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## COMMENT

# DON'T SAY "GUN": IS CENSORSHIP OF STUDENT "GUN" SPEECH IN PUBLIC SCHOOLS A PERMISSIBLE INCULCATION OF SHARED COMMUNITY VALUES OR AN UNCONSTITUTIONAL ESTABLISHMENT OF ORTHODOXY?

*Melanie E. Migliaccio*<sup>†</sup>

### I. INTRODUCTION

The First Amendment to the United States Constitution<sup>1</sup> prohibits the government from prescribing an orthodox belief and protects from abridgement the right to speak about controversial matters. The Second Amendment<sup>2</sup> recognizes the right of the American citizen to own and carry firearms. Yet a clash of these two Amendments has occurred in a widespread series of incidents involving harsh discipline meted out to students who engaged in gun-related speech in school. The Second Amendment issue in elementary schools is not whether children may “keep and bear [real] arms,” but rather, whether school officials, by suppression of certain speech, may create an atmosphere where the right to keep and bear arms is disfavored and treated as a mere platitude. The question is whether school officials are inculcating in children a prescribed view about guns, and, if they are, whether that inculcation is unconstitutional.

B.H.,<sup>3</sup> a sixth grader from Huntingtown, Maryland, was talking to his friends during his bus ride home about a recent school shooting.<sup>4</sup> B.H. told

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1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

2. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

3. The child’s name is not given in the news story. The representative initials are based on the father’s name.

4. Martin Di Caro, *WMAL Exclusive: 11-Yr-Old Suspended From School for Merely Talking About Guns*, WMAL (June 3, 2013), <http://pro.wmal-af.tritonflex.com/common/>

his friends that he wished he had a gun to protect everyone and defeat the bad guy.<sup>5</sup> As B.H.'s father noted, B.H. just wanted to be a hero and protect people.<sup>6</sup> Although B.H. neither threatened nor bullied anyone, the bus driver refused to deliver B.H. home and instead returned to the school and hauled B.H. into the principal's office.<sup>7</sup> The principal purportedly told the father that "if you say the word 'gun' in my school you are going to get suspended for ten days."<sup>8</sup> B.H. was given a ten-day suspension.<sup>9</sup>

K.G.,<sup>10</sup> a 5-year-old girl from Mount Carmel, Pennsylvania, was suspended for ten days for making a "terroristic threat."<sup>11</sup> The "threat" concerned a plastic bubble gun that spews bubbles when the trigger is pulled.<sup>12</sup> While waiting for the bus after school, K.G. remarked to another student, who had a "princess" bubble gun at home, "I'll shoot you, you shoot me, and we'll all play together."<sup>13</sup> The next day, the school issued a ten-day suspension for a "terroristic threat."<sup>14</sup>

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page.php?pt=WMAL+EXCLUSIVE%3A+11-Yr-Old+Suspended+From+School+For+Merely+TALKING+About+Guns&cid=26543&is\_corp=0.

5. *Id.*

6. *Id.* Although it may be difficult to imagine, heroism has been punished by at least one school. In Fort Myers, Florida, a high school hero wrestled a loaded gun from another student during the bus ride home. Jessica Chasmar, *Student Suspended for Wrestling Loaded Revolver Away from Gunman*, WASH. TIMES (Mar. 3, 2013), <http://www.washingtontimes.com/news/2013/mar/3/student-suspended-wrestling-loaded-revolver-away-g/>. Witnesses confirm that the shooter pointed the gun point blank at another student and said he was going to shoot him. *Id.* The hero believes that the victim would have been killed if the hero had not acted. *Id.* The hero was suspended for being involved in an incident in which a firearm was present. *Id.*

7. Di Caro, *supra* note 4.

8. *Id.*

9. *Id.*

10. The child's name was not reported in the news story, and the initials are based on the parent's name.

11. Meridith Edwards, *Pennsylvania girl, 5, suspended for Talk of 'Shooting' a Hello Kitty 'Bubble Gun'*, CNN (January 22, 2013), <http://www.cnn.com/2013/01/21/us/pennsylvania-girl-suspended>. The school was unable to comment on the story because of federal privacy rules, but the attorney representing K.G. and her family provided CNN with documents related to the incident. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* A few days later the suspension was reduced to two days and the category changed to "threat to harm others." *Id.* After the situation made national headlines and the family retained an attorney, the suspension was dropped altogether. Bohman, *School Board Erases Suspension of Child with 'Hello Kitty' Gun*, WNEP NEWS (January 30, 2013),

N.A., like K.G., was suspended for talking about a plastic toy gun that he had at home.<sup>15</sup> N.A., a six-year-old in Pasco, Washington, told his classmates about the Nerf guns his family purchased during a recent vacation trip.<sup>16</sup> An eavesdropping classmate told her teacher that N.A. had a gun at school.<sup>17</sup> No gun, "toy or otherwise," was at the school, but N.A. was suspended for merely talking about the Nerf guns with other students.<sup>18</sup> The school justified the suspension by claiming that the girl who reported the gun conversation "felt her health and safety were threatened."<sup>19</sup>

Schools promote an anti-gun atmosphere by treating the presence of toy guns, or even "guns" made out of pastry, with the same harsh discipline as real weapons. A ten-year-old boy in Alexandria, Virginia, who brought "a cheap fake gun with an orange tip" on the school bus, was arrested, fingerprinted, and charged with brandishing a weapon after a girl on the bus told her mother that she was scared.<sup>20</sup> A five-year-old boy near Boston, Massachusetts used Lego blocks to create a toy in the shape of a gun during an afterschool program, which resulted in a written warning that if he does it again he can be suspended because a toy in the shape of a gun might be a

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<http://wnep.com/2013/01/30/school-board-erases-suspension-of-5-year-old-with-hello-kitty-gun/>. The girl's attorney confirmed that a subsequent agreement to expunge the incident from the girl's record means that the girl will not sue the school district. The girl's mother said she hoped the case was closed because she worries that a suspension involving "terror threats" could threaten the child's future opportunities. *Id.*

15. Ty Beaver, *Pasco School District Overturns 6-year-old's Suspension for Discussing Toy Gun*, TRI-CITY HERALD (Mar. 7, 2013), <http://www.tri-cityherald.com/2013/03/07/2302285/pasco-school-district-overturns.html>. The Tri-City Herald is a newspaper serving the Southeastern area of Washington State.

16. *Id.* [Author: Nerf guns "shoot" soft foam rubber balls.]

17. *Id.*

18. *Id.*

19. *Id.* The parents challenged the suspension, noting that there is no provision in the student discipline policy that prohibits talking about guns and there was no evidence that the boy threatened anyone. *Id.* The Pasco School District eventually overturned the suspension, but stated that there was "no plan to review current policy on the issue." *Id.* Although relieved that his son's record will be cleared, N.A.'s father "plans to look into the issue" because he believes "there's a lot to be said." *Id.* Of concern to the parents is the belief that their son was singled out for discipline in the incident. *Id.*

20. Donna St. George & Allison Klein, *Charge Dropped against 10-Year-Old Who Carried Toy Gun on School Bus*, WASH. POST (Feb. 26, 2013), [http://www.washingtonpost.com/local/charge-dropped-against-10-year-old-who-carried-toy-gun-on-school-bus/2013/02/26/87e0f898-8024-11e2-a350-49866afab584\\_story.html](http://www.washingtonpost.com/local/charge-dropped-against-10-year-old-who-carried-toy-gun-on-school-bus/2013/02/26/87e0f898-8024-11e2-a350-49866afab584_story.html).

