Race and the Achievement Gap*, RETHINKING SCHOOLS, Summer 2001, http://www.rethinkingschools.org/archive/15_04/Race154.shtml. (“That there is a race gap in educational achievement is not news. Large numbers of the nation’s children leave school, with and without high school diplomas, barely able to read, write, and do simple math. But the failures of the schools are not evenly distributed. They fall disproportionately on students of color.”).

183. ARUM, *supra* note 10, at 181.

184. *Id.* at 4, 13 (“The reason that ‘adversarial legalism’ has been so costly with regard to school discipline is that the legal challenges produced not only changes in organizational practices, but also undermined the legitimacy of a school’s moral authority more generally.”).

185. See JOHNSON, *supra* note 27, at 6 (describing the meeting).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

was not enough: The speech had to *materially and substantially* disrupt the educational process, an inherently vague standard that gave lower courts a broad license to second-guess the judgment of school officials.

Those courts often decided on their own what constituted a material and substantial disruption, without paying serious attention to what school officials thought. No court showcased that flexibility more zealously than the Ninth Circuit in *Fraser*. The Bethel School District understood *Tinker's* message perfectly when it erected a policy that prohibited conduct that “materially and substantially interferes with the educational process... including the use of obscene, profane language or gestures.”¹⁸⁶ Furthermore, it offered plenty of evidence to show that Matthew Fraser’s speech had *actually disrupted* the educational process.¹⁸⁷ And, indeed, the Ninth Circuit agreed that Fraser’s speech evoked a “lively and noisy response from the students,” including “sexually suggestive movements.”¹⁸⁸ However, it disagreed with school officials about the extent of the disruption, concluding that the level of disruption was not material or substantial enough to justify Fraser’s punishment. For instance, the court determined that the school “had no difficulty in maintaining order during the assembly,” suggesting that nothing short of bedlam would meet *Tinker's* disruption standard.¹⁸⁹

The flexibility that *Tinker* gave lower courts to overturn school discipline signaled to students that they should challenge their school officials’ decisions.¹⁹⁰ The signal worked: While only seventy-two school discipline cases reached the nation’s appellate courts between 1960 and 1968, an average of seventy-six *per year* reached the appellate courts in the six years following *Tinker*.¹⁹¹ The sheer cost of that litigation, combined with the legal training that schools had to give school officials to guard against imposing unconstitutional discipline, chilled disciplinary responses to student misbehavior.¹⁹² So did the fact

186. *Fraser v. Bethel Sch. Dist.* No. 403, 755 F.2d 1356, 1357 n.1 (9th Cir. 1985).

187. *Id.* at 1360 (describing how some students hooted and hollered during Fraser’s speech and how one teacher spent ten minutes of class time the next day discussing Fraser’s speech because that was all her students wanted to talk about).

188. *Id.* at 1360.

189. *See id.* at 1360.

190. *See ARUM, supra* note 10, at 15 (“Successful legal challenges to school authority taught students that school rules were indeed violatable.”).

191. *Id.* at 18.

192. *See id.* at 84 (“Court challenges to school discipline imposed significant financial burdens on school systems, both in terms of the cost of hiring lawyers and the time spent by school officials in answering these challenges.”). For example, in one recent student speech case, school officials were

that, by establishing a constitutional standard to measure school disciplinary procedures, the Court opened up the possibility that school officials would be held personally liable for the monetary damages that a student suffered as a result of impermissible discipline.¹⁹³ Rather than risk exposure to a damages award, school officials simply chose not to discipline students.¹⁹⁴ That caused teachers to lose control of their classrooms.¹⁹⁵ For example, one high school English teacher recounted how she caught a student (the son of a neurosurgeon) cheating on his exam, by holding an open book on his lap during the test.¹⁹⁶ By the time the teacher made it to the student's desk, he had put the book back

so concerned about a potential lawsuit that, after removing a student from class for wearing an inflammatory, anti-gay tee shirt, the school officials refused to suspend him, even though the student repeatedly asked them to suspend him. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1173 (9th Cir. 2006) (“Harper was not suspended, no disciplinary record was placed in his file, and he received full attendance credit for the day.”).

193. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975) (holding “that a school board member is not immune from liability for damages . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student”). Naturally, school officials have qualified immunity to shield them from such liability, so long as they do not violate clearly established law. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But some lower courts have used the student speech doctrine to reject qualified immunity claims. For example, the Ninth Circuit held Alaska principal Deborah Morse personally liable for damages suffered by Joseph Frederick when she suspended him for refusing to take down his “Bong Hits 4 Jesus” banner. *Frederick v. Morse*, 439 F.3d 1114, 1124 (9th Cir. 2006). The Ninth Circuit panel reasoned that Morse had studied an “advanced school law course” that discussed *Tinker*, *Fraser*, and *Hazelwood School District v. Kuhlmeier*, the third case in the Supreme Court’s student speech trilogy, and therefore determined that she violated Frederick’s clearly established constitutional rights. *Id.* at 1124–25 (additional quotation marks omitted). Of course, the court misjudged the fact that, while Morse may have known that she could not punish Frederick for exercising his speech rights absent special justification (be it actual or threatened disruption, school sponsorship, or the speech’s lewd nature), it was almost impossible for a reasonable person to *know* that she violated a clearly established right when the student speech doctrine involves such nuanced and complicated factual determinations. *See Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (explaining how, “unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply,” which suggested that the law Morse purportedly violated was not clearly established); *cf. Malley v. Briggs*, 475 U.S. 335, 341 (1986) (stating that qualified immunity “provides [] protection to all but the plainly incompetent or those who knowingly violate the law”). The court’s error may have resulted from the fact that it thought the case was easy to decide. *See Frederick*, 439 F.3d at 1124–25 (denying qualified immunity to Morse because “[t]he law of *Tinker*, *Fraser*, *Kuhlmeier*, *Burch*, and *McMinnville* is so clear and well-settled that no reasonable government official could have believed the censorship and punishment of Frederick’s speech to be lawful. In fact, there is nothing in the authorities that justifies what the school did, and no reasonable official could conclude otherwise” (footnote omitted)). Whatever the reason, the Supreme Court did not reach the merits of the qualified immunity issue when it decided the case because it found no constitutional violation in the first place.