“scary experience” for his classmates.<sup>21</sup> A seven-year-old boy in Anne Arundel County, Maryland inadvertently nibbled his strawberry-filled breakfast pastry into a shape that resembled a gun during a school-wide breakfast program, and he was suspended for making “a threat to other students” after he allegedly pointed his pastry and said, “Bang, bang.”<sup>22</sup> A six-year-old boy from Palmer, Massachusetts, was sent to detention after he brought his quarter-sized plastic toy gun on the bus, traumatizing other bus riders when another student yelled that the boy had a gun.<sup>23</sup> The mothers of both children agreed that the school’s reaction “send[s] the wrong message” that small plastic toy guns and real guns are equally scary and dangerous.<sup>24</sup>

Similarly, schools send the “wrong message” when they fail to distinguish between guns in the hands of “good guys” and those in the hands of “bad guys.” Two seven-year-old boys were suspended for pointing their pencils at one another while playing “Marines.”<sup>25</sup> The school justified the suspensions by noting that “a pencil is a weapon” and that some children could consider imaginary guns as threatening.<sup>26</sup> A batch of cupcakes

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21. Todd Starnes, *Child Faces Suspension for Making Lego Gun*, FOX NEWS RADIO (Jan. 29, 2013), <http://radio.foxnews.com/toddstarnes/top-stories/child-faces-suspension-for-making-lego-gun.html>.

22. Donna St. George, *Anne Arundel Second-Grader Suspended for Chewing His Pastry into the Shape of a Gun*, WASHINGTON POST (March 4, 2013), [http://www.washingtonpost.com/local/education/anne-arundel-second-grader-suspended-for-chewing-his-pastry-into-the-shape-of-a-gun/2013/03/04/44c4bbcc-84c4-11e2-98a3-b3db6b9ac586\\_story.html](http://www.washingtonpost.com/local/education/anne-arundel-second-grader-suspended-for-chewing-his-pastry-into-the-shape-of-a-gun/2013/03/04/44c4bbcc-84c4-11e2-98a3-b3db6b9ac586_story.html). The father, a “strong supporter of gun rights” suggests that the school’s actions were “just a direct result of society feeling that guns are evil and guns are bad.” *Id.* The school wrote a letter to parents assuring them that no students were in actual physical danger from the inappropriate use of food, but that a counselor was available to help any traumatized children talk through their anxiety. *Id.*

23. *Toy Gun Causes Disturbance on Palmer Elementary School Bus*, WGGB (May 24, 2013), <http://www.wggb.com/2013/05/24/toy-gun-causes-disturbance-on-palmer-elementary-school-bus/>

24. *Id.*

25. Anne McNamara, *Boy Who Held Pencil Like Gun Suspended*, FOX 43 TV (June 17, 2013), [http://www.fox43tv.com/dpps/news/local/boy-who-held-pencil-like-gun-suspended\\_6109580](http://www.fox43tv.com/dpps/news/local/boy-who-held-pencil-like-gun-suspended_6109580).

26. *Id.* See also, *Parents Furious After Boys Suspended For Using Fingers as Guns*, CBS BALT. (Jan. 15, 2013), <http://baltimore.cbslocal.com/2013/01/15/parents-furious-after-young-boys-suspended-after-playing-with-imaginary-weapon/> (reporting on two six-year-olds suspended for playing cops and robbers at recess while using their fingers as guns); Donna St. George, *Record Cleared for Prince William Boy Who Pointed finger Like a Gun*, WASH. POST (Feb. 18, 2013), [http://www.washingtonpost.com/local/education/record-cleared-for-prince-william-boy-who-pointed-finger-like-a-gun/2013/02/18/cd0c53a2-7a18-11e2-9a75-dab0201670da\\_story.html](http://www.washingtonpost.com/local/education/record-cleared-for-prince-william-boy-who-pointed-finger-like-a-gun/2013/02/18/cd0c53a2-7a18-11e2-9a75-dab0201670da_story.html) (detailing the suspension of a boy who pointed his

brought to school decorated with plastic World War II soldiers to celebrate a nine-year-old boy's birthday was rejected by the teacher because the soldiers had guns.<sup>27</sup> The principal defended the action, noting that the school "walk[s] a delicate balance in teaching non-violence in [the school] buildings and trying to ensure a safe, peaceful atmosphere," but the parent suggests that comparing military heroes to deranged mass murderers was carrying political correctness too far.<sup>28</sup> One might reasonably harbor the suspicion that school discipline for gun-related speech is designed to inculcate a distaste for all guns rather than merely protect students from gun-related violence.

Passive, non-verbal, pro-gun expression has also come under fire. Jared, an eighth-grader in West Virginia, engaged in quintessential political speech when he wore a t-shirt to school with the National Rifle Association logo, the picture of a hunting rifle, and the words "PROTECT YOUR RIGHT."<sup>29</sup> While Jared stood in line at the cafeteria, a teacher saw the shirt and demanded that Jared change it.<sup>30</sup> When Jared refused, the teacher pulled Jared out of line, in front of his classmates, and escorted him to the principal's office where the school called the city police.<sup>31</sup> Jared, isolated from his classmates and confined to the principal's office, was trying to explain that the shirt did not violate the dress code when the police

finger like a gun after another boy pretended to shoot him with a bow and arrow); Erica Ritz, *Second Grader Playing "Rescue the World" at Recess Suspended after Throwing Pretend Grenade at "Evil Forces,"* THE BLAZE (Feb. 5, 2013), <http://www.theblaze.com/stories/2013/02/05/second-grader-playing-rescue-the-world-at-recess-suspended-after-throwing-pretend-grenade-at-evil-forces-with-adorable-interview/> (describing the suspension of a boy for pretending to "save the world" by throwing an imaginary grenade at an imaginary box of evil forces while playing alone at recess).

27. Todd Starnes, *School Confiscates Cupcakes Decorated with Toy Soldiers*, FOX NEWS RADIO (Mar. 7, 2013), <http://radio.foxnews.com/toddstarnes/top-stories/school-confiscates-cupcakes-decorated-with-toy-soldiers.html>.

28. *Id.* The principal noted that some parents don't allow any guns as toys and that "living in a democratic society entails respect for opposing opinions." *Id.* The principal apparently sees no inconsistency in failing to suggest that parents who ban guns as toys should equally respect opposing opinions.

29. Charlo Green, *Update: 8th Grader Suspended Over T-shirt Returns to School*, WOWK TV (May 6, 2013), <http://www.wowktv.com/story/22041738/eighth-grader-suspended-over-t-shirt-returns-to-school-wv-logan-middle-school-jared-marcum>; see also *infra* Part III.A. (applying current jurisprudence to this incident).

30. Tiffany Madison, *14-year-old Jared Marcum Faces Jail, Fines for NRA Shirt*, WASH. TIMES COMMUNITIES (June 18, 2013), <http://communities.washingtontimes.com/neighborhood/citizen-warrior/2013/jun/18/suspended-wv-8th-grader-faces-jail-fines-nra-shirt/>.