194. *See ARUM*, *supra* note 10, at 13.

195. *Id.* at 149–51.

196. *Id.* at 151.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

onto the floor.¹⁹⁷ She sent the student to the principal's office but the principal, concerned about a potential lawsuit, summoned the teacher instead and asked for documentary proof that the student had cheated before the school took any action.¹⁹⁸ In another case, Jeffrey Gerstel, a special-education teacher in New York City, pulled a student out of his classroom after the student threatened to kill an assistant teacher.¹⁹⁹ As he was doing so, the boy collided with a bookcase and cut himself.²⁰⁰ Gerstel was summoned by the school to a hearing, where the student's mother announced her intention to sue the school district.²⁰¹ The mother eventually settled her claim with the school out of court, but other damage had been done.²⁰² The student went back into Gerstel's classroom and tormented the teacher for the rest of the year: Anytime Gerstel tried to assert control over his classroom, the students would taunt him with chants of, "I'm going to get my mother up here and bring you up on charges."²⁰³

Those may have been foreseeable consequences. After all, we typically prefer to overprotect speech rights and chill the government from punishing other speakers than underprotect the rights and chill people from speaking²⁰⁴ and we accept that placing the burden on the government will have financial and administrative costs. But the *Tinker* majority did not foresee the effect its disruption standard would have on school discipline generally. As noted earlier, the effectiveness of school discipline often turns on the degree to which students accept the legitimacy of school rules and the moral authority of school leaders.²⁰⁵ *Tinker's* vague and malleable standard, which made *judges*, not school officials, the ultimate arbiters of proper discipline, undermined that legitimacy and moral authority.²⁰⁶ The variation in decisions that

197. *Id.*

198. *See id.*

199. *See* Kay S. Hymowitz, *Who Killed School Discipline?*, *City Journal* (Spring 2000), available at http://www.city-journal.org/html/10_2_who_killed_school_dis.html.

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. For example, the Supreme Court has relaxed its discretionary rule that a party cannot invoke the constitutional rights of third parties in the First Amendment context, allowing an individual whose own conduct is not constitutionally protected to challenge a state policy as facially invalid. As one professor argues, this policy seems to reflect "[t]he special status of First Amendment claims." *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282–83 (1984).

205. ARUM, *supra* note 10, at 33.

206. *Id.* at 4.

Tinker engendered also made it more difficult for schools to implement new disciplinary policies.²⁰⁷ But schools could not abandon their disciplinary policies altogether so, in an attempt to guard against student lawsuits, they reduced the use of extreme punishments like expulsion and instead disciplined students extensively with short-term suspensions.²⁰⁸ That might have seemed great to students who frequently misbehaved or behaved so poorly that they would have been threatened with expulsion in earlier years, but it made school discipline seem less fair, more arbitrary, and unjust.²⁰⁹ Students did not internalize or respect school rules and, as a result, discipline was ineffective—even when it was justified.²¹⁰

The *Tinker* majority did not intend those consequences. Indeed, the disruption standard that so many courts have culled from *Tinker* was not even necessary to decide the case. The Des Moines School Board did not violate the Constitution because it could not demonstrate disruption: It violated the Constitution because it favored one expression over another.²¹¹ Its policy *only* prohibited the wearing of black armbands, a particular symbol that students wore to school to express their disagreement with the Vietnam War.²¹² The Des Moines schools allowed students to wear other expressive symbols, including political campaign buttons and even the Nazi Iron Cross.²¹³ They apparently had no problem with student expression that *promoted* American involvement in the Vietnam War.²¹⁴ Christopher Eckhardt recalled that

207. *Id.* Although *Tinker* enabled courts to routinely second-guess the discipline decisions made by school administrators, the student speech doctrine's flexibility posed more basic problems. As Arum notes, not all school discipline lawsuits favored students. Rather, "U.S. court decisions have varied over time and across jurisdictions . . . some have tended to favor students, some school authorities." *Id.* According to Arum's research, the chance that a student would win a school discipline case peaked at 49 percent in the mid- to late 1960s. *Id.* at 88. The likelihood of student success has dropped since then, hovering in the 35 to 40 percent range since the early 1980s. *Id.* But the mere "variation in the direction of court decisions was partly responsible for the difficulties schools encountered when they attempted to implement disciplinary practices that fostered both learning and effective socialization." *Id.* at 4.

208. *Id.* at 13.

209. *Id.* at 31, 33 ("[W]hen courts were supportive of student rights, students reported that school discipline was both less strict and less fair: that is, schools were less likely to apply discipline and the limited discipline they did apply was considered even less legitimate than elsewhere.").

210. *See id.* at 33 ("For discipline to be effective, students must actually internalize school rules. This internalization occurs much more readily when school discipline is equated with the legitimately exercised moral authority of school personnel.").

211. *See Tinker*, 393 U.S. at 510-11.

212. *Tinker*, 393 U.S. at 510-11.

213. *Id.* at 510.

214. JOHNSON, *supra* note 27, at 7-8 (emphasis added).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

the gym teachers and coaches at Roosevelt High School encouraged students to chant “Beat the Vietcong” during their calisthenics exercises after news broke of the armband plan.²¹⁵

As Justice Fortas recognized, that inconsistent treatment of messages represented a classic form of viewpoint discrimination,²¹⁶ which the First Amendment has always prohibited, regardless of context.²¹⁷ The difference in treatment was especially inappropriate in the public school setting, since states did not develop public schools to “foster a homogenous people”²¹⁸ or to be “enclaves of totalitarianism,” where school officials have total control over their students and transform them into “closed-circuit recipients of only that which the State chooses to communicate.”²¹⁹ Then disruption came in. Justice Fortas wrote that, “[i]n order for... school officials to justify prohibition of a *particular expression* of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an *unpopular viewpoint*.”²²⁰ In other words, a school could curtail a particular message when it could reasonably forecast that the speech “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”²²¹ But Justice Fortas did not believe that disruption was the *only* interest that could justify discipline that restricted speech. Why? Because his opinion explicitly did not address “regulation of the length of skirts or the type of clothing, [] hair style, or deportment,” all of which the *Tinker* majority suggested a school could regulate consistent with the First Amendment, regardless of whether the regulated conduct “disrupted” school activities.²²² The fact

215. JOHNSON, *supra* note 27, at 7–8 (emphasis added). One of the coaches later said that this chant sprang from the students themselves but that the coaches decided not to stop the chant because the students were “proving their Americanism.” *Id.* at 8 (additional quotation marks omitted).

216. See *Tinker*, 393 U.S. at 510–11 (“[A] particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was *singled out* for prohibition. Clearly, the prohibition of expression of *one particular opinion*, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” (emphases added)).

217. See, e.g., *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”).

218. *Tinker*, 393 U.S. at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

219. *Id.* at 511.

220. *Id.* at 509 (emphasis added).

221. See *id.* (additional quotation marks omitted).

222. See *Tinker*, 393 U.S. at 507–08 (citing *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968)). In *Ferrell*, three students were denied admission into their high school because they wore

that Justice Fortas considered clothing regulations to be distinct from the regulation at issue in *Tinker* indicates that the *Tinker* majority did not intend to limit a school's ability to discipline its students to situations where the student's conduct disrupted the educational process. It simply identified disruption as one interest that would justify schools in punishing students for conduct that included constitutionally protected speech.

D. *In Loco Parentis* Revived: Recognizing the Ability of School Officials to Discipline Students in a Content-Neutral Manner

The *in loco parentis* standard would prohibit school officials from discriminating against speakers or imposing content-based restrictions on student speech, unless they could show that the particular speech at issue would materially and substantially disrupt the educational process. Thus, the standard would be consistent with *Tinker* and the rest of the Supreme Court's First Amendment jurisprudence: a school could not arbitrarily decide to prohibit one type of speech, or one particular message, without showing a compelling justification for that discriminatory action, such as a substantial disruption of the educational process.²²³

Of course, school officials would have to respect other basic

Beatles-style mop tops, which they insisted were necessary to operate their band, "Sounds Unlimited." *Ferrell*, 392 F.2d at 698–99 & nn.1–2. In fact, the students' contract with their band manager required that they "maintain their dress and personal [sic.] appearance in conformity with accepted STANDARDS and CUSTOMS OF ROCK & ROLL GROUPS, COMBO'S & BANDS including so called BEATLE TYPE HAIR STYLE." *Id.* at 698 n.2 (capitalization in original). And the Fifth Circuit assumed that the students' wearing of the hair style was constitutionally protected expression. *Id.* at 702. Although the school's principal recited previous incidents involving students who wore Beatles-style hair cuts, including "one occasion [where] a group of boys in his school had decided that a classmate's hair was too long and that they were going to take the matter in their own hands and trim it themselves." *Id.* at 700–01. The Fifth Circuit upheld the school's actions because it did not consider them arbitrary, unreasonable, or discriminatory. *Id.* at 702. The element of disruption, although it may have been relevant to the Court's determination that the principal had not acted unreasonably, was not required for the school to punish the students. *See id.* In fact, a skeptical court like the Ninth Circuit's *Fraser* panel would probably have viewed the "disruptions" cited by the school principal in *Ferrell* as unpersuasive.

223. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (reading the First Amendment "to permit reasonable regulation of speech-connected activities in carefully restricted circumstances"); *see also Hill v. Colorado*, 530 U.S. 703, 723 n.31 (2000) ("It is, of course, no answer to assert that the [law] does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. 'The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" (quoting *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980) (additional quotation marks omitted))).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

constitutional rights as well, which would protect students against blatantly unconstitutional discipline. For example, they could not suspend or expel students from school without giving them notice of the charges and an opportunity to respond to them.²²⁴ But otherwise, the *in loco parentis* standard would give school officials broad authority to discipline students. They would have the authority to draw up disciplinary rules and, so long as the rules did not discriminate on the basis of content or viewpoint, courts would review them the way they review other government action that does not substantially burden constitutional rights, by measuring whether the school board had a reasonable basis for developing the rule.²²⁵

Simply giving officials that authority, and removing the cloud of judicial activism that currently hovers over school discipline, would have a profound effect in the school setting.²²⁶ Truly deferring to school officials in designing disciplinary policies and making disciplinary decisions would restore the moral authority that school boards lost in the student speech revolution. It would send a signal to students that, except in the rare cases like *Tinker* where a school has arbitrarily singled out a particular opinion for punishment, the courts are an inappropriate place to challenge school disciplinary policies. And by removing the threat of a lawsuit from every discipline decision that is made, the *in loco parentis*

224. See *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (extending minimum due process protections, including notice and an opportunity to be heard, to students facing even minor suspensions).