31. *Id.*

arrived.<sup>32</sup> The police officer reportedly told Jared to “sit down and be quiet,” which Jared declined to do.<sup>33</sup> Jared was arrested, removed from school in hand-cuffs, and charged with obstruction.<sup>34</sup> The obstruction charge was later dismissed;<sup>35</sup> however, Jared’s treatment sends a clear and chilling signal to other students that pro-gun speech is disfavored and will be met with harsh, traumatic, and embarrassing discipline.

Similarly, an English teacher in a Texas high school assigned students in his class to write a paper on any fun experience they had enjoyed over the weekend.<sup>36</sup> One student wrote about a trip to Cabella’s sporting goods store with his mom to buy a gun, and another student wrote about recently attending the Fort Worth Gun Show.<sup>37</sup> Both students were told they had to choose a different topic and rewrite the assignment or receive a grade of “zero.”<sup>38</sup> “Classmates reportedly laughed at the students after their papers were rejected based solely on their subject matter.”<sup>39</sup> After the mother of one of the students challenged the teacher regarding his bias towards guns and posted the video on YouTube, the teacher accepted the papers and apologized for misperceptions.<sup>40</sup> But the students had already been subjected to ridicule in front of their peers for choosing a pro-gun topic.

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32. *Id.*

33. *Id.*

34. *Id.* Jared’s step-father claims that when he came from work to pick up his child from the police station the City police threatened to charge Jared with making “terroristic threats” because of the t-shirt. *Id.* See also Charlo Greene, *14-year-old at the Center of “NRA T-Shirt Controversy” Now Facing Possibility of 1 Year in Jail*, WTRF (June 27, 2013), <http://www.wtrf.com/story/22587338/14-year-old-at-the-center-of-nra-t-shirt-controversy-now-facing-possibility-of-1-year-in-jail> (quoting Jared’s step father regarding the obstruction charge, “Every aspect of this is just totally wrong.”).

35. AP, *Charge Dismissed against Agains W.Va. Middle School Student Who Refused to Take Off NRA T-shirt*, FOX NEWS, (June 28, 2013), <http://www.foxnews.com/us/2013/06/28/charge-dismissed-against-wva-middle-school-student-who-refused-to-take-off-nra>.

36. Fil Alvarado, *Teacher Refused to Grade Report on Guns, Mom Says*, MYFOXDFW (Feb. 20, 2013), <http://www.myfoxdfw.com/story/21291400/teacher-refused-to-grade-report-on-guns-mom-says>; Mike Opelka, *Texas Teacher Reportedly Threatens to Give Students Zeros on Homework Assignment for Writing About Guns*, THE BLAZE (Feb. 21, 2013), <http://www.theblaze.com/stories/2013/02/21/texas-teacher-threatens-to-give-students-zeros-on-homework-assignmet-for-writing-about-guns/>.

37. Opelka, *supra* note 35.

38. *Id.*

39. *Id.*

40. *Id.*; Alvarado, *supra* note 35.

A father of a Connecticut student began suspecting that schools were “trying to indoctrinate our kids” when he discovered that his son was taught that the Second Amendment does not protect the right of Americans to bear arms.<sup>41</sup> In April of 2013, well after both *District of Columbia v. Heller*<sup>42</sup> and *McDonald v. City of Chicago, Ill.*<sup>43</sup> were decided, students were given a worksheet that stated, “[C]ourts have never found a law regulating the private ownership of weapons unconstitutional.”<sup>44</sup> The lesson further taught that “[t]he judges and courts of each generation provide the interpretation of the [Constitution].”<sup>45</sup> Attorney Mat Staver, founder of Liberty Counsel, emphasized, “This idea that this school is propagating that the Constitution can simply be changed at the whim of someone—or that the Second Amendment does not protect the individual right to bear arms is absolute propaganda and absolutely false.”<sup>46</sup>

Some people have labeled incidents such as these as “outrageous,”<sup>47</sup> “ridiculous”<sup>48</sup> and “just totally wrong,”<sup>49</sup> but others wonder if such widespread incidents point to a deeper problem: the training of school children to dislike guns. Gun-related speech takes on greater significance because the keeping and bearing of arms is itself a protected constitutional

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41. Todd Starnes, *School: Americans Don't Have Right to Bear Arms*, FOX NEWS RADIO (Apr. 9, 2013), <http://radio.foxnews.com/toddstarnes/top-stories/school-americans-dont-have-right-to-bear-arms.html>.

42. 554 U.S. 570 (2008).

43. 130 S. Ct. 3020 (2010).

44. Starnes, *supra* note 40. The worksheet further stated, “The courts have consistently determined that the Second Amendment does not ensure each individual the right to bear arms . . . . So a person has no right to complain about a Second Amendment violation by state laws.” *Id.*

45. *Id.*

46. *Id.*

47. Bohman, *supra* note 14.

48. *Parents Furious After Boys Suspended For Using Fingers as Guns*, CBS BALT. (Jan. 15, 2013) (reporting on two six-year-olds suspended for playing cops and robbers at recess while using their fingers as guns), <http://baltimore.cbslocal.com/2013/01/15/parents-furious-after-young-boys-suspended-after-playing-with-imaginary-weapon/>.

49. Greene, *supra* note 29; see also Peter Kasperowicz, *GOP Bill Would Defund Schools with Rules Against Playing with Imaginary Guns*, THE HILL (July 10, 2013, 9:10 AM), <http://thehill.com/blogs/floor-action/house/310079> (reporting H.R. 2625 which would block federal funds to any school that punishes students for carrying miniature guns, eating food into the shape of a gun, using fingers as guns, or wearing clothing supporting the Second Amendment because these punishments “are only teaching students to be afraid of inanimate objects that are shaped like guns”) (internal quotation marks omitted).



right. The Supreme Court has warned that schools must not teach children to regard as mere platitudes the freedoms protected by the Bill of Rights.<sup>50</sup> The issue is further inflamed by passionate beliefs held on the many sides of the gun control debate in the wake of highly publicized school shootings.<sup>51</sup>

Schools have a responsibility to protect the children within their care, but the Supreme Court has warned that school officials may not prescribe what shall be orthodox beliefs. Part II discusses the current Constitutional balance, as established by the Supreme Court, between the child's right to free speech protection and the school's need for control and order. Part III applies the current jurisprudence to the incidents introduced *supra* and suggests that current jurisprudence does not adequately protect children from the inculcation of government-imposed beliefs. Part IV suggests that protecting children's "freedom of the mind" is best accomplished by increasing parental choice in schools through a universal voucher program.

## II. FREE SPEECH VERSUS SCHOOL CONTROL

The First Amendment restrains the federal government from abridging the free speech of citizens.<sup>52</sup> The Supreme Court has held that the Free Speech Clause is incorporated under the Fourteenth Amendment against the states and their political subdivisions, including school boards.<sup>53</sup> Further, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."<sup>54</sup> Unfortunately, the Court's analysis of when the "special characteristics of the school environment" should outweigh First Amendment protection—or whether and when the First Amendment should apply at all—has not been clear.<sup>55</sup>

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50. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

51. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001) ("[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spate of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies. After Columbine, Thurston, Santee and other school shootings, questions have been asked about how teachers or administrators could have missed telltale 'warning signs.'").

52. U.S. CONST. amend. I, cl. 3.

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

54. *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

55. *Morse*, 551 U.S. at 404.

A. *Tinker v. Des Moines Independent Community School District: The Seminal Case*

Depending on one's view of students' speech rights, *Tinker*<sup>56</sup> either established First Amendment protection for student speech<sup>57</sup> or it "effected a sea change in students' speech rights, extending them well beyond traditional bounds."<sup>58</sup> Either way, courts look to *Tinker* as the baseline from which to adjudicate school speech cases.<sup>59</sup> But it was *West Virginia State Board of Education v. Barnette*<sup>60</sup> that laid the foundation for *Tinker*. *Barnette*, in turn, was an extension of the clarification of parental rights in *Meyer v. Nebraska*<sup>61</sup> and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.<sup>62</sup>

1. *Meyer and Pierce*

A cultural movement toward "progressive" ideas of free government-run schools had taken root by the early twentieth century and parents had lost much of their power in making educational choices for their children.<sup>63</sup> In 1923, the *Meyer* Court addressed a Nebraska statute, upheld by the Nebraska Supreme Court, that prohibited the teaching of foreign languages to children younger than the eighth grade.<sup>64</sup> The stated purpose of the statute was to correct the "baneful effects" of allowing recent immigrants to "rear and educate their children in the language of their native land."<sup>65</sup> The state also argued that a child's comparatively small daily capacity for learning must be carefully managed by the Legislature so that the proper

56. *Tinker*, 393 U.S. 503 (1969).

57. *Morse*, 551 U.S. at 403.

58. *Id.* at 416, (Thomas, J., concurring).

59. See, e.g., *H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 401 (E.D. Pa. 2011) ("If school speech does not fit within one of these exceptions, it may be prohibited only if it would substantially disrupt school operations [under *Tinker*]."). This is the most common interpretation of the Supreme Court's holdings, and has been adopted by at least eight circuits. *Griggs ex rel. Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 740 (N.D. Ind. 2005).

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

61. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

62. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

63. See discussion *infra* Part IV.A.2.

64. *Meyer*, 262 U.S. at 397.

65. *Id.* at 397–98.

topics for study are selected.<sup>66</sup> The actual goal of the Legislature was to create a homogenous people who would all think in the same native language and thus have the same civic development.<sup>67</sup> The Court recognized this as the ideology advocated by Plato and exemplified by Ancient Sparta, where the State, not parents, made the educational decisions necessary to produce “ideal citizens.”<sup>68</sup>

Our Nation, in contrast, has not chosen that system.<sup>69</sup> The *Meyer* Court acknowledged that parents have a natural duty, and a corresponding right of control, to ensure that their children are educated—a duty and right that cannot be infringed.<sup>70</sup> Consequently, the Court viewed the Legislature’s ban on foreign language instruction as interference with the power of parents to control the education of their own children.<sup>71</sup> The decision of the Nebraska Supreme Court was properly reversed.

*Meyer* contains two subtle but important principles. First, a state may compel attendance *at some school*, but the choices of how that education is accomplished must rest with the parent.<sup>72</sup> Second, a state nevertheless has more power to dictate curriculum in state-run schools.<sup>73</sup> These two principles were implicated again, two years later, in *Pierce*. The issue in *Pierce* was the constitutionality of Oregon’s statute to require all school-age children to attend a public school—thereby eliminating a choice by parents to send their children to a religious private school.<sup>74</sup> In contrast to the *Meyer* Court’s acknowledgment of state control of curriculum in state-run schools, the *Pierce* Court acknowledged the undisputed power of the state to regulate, inspect, supervise, and examine *all* schools—public and private.<sup>75</sup> Nevertheless, the Court rejected the theory that states may “standardize its

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66. *Id.* at 398.

67. *Id.* at 398, 401–02.

68. *Id.* at 401–02 (noting that Sparta’s method of submerging the individual and developing ideal citizens was to remove children from their parents at the age of seven and entrust them to the care of the State). *See also infra* text accompanying notes 230–33.

69. *Meyer*, 262 U.S. at 402.

70. *Id.* at 399, 400–01.

71. *Id.* at 401.

72. *Id.* at 403.

73. *Id.* at 402 (reasoning that the state government has power to compel).

74. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 530, 532 (1925).

75. *Id.* at 534.

children by forcing them to accept instruction from public teachers only.”<sup>76</sup> “The child is not the mere creature of the state . . . .”<sup>77</sup> Once again, the Court denied as unconstitutional a state’s attempt to establish a state-dictated orthodoxy and recognized parental choice as the guardian of liberty. While *Meyer* and *Pierce* affirmed parental decision-making authority over educational decisions, it also affirmed the power of government officials to set educational requirements. *Barnette* enunciated a limit to that power.

## 2. *Barnette*

In the two decades between *Pierce* and *Barnette*, the nation endured a World War for the second time in a generation. West Virginia passed a statute requiring all school children to affirm their Pledge of Allegiance daily to the United States flag.<sup>78</sup> Parents subscribing to the Jehovah Witness teachings refused to allow their children to swear allegiance with a stiff-armed salute<sup>79</sup> to a flag, objecting that such an act was forbidden by God’s commands in the Bible.<sup>80</sup> The issue for the *Barnette* Court was who must prevail when the desire of the parents to inculcate firmly held beliefs conflicts with the desire of the state to establish curriculum requirements.

The *Barnette* Court began by distinguishing between what is taught as information, such as instruction in what the Pledge of Allegiance says and means, and what is taught to foster a belief or opinion, such as requiring the student to actually declare allegiance.<sup>81</sup> The Court reasoned that a school district may require children to be instructed in this Nation’s patriotic elements, but school officials cross the line when they bring the coercive power of government to bear on students who refuse to act in accordance with a particular belief.<sup>82</sup> *Barnette* ended with Justice Jackson’s often-quoted ideal: “If 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,

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76. *Id.* at 535.

77. *Id.*

78. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

79. *Id.* at 626. The stiff-arm salute was so similar to Hitler’s “Nazi-Fascist” salute that various groups complained, and the salute was adjusted to require the palm to face upward instead of downward. *Id.* at 627–28 & n.3.

80. *Id.* at 629.

81. *Id.* at 631.

82. *Id.* The coercion was severe. Students not willing to swear to the flag were excluded from school and considered truant. Parents were thereby threatened with fines and jail and students were threatened with incarceration in juvenile detention facilities maintained for juvenile criminals. *Id.* at 630.

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>83</sup>

*Barnette*'s attempt to distinguish between inculcation of secular, neutral knowledge and inculcation of partisan beliefs in pursuit of uniformity is an ideal rather than a practical possibility. Although the Court warned that “officially disciplined uniformity” results in a “disappointing and disastrous end,” the Court nevertheless failed to recognize that when school boards and teachers operate as government officials, every discretionary decision regarding content of curriculum or method of instruction will necessarily be an attempt by “official[s], [both] high and petty, [to] prescribe what shall be orthodox in . . . matters of opinion.”<sup>84</sup> Or, perhaps, the Court did recognize that very danger and created for the first time a trigger, ideological though it may be, upon which a student's constitutional rights would be judicially protected.