225. In a way, the *in loco parentis* standard is a twist on the time, place, and manner analysis that the Supreme Court traditionally uses to review content-neutral regulations that restrict speech in a particular public setting. See, e.g., *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994) (reiterating that the Court reviews content-neutral regulations that govern conduct in a traditional public forum to determine "whether the time, place, and manner regulations were narrowly tailored to serve a significant governmental interest." (additional quotation marks omitted)). I based the model on this test because regulations in the school setting, by their nature, only affect speech in a particular setting and leave open many alternative channels of communication—a point I will return to in Part IV of this Article. Given how deferentially the Court typically applies the time, place, and manner test, I assume that it would probably recognize any non-discriminatory educational interest as significant enough to meet the test. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1368 (2006) ("[B]oth the 'time, place, or manner' and 'content-neutral' labels have essentially become terms of art to express a conclusion by the Court that a given regulation will be subjected to a fairly deferential level of scrutiny."). Thus, the *in loco parentis* model would merely measure whether the disciplinary policy was so patently unreasonable that the Court had no reason to defer to the school officials' judgment in developing it. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) ("[T]he requirement of narrow tailoring [in the time, place, and manner analysis] is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" and "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." (omission in original) (additional quotation marks omitted)).

226. ARUM, *supra* 10, at 185-87.

standard would allow school officials to discipline students more fairly. They could deal with serious infractions—or students who violate multiple school rules—more seriously, without the fear that a court will step in and decide for itself what amount of punishment is appropriate.²²⁷ That matters because, as Richard Arum's research has shown, the effectiveness of school discipline depends on its legitimacy, and the extent to which students accept the discipline as fair.²²⁸

The *in loco parentis* standard also recognizes that school boards, especially those in urban areas where the achievement gap is widest,²²⁹ have a legitimate interest in using discipline as a policy tool to promote safe schools. Indeed, studies have shown that stricter disciplinary policies help combat the threat of school violence and help prevent students from falling into criminal behavior.²³⁰ For example, in one study, “stricter discipline led dramatically to reduced rates of individual arrest... the probability of individual arrest decreas[ing] from six percent to two percent as perceptions of school strictness increased.”²³¹ But those results did not just depend on the strictness of the policies themselves; rather, they hinged on a combination of the strictness of the policy and the degree to which students accepted the policy as fair. Thus, “when discipline was considered unfair, stricter discipline was

227. For instance, under the current student discipline doctrine, the Eighth Circuit held that school officials violated the “substantive due process” rights of two students when they suspended them for three months for spiking the punch at a school activity with two 12-ounce bottles of malt liquor. *Strickland v. Inlow*, 485 F.2d 186, 187, 190 (8th Cir. 1973). The court apparently thought that the school board’s decision to suspend the girls was unreasonable because it made no finding regarding the alcoholic content of the spiked punch: it read the school’s policies to only prohibit “intoxicating liquors,” not all alcoholic beverages and the court interpreted Arkansas state law to define an “intoxicating liquor” as a drink that has an alcohol content exceeding 3.2 or 5 percent of its overall weight. *Id.* at 190. The spiked punch would have failed that test because it only contained 24-ounces of malt liquor, and 60-ounces of a soft drink, and enough water to concoct one and a half gallons of punch. *Id.* at 187. The Supreme Court disagreed with the Eighth Circuit’s interpretation of the school policy, saying the court was “ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement.” *Wood v. Strickland*, 420 U.S. 308, 324–25 (1975). The Court unanimously vacated that portion of the Eighth Circuit’s decision. *See id.* at 327 (Powell, Blackmun, and Rehnquist, JJ., and Burger, C.J., concurring in part and dissenting in part).

228. ARUM, *supra* note 10, at 33.

229. *See generally* KATHLEEN PORTER & STEPHANIE SOPER, NAT’L CLEARINGHOUSE FOR COMPREHENSIVE SCH. REFORM, CLOSING THE ACHIEVEMENT GAP: URBAN SCHOOLS 1 (2003), available at http://www.centerforcsri.org/pubs/annual/csrconsum03_closing.pdf (arguing that the problem at the root of the American education “crisis” is the achievement gap in urban schools that serve a majority of low-income and minority students).

230. *See* ARUM, *supra* note 10, at 34, 183, 185 (“School disciplinary climates, while important for all students, were likely to be of greatest significance to youth at risk for delinquency and incarceration.”).

231. *See id.* at 185.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

actually associated with higher rates of fighting.”²³² Additionally, “[i]n schools that were perceived as least fair, student perceptions of strictness had less significant effects” on the arrest rate.²³³

Tinker’s objective disruption standard undermined that fairness, hindering the ability of schools to use aggressive student discipline to make urban schools safer. The *in loco parentis* standard corrects that mistake and elevates the importance of keeping schools safe in the constitutional analysis of school discipline.

IV. THE *IN LOCO PARENTIS* MODEL OF MEASURING STUDENT DISCIPLINE ADEQUATELY PROTECTS SPEECH RIGHTS

The main concern with adopting a deferential *in loco parentis* standard to govern student discipline cases is the fear that the standard will chill the expression of certain messages, especially opinions with which the government disagrees.²³⁴ But we should be less worried about overprotecting the right to speak in the school setting. For one, when the government (acting through local school boards) regulates student speech, it acts as an educator, not as the sovereign. Its conduct has virtually no impact outside the school environment, rendering any “chill” on free expression minimal. More importantly, the *in loco parentis* standard protects against the most serious threat to free expression by prohibiting schools from discriminating against students on the basis of their viewpoint. In that way, the *in loco parentis* standard would ensure that schools do not become “enclaves of totalitarianism,” tools for government officials to use to indoctrinate students with the government’s preferred message.²³⁵

232. *Id.* at 183.

233. *Id.* at 185.

234. *See, e.g., Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito and Kennedy, JJ., concurring) (rejecting the Petitioners’ argument that school officials should have broad authority to regulate student speech that interferes with the school’s “educational mission” because “some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups”).

235. *Tinker*, 393 U.S. at 511.

A. The Government as Educator, Not Sovereign: Why We Should Not Be So Skeptical of Limiting Constitutional Rights in the School Setting

One of the flaws that has driven criticism of the *in loco parentis* doctrine is the assumption that, when the government regulates conduct inside the school setting, it acts with the same type of authority that it acts with when it regulates conduct as the sovereign.²³⁶ Indeed, several members of the current Supreme Court appear to suffer from this assumption. They have gone so far as to compare government regulation of student conduct to government regulation of political campaigning, saying that, just as when the government announces what organizations can and cannot say about political candidates, “when the ‘First Amendment is implicated [in the school setting], the tie goes to the speaker,’” not to the censor.²³⁷

But, as then-Justice Rehnquist once noted, “the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice.”²³⁸ For example, the Supreme Court has long recognized that the government has discretion to limit speech that occurs on certain government property, because when it does so it acts more as a property owner than as a sovereign.²³⁹

Similarly, the Court has said that the government can place more serious restrictions on its employees’ speech than it can on non-employees’ speech because the government, acting as employer, “has interests... that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”²⁴⁰ Most

236. See, e.g. *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006) (“Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself.”).

237. See *Morse v. Frederick*, 127 S. Ct. 2618, 2649 (2007) (Stevens, Ginsburg, and Souter, JJ., dissenting) (quoting *Fed. Election Comm’n v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2669 (2007)).

238. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 908 (1982) (Rehnquist, J., dissenting).

239. See *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”).

240. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In the government employment context, the Court has said that the First Amendment protects a government employee’s right to engage in speech on matters of public concern so long as the speech does not interfere with the employee’s job. See *id.* at 572–73 (concluding, in that case, that a school could not fire a teacher for speaking when the teacher’s speech did not impede his performance or interfere with the general operations of the school). However, “where a government employee speaks ‘as an employee upon matters only of personal interest,’ the First Amendment does not offer protection.” *Garcetti v. Ceballos*, 126 S. Ct.

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

notably, the government-employer has an interest “in promoting the efficiency of the public services it performs through its employees.”²⁴¹ In deference to that non-sovereign interest, the Court eschews strict scrutiny and balances the government’s interest against the employee’s interest in speaking out on matters of public concern.²⁴² Employee speech that does not touch on a matter of public concern receives *no* First Amendment protection.²⁴³ But the Court does not worry that the government-employer will chill expression in the citizenry at large because it recognizes that the regulation of government employees has virtually no impact outside the public employment context.²⁴⁴

The same is true when the government acts as educator. School rules do not apply to the public in general; they only affect the conduct of certain individuals (most of them minors, no less). Indeed, school rules seem even less restrictive than rules that govern the conduct of government employees, since they only apply in certain locations and at certain times of the day.²⁴⁵ Even school officials themselves recognize that, once a student steps outside the school grounds, she is outside the school’s jurisdiction and cannot be punished for violating “school” rules.²⁴⁶ Additionally, the government’s interests in educating

1951, 1973 (2006) (Breyer, J., dissenting) (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

241. See *Pickering*, 391 U.S. at 568.

242. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568).

243. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 444-45 (2006) (Breyer, J., dissenting) (“[W]here a government employee speaks ‘as an employee upon matters only of personal interest,’ the First Amendment does not offer protection.” (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983))).

244. See *Connick*, 461 U.S. at 147 (“We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee’s false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.” (citations omitted)).

245. See, e.g., *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979) (“[O]ur willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government.”).

246. E.g., MICHAEL IMBER & TYLL VAN GEEL, *A TEACHER’S GUIDE TO EDUCATION LAW* 67-68 (3d ed. 2005). Of course, this is an overly simplistic statement. Many courts have recognized that a school’s jurisdiction extends off-campus during school hours, or at least during school-sanctioned events. See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2624 (2007) (rejecting *Frederick*’s argument that his off-campus activity should not even have been subject to the Court’s student speech doctrine because “[t]he event occurred during normal school hours . . . was sanctioned by Principal Morse ‘as an approved social event or class trip,’ and the school district’s rules expressly provide that pupils in ‘approved social events and class trips are subject to district rules for student conduct’” (citations omitted)). Some have even said a school can discipline a student for activity that occurred solely outside of school, and during non-school hours, if the student’s off-campus activity had a “sufficient

our children differ from its interests in regulating the conduct of the general public: Most importantly, it has primary responsibility for preparing American children to compete for the more sophisticated jobs that will dominate the New Economy. The federal government considers that interest so important that it has conditioned federal funding to states on their development of rigorous curriculum and

academic standards.²⁴⁷ Surely that interest justifies the deference that the *in loco parentis* standard would show to school officials in making disciplinary decisions.

What seems to scare critics of the deferential *in loco parentis* standard more than the deferential *Pickering* standard is the fear that schools will use the doctrine to create those “enclaves of totalitarianism” that *Tinker* envisioned, tools the state can use in an Orwellian fashion to indoctrinate the future electorate with its officially-approved messages.²⁴⁸ Those fears, while legitimate, are largely built on a different concern: The idea that a state can compel its students to adopt a certain message or force children to accept the state’s preferred method of instruction.²⁴⁹ They ignore the fact that, while standards like *Pickering* balancing or *in loco parentis* show more deference to state officials than some constitutional doctrines, they do not give the government unlimited authority to control speech.

nexus” to the school environment—such as “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator.” See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864–65 (Pa. 2002).

247. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1457 (“If a State fails to meet the deadlines established by the Improving America’s Schools Act of 1994 (or under any waiver granted by the Secretary or under any compliance agreement with the Secretary) for demonstrating that the State has in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress, the Secretary shall withhold 25 percent of the funds that would otherwise be available to the State for State administration and activities under this part in each year until the Secretary determines that the State meets those requirements.”).

248. *Tinker*, 393 U.S. at 511.

249. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943) (holding a state cannot force its public school students to participate in the American flag salute because such an order involves the type of “involuntary affirmation,” or compelled speech, that is considered even more offensive to the First Amendment than laws that regulate speech).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

B. Tinkering With *Pickering*: The *In Loco Parentis* Standard, While Properly Deferring to the Judgment of School Officials, Protects Against the Most Serious First Amendment Infringements

A deferential standard like *in loco parentis* does not need to give unfettered discretion to school officials to be effective—nor should it. Although the government has different interests when it acts as educator rather than as sovereign, its behavior can still violate students’ First Amendment rights. The *in loco parentis* standard would protect against those violations.

For example, the First Amendment broadly prohibits the government from forcing individuals to affirm or adopt a message with which they disagree.²⁵⁰ The general reasoning behind such restrictions on “compelled” speech is our view that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind,’” which is the heart of the First Amendment.²⁵¹ But our practical fears about compelled speech run much deeper. Compelled speech threatens core principles at the root of the First Amendment, as exemplified by the phenomenon of cognitive dissonance, “a psychological process whereby an individual who has been forced to express a view contrary to her own eventually rationalizes her actions by subconsciously adopting the positions she has been forced to express.”²⁵² That harm “interferes with the autonomy of the individual’s mental processes” and “therefore breaches the wall between government and the mentally autonomous private individual—a central tenet of a healthy democratic system of government.”²⁵³

Those concerns exist both when the government acts as the sovereign and when it acts as an educator. Indeed, we might have more reason to be concerned about the government’s act of compelling students to affirm a particular message inside the classroom. Children spend a significant amount of time in school—particularly before their teenage years, when they are especially impressionable and vulnerable to

250. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

251. *Id.* (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (Murphy, J., concurring)).

252. See Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values & the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114 (1999) (describing cognitive dissonance as one of four particular harms associated with compelled speech).

253. See *id.*

government brainwashing.²⁵⁴ For these reasons, the Supreme Court has consistently prohibited the government from compelling students to support a particular message, even if that message is a show of patriotism during a time of war.²⁵⁵ As Justice Jackson noted, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²⁵⁶

The same dangers result when the government, rather than forcing students to affirm a particular belief, promotes one viewpoint over another in the school setting. When school officials discipline students because of their viewpoint, they effectively compel students to adopt the school’s favored message. This understanding drove the Court’s opinion in *Tinker* and was reflected when the Court stated: “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate” or “confined to the expression of those sentiments that are officially approved.”²⁵⁷ Furthermore, “[t]he classroom is particularly the ‘marketplace of ideas,’” and, in order to develop the type of citizens that we want to lead America in the future, we want our education system to promote “‘wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”²⁵⁸ Viewpoint discrimination destroys that wide exposure.

The *in loco parentis* standard would protect against those harms by subjecting educational policies that compel students to affirm a particular belief to strict scrutiny. It would also strictly scrutinize any disciplinary policy that discriminates among viewpoints or speakers on

254. See Sandra L. Hofferth & John F. Sandberg, *How American Children Spend Their Time*, 63 J. OF MARRIAGE & FAMILY 295,300 (May 2001) (indicating that children under age 13 spend an average of 21 hours per week in school, with another four-plus hours in day care services).

255. See *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) (striking down a compulsory flag salute in the West Virginia public schools); see also *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring) (noting that the Court has traditionally viewed government promotion of religion more skeptically when the government acts as educator in the school environment because “when government-sponsored religious exercises are directed at impressionable children who are required to attend school, . . . [the] government endorsement is much more likely to result in coerced religious beliefs”); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a Nebraska law that prohibited educators from teaching their students in any language except English).

256. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. at 642.

257. *Tinker*, 393 U.S. at 511.

258. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (additional citations omitted) (alteration in original).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

the basis of the message those speakers convey—a standard the *Tinker* Court could have easily used to strike down the Des Moines schools' ban on black armbands. To further protect student speech interests, the standard would allow for as-applied challenges, so that school officials do not draft facially neutral disciplinary policies but apply them in a way that discriminates among viewpoints.²⁵⁹ It better serves the legitimate interests that the government has in educating public schoolchildren than the current student speech doctrine, which invites judges to make disciplinary decisions that school officials are better trained to make.

C. What School Officials Can Learn from *Morse* in Arguing for an *In Loco Parentis* Standard to Govern All Student Discipline Cases

Of course, the Supreme Court would have to accept the *in loco parentis* standard and extend it to school discipline cases itself, which might seem unlikely given the hostility that several of the Court's current members have shown to the *in loco parentis* concept.²⁶⁰ But at least three justices appear comfortable with such a standard,²⁶¹ and two of the justices who appear most hostile to the *in loco parentis* standard, Justices Kennedy and Alito, could be swayed by redefining the *in loco parentis* doctrine in terms of the government's special interest in acting as educator, rather than in terms of parental delegation. Indeed, that was how the attorneys that represented principal Deborah Morse in

259. See, e.g., *The Tool Box v. Ogden City Corp.*, 355 F.3d 1236, 1244 (10th Cir. 2004) (noting that a First Amendment claim can be brought when an individual alleges "that a 'licensor' has applied a facially neutral law to deny protected expression").

260. See *Morse v. Frederick*, 127 S. Ct. at 2637–68 (Alito and Kennedy, JJ., concurring in the judgment) ("When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.").

261. *Id.* at 2621 (noting that there are three justices, Chief Justice John Roberts and Associate Justices Antonin Scalia and Clarence Thomas, who provided the strongest votes for reversing the Ninth Circuit's decision in *Morse*. In fact, Justice Thomas seems most willing to adopt a modern *in loco parentis* standard. See *Morse v. Frederick*, 127 S. Ct. at 2634 (Thomas, J., concurring) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.")).