In early American schools, constitutional protections were no more appropriate to the schoolroom than to the living room because teachers were agents of the parent in transmitting community-approved knowledge and values.<sup>85</sup> Parents protected the minds of their children by choosing which educator to employ or declining to use the local school at all. As free government-run schools became the norm and teacher pay and employment became attenuated from parental satisfaction, parents lost the ability to protect their children from coercive government-created ideology. The vulnerability of children is even more pronounced where parents are compelled to send their children to school and have no realistic alternative to the government-run institution.<sup>86</sup> *Barnette* creates the judiciary as defender of children's fundamental rights where parents are no longer able to protect their children from the coercive power of the government. *Barnette* promises to protect “from all official control” the “sphere of intellect and spirit.”<sup>87</sup>

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83. *Id.* at 642.

84. *Id.* at 637, 642.

85. See discussion *infra* Part IV.A.

86. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring); *Barnette*, 319 U.S. at 626–27 (noting that the stiff-armed Pledge was required by statute in every school, including private, parochial, and denominational schools). Significantly, the Court distinguished the plaintiff's situation from that of students choosing to attend a university or serve in the military. *Id.* at 631–32. Choice is once again the antidote to coercion.

87. *Barnette*, 319 U.S. at 642. The Court's attempt to protect the freedom of the mind is more ideological than principled. The Court essentially creates a judicial balancing test whereby government officials, from teachers to federal bureaucrats, may prescribe what shall

### 3. *Tinker v. Des Moines Independent Community School District*

The year was 1966 and the balance between freedom of expression and disturbance of school discipline had become an unsettled legal issue. The *Tinker*<sup>88</sup> children decided, with their parents' support, to wear black armbands in protest of the involvement of the United States in the Vietnam hostilities.<sup>89</sup> In a preemptive move, the school district adopted a policy forbidding the armbands, and the *Tinker* plaintiffs were suspended when they wore the armbands anyway.<sup>90</sup> The plaintiffs sued, arguing that the school violated their First Amendment rights.<sup>91</sup> The same year, the Fifth Circuit Court of Appeals held that wearing a political symbol could not be prohibited "unless it 'materially and substantially interfere[s] with the requirements of appropriate discipline of the school.'"<sup>92</sup> The *Tinker* district court declined to follow the Fifth Circuit's test of material and substantial interference with school discipline and instead looked to the authority of the school. Although admitting that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment," the District Court upheld the school's authority to proscribe the armbands because of a reasonable fear of disturbance.<sup>93</sup> An equally divided en banc Court of Appeals affirmed without opinion.<sup>94</sup>

The Supreme Court rejected the "reasonable fear of disturbance" standard, declaring that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to

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be inculcated in school children, but if the officials go too far, according to the judgment of the court, then the court will intervene. Based on jurisdictional principles, however, the solution to protecting the freedom of the mind is not to introduce judicial balancing tests but rather to restore to parents the ability to protect their own children, through educational choice. See discussion *infra* Part V.

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

89. *Id.* at 504, 516 (Black, J., dissenting).

90. *Id.* at 504.

91. *Id.*

92. *Id.* at 505 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)). The Fifth Circuit upheld the school's prohibition of "freedom buttons" because those students who wore the buttons harassed students who did not, creating a disturbance in the educational setting. *Id.* at 505 n.1 (internal citation omitted).

93. *Id.* at 505, 508.

94. *Id.*

freedom of expression.”<sup>95</sup> The Court adopted the Fifth Circuit’s test and held:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.<sup>96</sup>

In rejecting a “reasonable fear” standard, the Court warned that proscription based on a mere apprehension of disturbance would threaten to quash free expression because “[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance,” and thus be proscribable.<sup>97</sup> Allowing freedom of expression risks some disturbance, “[b]ut our Constitution says we must take this risk, [because] . . . it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”<sup>98</sup>

Although schools bear responsibility for the education, safety, and well-being of the students in their care, school officials may not regard students as “closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”<sup>99</sup> The Court reasoned that “[s]chool officials do not possess absolute authority over their students” because state-operated schools bear the same restrictions as other branches of the government.<sup>100</sup> The Court instructed that the Constitutional freedoms of students must be “scrupulous[ly] protect[ed].”<sup>101</sup> Schools must not “strangle the free mind at its source and teach youth to discount

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95. *Id.* at 508.

96. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

97. *Id.* at 508.

98. *Id.* at 508–09 (internal citation omitted).

99. *Id.* at 511.

100. *Id.*

101. *Id.* at 507.

important principles of our government as mere platitudes.”<sup>102</sup> The Court emphatically rejected the notion that students “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>103</sup>

In summary, the traditional interpretation of *Tinker* states that student expression may not be suppressed unless school officials reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school.”<sup>104</sup> But a jurisdictional question lurks in the shadows of the opinion—whether education is the jurisdiction of the parent or the school. *Tinker* has often been framed as a case involving student political speech,<sup>105</sup> but the true underlying conflict, as in *Barnette*, is between the parent’s right to inculcate deeply held beliefs even when those beliefs conflict with the school’s interest in establishing rules. The Majority notes in passing that the decision to wear black armbands in protest was not a spontaneous or ill-conceived decision.<sup>106</sup> Rather, it was a group of adults, including the *Tinker* children’s parents, who decided to fast and to wear black armbands for two weeks to symbolize their objections to the Vietnam hostilities.<sup>107</sup> The children and their parents had engaged in similar activities before, and the children decided to participate in this event with their family.<sup>108</sup> The children were suspended until they were willing to return without the armbands, which they did after the two-week period was over.<sup>109</sup> Further, Justice Black began his dissent by attacking the credibility of the *parents*. He called the *Tinker* children’s father a “Methodist minister without a church” and noted that he drew a salary from the American

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

103. *Id.* at 506. In spite of the Court’s strong language of protection for the “free mind” of youth, the Court indicated that if the school regulation had involved the “length of skirts or the type of clothing, . . . [or] hair style, or deportment” rather than black armbands, then the “scrupulous[ly] protect[ed]” fundamental rights would have succumbed to the school’s dictates. *Id.* at 507–08.

104. *Morse v. Frederick*, 551 U.S. 393,403 (2007).

105. *See, e.g., Morse*, 551 U.S. at 403 (describing the *Tinker* speech as political speech and the “core of what the First Amendment is designed to protect”). Indeed, the dissent derided the students because they had been sent to school at taxpayer expense to learn what was being taught, not to “talk politics” and “broadcast political” views. *Tinker*, 393 U.S. at 522–23 (Black, J., dissenting).

106. *See Tinker*, 393 U.S. at 504.

107. *Id.*

108. *Id.*

109. *Id.*



Friends Service Committee,<sup>110</sup> a Quaker organization devoted to the pacifist pursuit of peace and justice.<sup>111</sup> Justice Black further noted that the mother of “[a]nother student who defied the school order and insisted on wearing an armband in school” was an official in the Women’s International Peace and Freedom organization.<sup>112</sup> Justice Black did not use these facts in his rationale and appears to have noted them solely as a way to prejudice the reader against the parents by exposing their political views. The underlying issue of this case, then, is not whether children have the right to political speech in school, but whether children have the right to participate in a passive political activity with their family even if that activity spills over into the school. It is the issue of whether parents properly have the jurisdiction to teach their children political views and opinions, just as *Barnette* dealt with religious beliefs, or whether schools should hold the superior authority to pass judgment on which views and opinions are proper for the school setting.