*Morse v. Frederick*²⁶² won their case in the Supreme Court in 2007.

Morse arose during the Olympic torch's journey to the 2002 Winter Olympics in Salt Lake City.²⁶³ As the torch made its way through Juneau, Alaska, officials at Juneau-Douglas High School let students out of class to watch the torch pass their high school.²⁶⁴ Students lined the sidewalk on the school side of the street, as well as the sidewalk across the street from the school.²⁶⁵ Joseph Frederick, a seventeen-year old senior who had failed to show up for his first classes of the morning, nonetheless showed up to watch the torch relay.²⁶⁶ He brought a large banner with him and, as the torch passed by, followed by television cameras, Frederick and his friends unfurled the banner.²⁶⁷ It read: "BONG HITS 4 JESUS."²⁶⁸

Morse, the school's principal, confronted Frederick and told him to take the banner down.²⁶⁹ Morse believed that the banner violated a school policy prohibiting the display of offensive material, including material that advertised or promoted drug use.²⁷⁰ When Frederick refused, she grabbed the banner from him and suspended him from school for ten days.²⁷¹ Frederick eventually challenged his suspension in court and, although a district court in Alaska granted summary judgment in favor of the school district,²⁷² a panel of the Ninth Circuit Court of Appeals disagreed.²⁷³ The Ninth Circuit refused to analyze the case under *Fraser* because it interpreted *Fraser* narrowly as a decision that hinged on the sexual content of the speech and its delivery in a school assembly.²⁷⁴ Thus, it simply applied *Tinker's* disruption standard and, because the school had offered no evidence to show that Frederick's banner would have disrupted the educational process, it struck down the

262. 127 S. Ct. 2618 (2007).

263. See *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Frederick*, 439 F.3d at 1116.

270. *Id.*

271. *Id.*

272. *Id.* at 1116–17.

273. *Id.* at 1118.

274. See *id.* at 1119 ("Our case differs from *Fraser* in that Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly.").

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

suspension as unconstitutional.²⁷⁵ It also refused to grant Morse qualified immunity for her actions, making her personally liable for Frederick's monetary damages.²⁷⁶

The Supreme Court re-listed *Morse* four times before granting certiorari in the case, suggesting that it considered summarily reversing the Ninth Circuit on qualified immunity grounds.²⁷⁷ But when the case reached arguments on the merits, Morse's attorneys (led by former Solicitor General and D.C. Circuit Judge Kenneth Starr) made a critical decision: Rather than try to justify Morse's actions under *Tinker's* disruption standard, they argued that the school was justified in prohibiting messages that it reasonably believed promoted illegal drug use.²⁷⁸ Without saying so, that argument echoed the *in loco parentis* rationale of cases like *Fraser* and *Vernonia* and focused the Court's attention on the important non-sovereign interests the government has in educating American children, interests that were largely glossed over by lower courts that mechanically applied *Tinker's* disruption standard.

The strategy worked. The Court reversed the Ninth Circuit²⁷⁹ and, in doing so, it applied neither *Tinker's* disruption standard nor *Fraser's* "offensiveness" standard. True, it interpreted *Fraser* to refine the "special characteristics of the school environment" that allow schools

275. *Frederick*, 439 F.3d at 1123. Indeed, in the Ninth Circuit, the school and principal Morse did not even argue that Frederick's punishment was justified under *Tinker*: They "conceded that the speech . . . was censored only because it conflicted with the school's 'mission' of discouraging drug use." *Id.*; see also Brief of Appellees at 47–48, *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006) (No. 03-35701) (arguing that the disruptiveness of Frederick's actions was "immaterial" because "[u]nder *Fraser* a showing of disruption is not required").

276. *Id.* at 1124–25.

277. Supreme Court observers widely believe that the Court re-listed the case four times because it considered summarily reversing the Ninth Circuit's decision to deny qualified immunity to Morse, making the principal personally liable for any damages that Frederick suffered. *E.g.*, Murad Hussain, *The "Bong" Show: Viewing Frederick's Publicity Stunt Through Kuhlmeier's Lens*, 116 Yale L.J. Pocket Part 292, 293 (2007), available at <http://thepocketpart.org/2007/3/9/hussain.html>.

278. See Transcript of Oral Argument at 3–5, *Morse*, 127 S. Ct. 2618 (No. 06-278) (arguing that "Tinker articulated a rule that allows the school boards considerable discretion both in identifying the educational mission and to prevent disruption of that mission," which included deterring illegal drug use). Of course, Morse's attorneys may have used this argument as much out of necessity as for strategic reasons: One student described the scene outside the Juneau high school as "chaos," with students getting into fights and throwing snowballs and plastic soda bottles as they awaited the arrival of the Olympic torch. Brief for Respondents at 2–3, *Morse*, 127 S. Ct. 2618 (No. 06-278). Frederick and his companions, by contrast, were "calm and orderly," a characterization that Morse did not dispute. *Id.* at 3. Thus, Morse would have had a difficult time convincing the Court that Frederick's actions *physically disrupted* the educational process in any way. See *id.* (emphasis added).