The *Tinker* Court’s rationale takes on even greater significance when applied to student speech about guns. The right to own and carry a gun, along with the underlying right to use the gun in defense of self or others, is a Constitutional right granted to American citizens.<sup>113</sup> Nevertheless, the issues surrounding gun ownership and gun regulation evoke strong emotion among adults. The underlying jurisdictional issue is whether parents or the school should determine what view of guns is transmitted to students.

### B. *The Role of Schools Post-Tinker*

The *Tinker* decision is not without controversy. One sitting Supreme Court Justice has bluntly stated that the *Tinker* standard is “without basis in the Constitution,” and, given the opportunity, he would overturn it.<sup>114</sup> The Court has decided several subsequent cases involving student Free Speech rights and school authority. Depending on one’s view, these cases either

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110. *Id.* at 516 (Black, J., dissenting).

111. *About AFSC, Who We Are*, AMERICAN FRIENDS SERVICE COMMITTEE, <http://afsc.org/about> (last visited Dec. 17, 2013).

112. *Tinker*, 393 U.S. at 516 (Black, J., dissenting).

113. *See* U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3026 (2010).

114. *Morse v. Frederick*, 551 U.S. 393, 410–11, 422 (2007) (Thomas, J., concurring) (“In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”).

“scale back”<sup>115</sup> and “further erode”<sup>116</sup> *Tinker*’s First Amendment protections or carve out small, defined exceptions to the strong protections.<sup>117</sup>

1. *Bethel School District No. 403 v. Fraser*: The Lewd Sexual Content Exception

In *Fraser*,<sup>118</sup> a high school student was suspended for giving a speech with lewd sexual content during an assembly.<sup>119</sup> In the two decades between *Tinker* and *Fraser*, the Court adopted a different view of the role and purpose of public school. While *Tinker* emphasized the individual liberty and fundamental rights afforded each American citizen and the school’s role in preparing students to exercise those rights responsibly, *Fraser* emphasized civility.

The *Fraser* Court framed public education as a way to inculcate “habits and manners of civility” because these “fundamental values” are “necessary to the maintenance of a democratic political system.”<sup>120</sup> While acknowledging the “freedom to advocate unpopular and controversial views in schools and classrooms,” the Court championed “society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>121</sup> Thus, while *Tinker* emphasized the need for vigorous debate and exposure of children to diverse opinions, *Fraser* emphasized the need for considerable deference to the sensibilities of others and the promulgation and inculcation of “shared values.”<sup>122</sup> In this way, the *Fraser* Court seems to embrace what the *Tinker* Court rejected—the Sparta-like role of schools in creating a homogenous populous.<sup>123</sup> *Fraser* assigned to teachers and older students the duty to “demonstrate [to younger students]

115. *Id.* at 417 (Thomas, J., concurring).

116. *T.A. v. McSwain Union Elementary Sch.*, No. 1:08-CV-01986, 2010 WL 2803658, at \*4 (E.D. Cal. July 16, 2010).

117. *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003).

118. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

119. *Id.* at 680.

120. *Id.* at 681. The Court further noted that the democratic political system “requires consideration for the personal sensibilities of the other participants and audiences.” *Id.* In the *Fraser* Court’s estimation, it is public school’s role to teach the “shared values of a civilized social order.” *Id.* at 683.

121. *Id.* at 681.

122. *Id.* at 683 (“The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . .”).

123. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–12 (1969).

the appropriate form of civil discourse and political expression by their conduct and deportment *in and out of class*,” and equated teachers and other students with parents as proper role models for children.<sup>124</sup> While the Court ascribed to “schools, as instruments of the state,” the duty to “educat[e] our youth for citizenship,” it also appealed to the *in loco parentis* rationale.<sup>125</sup> Because parents would act to protect their children “from exposure to sexually explicit, indecent, or lewd speech,” school authorities must act on the parents’ behalf.<sup>126</sup>

Rather than forge a new role for public schools—that of civility monitors and guardians of the sensibilities of others, Justice Brennan advocated applying the *Tinker* test to the *Fraser* facts.<sup>127</sup> Justice Brennan concurred because he found the Plaintiff’s language to be disruptive and therefore proscribable under *Tinker*.<sup>128</sup> Justice Marshall agreed with Justice Brennan’s *Tinker* test but dissented because the school failed to show there was any disruption.<sup>129</sup> In weighing Fraser’s speech rights against the school’s need for discipline, two Justices applied the same test and got opposite results. The “mode of analysis employed in *Fraser* is not entirely clear”<sup>130</sup> because the Court acknowledged the First Amendment Free Speech rights of students and yet granted to school boards the right to determine what speech may be censored.<sup>131</sup> Although the result in *Fraser* was correct, ambiguity in the rationale arises because the Court did not address the fundamental question of whether schools, as instruments of the state, or parents should determine what values should be transmitted to children.

## 2. *Hazelwood School District v. Kuhlmeier*: The Imprimatur Exception

Two years after *Fraser*, the Court again addressed the issue of student speech, and again left the *Tinker* test on the shelf.<sup>132</sup> In *Kuhlmeier*, students

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124. *Fraser*, 478 U.S. at 683 (emphasis added).

125. *Id.* at 683–84.

126. *Id.* at 684. *In loco parentis* today is not analogous to the common law doctrine because rather than choosing a school official to stand in their place, parents are forced to send their children to public schools where government officials, rather than the parents, determine what are the important lessons to learn. See discussion *infra* Part IV.

127. *Fraser*, 478 U.S. at 689 (Brennan, J., concurring).

128. *Id.*

129. *Id.* at 690 (Marshall, J., dissenting).

130. *Morse v. Frederick*, 551 U.S. 393, 404 (2007).

131. *Id.*

132. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (“[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student

brought suit after the school authorities refused to allow two articles to be published in the school newspaper.<sup>133</sup> The district court found no First Amendment violation, but the Eighth Circuit Court of Appeals reversed.<sup>134</sup> The court began by finding that the school newspaper was a public forum because it was designed to allow the expression of student viewpoints.<sup>135</sup> The Eighth Circuit then applied *Tinker*, concluding that in the absence of material and substantial interference with school work, discipline, or the rights of others, the school unconstitutionally suppressed the student's speech.<sup>136</sup> The Supreme Court reversed, distinguishing between a student's right to expression, which was the question addressed in *Tinker*, and a student's right to have the school affirmatively promote that speech in a publication bearing the imprimatur of the school.<sup>137</sup> Basing its rationale on *Fraser* instead of *Tinker*, the Court recognized a right of school officials to determine what speech is appropriate for a school setting—whether assembly, classroom, or school newspaper—and to disassociate the school from any speech deemed improper.<sup>138</sup> Further, the *Kuhlmeier* Court reasoned that a “school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with *the shared values of a civilized social order*.”<sup>139</sup> The Court's holding was ambiguous<sup>140</sup> and granted to government equal responsibility with parents to educate the Nation's youth.<sup>141</sup>

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expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

133. *Id.* at 263.