279. *Morse*, 127 S. Ct. at 2629.

to more closely regulate student speech.²⁸⁰ But when the Court said that the government's interest in stopping student drug use combined with the "special characteristics of the school environment" to justify Principal Morse's actions because she could have reasonably believed that his speech promoted illegal drug use,²⁸¹ it stepped outside the student speech doctrine and echoed the reasoning of cases like *Pickering*, where the Court balanced individual rights against interests that the government had in acting in its non-sovereign capacity.²⁸² And it went even further than the *T.L.O.* and *Vernonia* Courts did. The connection between drug use and the rules applied in those cases was much tighter. Both cases involved students suspected of possessing or selling drugs at school. Neither implicated First Amendment rights of expression—a point that was not lost on the *Morse* dissenters, who viewed Frederick's banner as utter nonsense.²⁸³

But Morse's attorneys convinced the Court that schools deserve more deference when combating drug use by their students, and they got a majority of the Court to eat right out of their hand. Even Justices Kennedy and Alito, who are by most accounts the Court's strongest supporters of First Amendment liberties,²⁸⁴ said that "[s]peech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious" as the threat of violence in school hallways.²⁸⁵ Lest we forget that, although Justice Alito

280. *See id.* at 2626–27 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

281. *Id.* at 2628–29, 2638 (Alito and Kennedy, JJ., concurring) (“[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting.”). Although Justices Alito and Kennedy did not mention other “special characteristics,” they did not seem to think that this was the only one that would justify altering the student speech analysis. *See id.* (“The special characteristic that is relevant in this case is the threat to the physical safety of students.” (emphasis added)).

282. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968) (reiterating that government employers can discipline their employees for statements that impede the employee's proper performance of her daily duties).

283. *See Morse*, 127 S. Ct. at 2646 (Stevens, Ginsburg, and Souter, JJ., dissenting) (noting that “the relationship between schools and students ‘is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults’” (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995))).

284. *See* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2002* (2002) (unpublished update of Professor Volokh's 2000 article, *How the Justices Voted in Free Speech Cases*, 48 UCLA L. REV. 1191, 1193 (2000), on file with the author), available at <http://www.law.ucla.edu/volokh/howvoted.htm> (noting that, since Justice Breyer joined the Court in 1994, Justice Kennedy has voted with the speaker in free speech cases seventy-five percent of the time, while the other five active justices' records were more mixed, supporting the speaker only fifty to sixty percent of the time).

285. *Morse*, 127 S. Ct. at 2638 (Alito and Kennedy, JJ., concurring in the judgment).

RICHMOND JOURNAL OF LAW AND THE PUBLIC INTEREST

described such deference “as standing at the far reaches of what the First Amendment permits,”²⁸⁶ that reasoning allowed the Court to sidestep some of the difficult issues that *Morse* presented, including the fact that many people who saw Frederick’s banner interpreted it as nonsense, a catchy phrase designed to attract television cameras rather than to promote illegal drug use.²⁸⁷ Furthermore, Frederick’s demonstration took place on the sidewalk across the street from the school, during a public event that the school allowed its students to attend: It was not the type of on-campus speech that the Court had traditionally allowed schools to regulate under its student speech doctrine.²⁸⁸

For that reason, Justices Alito and Kennedy should reconsider their opposition to an *in loco parentis* standard when it gives significant deference to school officials in disciplining students, so long as they do not discriminate according to viewpoints. The standard might even win over Justice Breyer, often recognized as the quintessential First Amendment pragmatist.²⁸⁹ It was Justice Breyer, after all, who suggested that, when a law restricts the freedom of the press in order to protect another constitutional right, the Constitution merely “demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with [the competing right].”²⁹⁰ But the *in loco parentis* standard has to be introduced as one that derives from the government’s interests in acting as educator, and its desire to improve the quality of education that American children receive in our public schools, rather than on the antiquated notion that parents delegate their parental decision-making to school officials when their children step through the

286. *Id.*

287. *See id.* at 2643-2644 (Stevens, Souter, and Ginsburg, JJ., dissenting); *see also* Frederick v. Morse, 439 F.3d 1114, 1117-18 (9th Cir. 2006) (“Frederick says that the words were just nonsense meant to attract television cameras because they were funny.”).

288. *See, e.g.*, Brief for Student Press Law Center et al. as Amici Curiae Supporting Respondents at 8, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278) (“In this case Frederick’s speech occurred on public property during a commercially sponsored community event that was open to the public. The planning, creation and display of Frederick’s message occurred entirely off of school property. Frederick’s speech was not part of a school class or extra-curricular project and he used no school resources for its creation.” (citations omitted)).

289. Lyle Denniston, *Once Again No First Amendment Champion*, AM. JOURNALISM REV., Oct. 1994, at 70; *but see Morse*, 127 S. Ct. at 2638-39 (Breyer, J., concurring in the judgment in part and dissenting in part) (“[T]o hold, as the Court does, that ‘schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use’ (and that ‘schools’ may ‘restrict student expression that they reasonably regard as promoting illegal drug use’) is quite a different matter. This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.” (internal citations omitted)).

290. *Bartnicki v. Vopper*, 532 U.S. 514, 537-38 (2001) (Breyer and O’Connor, JJ., concurring).

schoolhouse gates.

V. CONCLUSION

The No Child Left Behind Act expires this year. Once lauded as one of President George W. Bush's greatest achievements,²⁹¹ it has since been criticized (even by Republicans) as a failure.²⁹² Of course, the NCLB Act may have failed for a number of reasons, including inadequate funding—although America still spends more money per student than virtually every other country in the world—and there is nothing that the courts can do to change that. But what the struggles of the No Child Left Behind Act demonstrate is that rigorous education reform is meaningless if schools do not have the moral authority to control the environment in which the reform

takes place. Courts can do something about that, and scrapping the current student speech doctrine in favor of a more deferential *in loco parentis* standard would go a long way toward restoring that moral authority.

291. See William L. Taylor & Dianne M. Piche, *Will New School Law Really Help?*, USA TODAY, Jan. 9, 2002, at 13A (describing the No Child Left Behind Act as “a major step forward in providing educational opportunities for poor children”).

292. See Megan Boldt, *GOP Urges State to Opt out of 'No Child'*, ST. PAUL PIONEER PRESS, Dec. 7, 2007, at B3 (quoting a Republican state senator who called the law “a failure” and said “the state is ‘held hostage’ by what amounts to meager federal funds”).