134. *Id.* at 65.

135. *Id.* at 269.

136. *Id.* at 265.

137. *Id.* at 271–73.

138. *Id.* at 266–67.

139. *Id.* at 272 (emphasis added) (internal quotation marks omitted).

140. *Id.* (holding that educators may censor the “style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” but giving little guidance on what actions are reasonable and what pedagogical concerns are legitimate).

141. *Id.* (“[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”) (emphasis added). Further, the Court declared that “judicial intervention to protect students' constitutional rights” is required only when the school's censorship of a “vehicle of student expression has no valid educational purpose.” *Id.*

Although Justice Brennan's dissent noted the "supremely subjective choices" that the public educator regularly makes, he accepted that the public educator is tasked with nurturing "students' social and moral development by transmitting to them an official dogma of community values."<sup>142</sup> Further, Justice Brennan appealed to *Barnette*<sup>143</sup> and *Tinker*<sup>144</sup> to argue that "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate."<sup>145</sup> Justice Brennan advocated granting to school officials a jurisdiction over children that is co-extensive with parents, but at the same time attempted to restrain that authority through constitutional limits. The tension between a public school as the "inculcat[or] of its own perception of community values"<sup>146</sup> and a public school subject to the constitutional limits on suppression of student speech is at the heart of many gun speech incidents.

### 3. *Morse v. Frederick*: The School Message Exception

The ideological battle between student expression and school discipline surfaced once again in the Court's fractured opinion in *Morse*.<sup>147</sup> In 2002, the Olympic Torch passed through Juneau, Alaska on its way to Salt Lake City for the Winter games.<sup>148</sup> The local high school released students from school so they could watch the Coca-Cola sponsored event.<sup>149</sup> Joseph Frederick arrived on the scene after school had been dismissed and joined the mixed crowd of students and non-students across the street from the

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142. *Id.* at 278 (Brennan, J., dissenting) (internal quotation marks omitted).

143. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("strangle the free mind at its source").

144. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("[students do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

145. *Kuhlmeier*, 484 U.S. at 280.

146. *Id.* at 280 (Brennan, J., dissenting).

147. *Morse v. Frederick*, 551 U.S. 393 (2007). Chief Justice Roberts delivered the opinion. Although four justices joined the Chief Justice, three of them authored or joined concurring opinions. Justice Breyer filed a separate concurring opinion. *Id.* at 425.

148. *Id.* at 397; *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006) *rev'd and remanded*, 551 U.S. 393 (2007) and *vacated*, 499 F.3d 926 (9th Cir. 2007).

149. *Frederick*, 439 F.3d at 1115, 1119–20. Students who got bored with the festivities were free to leave. Although the school designated the event as an "approved social event or class trip," students did not have to obtain permission from their parents to attend, as normally required. Coca-cola passed out mini-bottles of soda, which the students threw at one another. *Id.* at 1116.

school.<sup>150</sup> As the news cameras passed, following the torch, Frederick and his friends unfurled a banner that stated "BONG HITS 4 JESUS."<sup>151</sup> The school principal crossed the street,<sup>152</sup> demanded that they take the sign down, snatched and crumpled the sign, and then suspended Frederick.<sup>153</sup> After an unsuccessful appeal of the suspension to the school board, Frederick sued the school district and the principal for violation of his First Amendment right to free speech.<sup>154</sup>

The Ninth Circuit Court of Appeals agreed with Frederick. The Ninth Circuit discerned three categories of speech in the Supreme Court's jurisprudence: plainly offensive speech subject to *Fraser*, school-sponsored speech subject to *Kuhlmeier*, and all other speech subject to *Tinker*.<sup>155</sup> Finding the speech to fall under the last category, the Appeals Court upheld Frederick's right to expression because the speech had caused no disturbance of the educational process.<sup>156</sup>

The Supreme Court reversed. Although the holding narrowly gives schools the authority to "safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use,"<sup>157</sup> the Court's rationale gives schools broad authority to suppress speech. Acknowledging that the slogan on the banner was "cryptic," the Court nevertheless based its decision on the "reasonable" interpretation of the slogan by the principal.<sup>158</sup> In a stretch, the Court perceived that the banner

150. *Id.* at 1116. Since Frederick had not yet set foot on school property on that day and classes had been dismissed, Frederick was arguably not "in school" when the incident occurred. *See id.*

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

152. Frederick and his friends were standing across Glacier Avenue from the school on a public sidewalk and not on school property. *Frederick*, 439 F.3d at 1116.

153. *Id.* at 1115–16; *Morse* 551 U.S. at 396.

154. *Morse*, 551 U.S. at 398–99.

155. *Frederick*, 439 F.3d at 1121.

156. *Id.* at 1123. The court notes that there was disturbance, but it was from the throwing of soda bottles and snowballs. *Id.* at 1115. Further, the court noted that the banner "was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission." *Id.* at 1123.

157. *Morse*, 551 U.S. at 397. The school district described its "basic educational mission" as "promot[ing] a healthy, drug-free life style." *Frederick*, 439 F.3d at 1116.

158. *Morse*, 551 U.S. at 401. Frederick himself steadfastly maintained that the words were chosen merely as "nonsense" to get the attention of television cameras and were never intended to convey a pro-illegal drug message. *Id.*

could have been interpreted as an imperative.<sup>159</sup> The Court distinguished the political speech in *Tinker*, which is “the core of what the First Amendment is designed to protect,” and instead focused on the “compelling interest” of deterring drug use by school children.<sup>160</sup> The Court noted that “Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use.”<sup>161</sup> In contrast to the Majority’s emphasis on a school board’s duty to act in the role of a parent by protecting children from dangerous messages, the dissent harkened back to *Tinker*’s restraint on governmental suppression of speech.

Justice Stevens, in a dissent joined by Justices Souter and Ginsburg, expressed concern that the Court’s ruling would spawn broad infringement of rights. Justice Stevens noted that government censorship based on viewpoint discrimination is subject to “the most rigorous” scrutiny, yet the Majority’s “test invites stark viewpoint discrimination.”<sup>162</sup> Justice Stevens warned that the Majority’s holding strikes at the “bedrock principle underlying the First Amendment”—that speech may not be censored merely because the listener disagrees.<sup>163</sup> Nevertheless, the Majority rejected foundational First Amendment doctrine because of the “unusual importance of protecting children from the scourge of drugs.”<sup>164</sup>

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159. *Id.* at 402. (“First, the phrase could be interpreted as an imperative: ‘[Take] bong hits . . .’—a message equivalent, as Morse explained in her declaration, to ‘smoke marijuana’ or ‘use an illegal drug.’ Alternatively, the phrase could be viewed as celebrating drug use—‘bong hits [are a good thing],’ or ‘[we take] bong hits’—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.”).

160. *Id.* at 403, 407 (internal quotation marks omitted).

161. *Id.* at 408. It further noted that Congress has provided billions of dollars to schools, but that the funding is contingent on the schools adopting a “clear and consistent [anti-drug] message.” *Id.* The Court was apparently untroubled that the First Amendment rights of students were sacrificed in the face of evidence that the “clear and consistent” anti-drug message of schools has been an abject failure and that illegal drug use in schools has substantially increased. *Id.* at 407 (noting that “evidence suggests that [the illegal drug problem in school] has only grown worse”).

162. *Id.* at 436–37 (Stevens, J., dissenting).

163. *Id.* at 437–38 (Stevens, J., dissenting).

164. *Id.* at 438 (Stevens, J., dissenting). Adding a twist of irony to the *Morse* opinion is the question of whether a sign in Alaska alluding to marijuana use refers to “illegal” drug use at all. Since the district court and the appeals court decided the case under the “disruption” standard of *Tinker*, neither court addressed whether marijuana can be considered an illegal drug. The appeals court made reference to the possible political nature of the sign because of the ongoing political debate surrounding marijuana

*Morse* went beyond granting to schools authority to refuse to sponsor student speech advocating disfavored messages as the *Kuhlmeier* Court did. *Morse* grants schools the jurisdiction to eliminate disfavored messages.<sup>165</sup> Since *Tinker*, every time the Court has heard a school speech case, it has sided with the school. Although the Court may, indeed, be creating so many exceptions that the speech protections for students are illusory, the lower courts have interpreted *Morse* to be just another narrow exception to *Tinker*.<sup>166</sup> In sum, a school may constitutionally

prohibit speech that is (1) lewd, vulgar, or profane [under *Fraser*]; (2) school-sponsored speech on the basis of a legitimate pedagogical concern [under *Kuhlmeier*]; and (3) speech that advocates illegal drug use [under *Morse*]. If school speech does not fit within one of these exceptions, it may be prohibited only if it would substantially disrupt school operations [under *Tinker*].<sup>167</sup>

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possession. *Frederick*, 439 F.3d at 1119 (“Also, it is not so easy to distinguish speech about marijuana from political speech in the context of a state where references regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued.”). In 1975, the Alaska Supreme Court held that the state constitution’s privacy clause protects the possession and use of marijuana in one’s own home. *Noy v. State of Alaska*, 83 P.3d 545, 545 (Alaska Ct. App. 2003) (citing *Ravin v. State*, 537 P.2d 494 (Alaska 1975)). A subsequent statute enacted by voters in 1990 to make all possession of marijuana illegal was also ruled unconstitutional. *Id.* at 545–46. Even more, then, the *Morse* Court upheld censorship of student speech that advocated, if anything, behavior that is legal, at least for adults in their own homes, merely because it contradicted the school’s “message.”

165. See *Morse*, 551 U.S. at 438 (Stevens, J., dissenting).

166. *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 639 (D.N.J. 2007) (“The Supreme Court’s recent holding in *Morse v. Frederick*, does not change this basic framework, or the applicable analyses for the trio. Instead, *Morse* adds a third exception to *Tinker*, allowing a school to censor speech that is ‘reasonably viewed as promoting illegal drug use.’” (footnote omitted) (citation omitted)).

167. *H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 401 (E.D. Pa. 2011). This is the most common interpretation of the Supreme Court’s holdings, and has been adopted by at least eight circuits. *Griggs ex rel. Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 740 (N.D. Ind. 2005). The Seventh Circuit, on the other hand, has adopted *Kuhlmeier* as the default standard, emphasizing the school’s authority as schoolmaster to limit speech that does not occur within a public forum. *Id.*



### III. APPLICATION OF CURRENT JURISPRUDENCE TO GUN-RELATED SPEECH INCIDENTS

#### A. *Expression of Political Opinions*

Jared's arrest for wearing an NRA t-shirt gained national attention.<sup>168</sup> The divergent reactions to the story mirror the dual perspectives advocated by the Court. A short article on an MSN-affiliated website cited the news story and claimed that "controversy erupted" when Jared, a kid "who insensitively wore an NRA shirt with a firearm motif to his school in Logan, W.Va., right after the spate of school shootings," refused to change the shirt.<sup>169</sup> The article's emphasis on "insensitivity" and "controversy" are reminiscent of the *Fraser* and *Kuhlmeier* Courts' similar emphasis on civility. In contrast, commentators from Outdoor Life emphasized Jared's exercise of "his First Amendment right to free speech" and sharply criticized the school's failure to applaud Jared's "understanding [of] how the Bill of Rights and Constitution are supposed to work."<sup>170</sup> This view resembles the *Tinker* Court's view of the role of public educators.

Several circuits have addressed the use of t-shirts as tools of First Amendment expression in the public school forum. In 2003, the Fourth Circuit heard the case of Alan Newsom's NRA t-shirt, which featured three silhouettes of men holding firearms superimposed over the caption "NRA Shooting Sports Camp."<sup>171</sup> In spite of the clear indication that the logo referred to "Shooting Sports," Elizabeth Pitt, an assistant vice-principal who saw the shirt in the lunch room, said that she "had the immediate impression that the figures were 'sharpshooters' which reminded her of the shootings at Columbine High School in Colorado and other incidents of school-related violence."<sup>172</sup> Pitt demanded that Alan turn the t-shirt inside out, contending that the shirt was inappropriate because it showed "pictures

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168. See discussion *supra* notes 30–34 and accompanying text (discussing the facts of Jared's NRA t-shirt incident).

169. *NRA Gun T-shirt Teen Might Do a Year in Fashion Prison*, MSN NOW (June 16, 2013), <http://now.msn.com/jared-marcum-nra-shirt-teen-faces-jail>.

170. John Haughey, *14-Year-Old Jared Marcum Now Faces Criminal Charges for NRA T-Shirt*, OUTDOOR LIFE (June 18, 2013), <http://www.outdoorlife.com/blogs/gun-shots/2013/06/14-year-old-jared-marcum-now-faces-criminal-charges-nra-t-shirt>.

171. *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003).

172. *Id.*

of men shooting guns.”<sup>173</sup> Alan, who had never had discipline problems in school, initially resisted but submitted after being warned that refusal would be considered “defiance.”<sup>174</sup>

At the time of the t-shirt incident, the school dress policy in no way prohibited depictions of “weapons” on t-shirts.<sup>175</sup> However, over the summer, the school district revised the dress code to prohibit messages on clothing that relate to weapons, thereby equating messages related to “weapons” with messages related to drugs, alcohol, vulgarity, and racism.<sup>176</sup> The federal district court denied Alan’s request for a preliminary injunction, opining that even if the shirt was symbolic speech, the school had the authority to ban the shirt because the school “only sought to suppress the form of the message (graphic description of gunmen) and not the message itself.”<sup>177</sup> Thus, the district court used the reasoning of *Fraser*, expanding its holding that approved of a ban on lewd sexual speech to include a ban on any *form* of expression deemed inappropriate by the school.<sup>178</sup>

The Fourth Circuit Court of Appeals reversed, advancing a narrower interpretation of *Fraser*. Although acknowledging the *Fraser* Court’s statements that “certain modes of expression are inappropriate and subject to sanctions” and that the determination of what constitutes inappropriate speech “properly rests with the school board,”<sup>179</sup> the Fourth Circuit described *Fraser*’s holding as a narrow exception to *Tinker*’s disruption requirement. “Under *Fraser*, the banned school speech need not meet *Tinker*’s disruption requirement; rather, speech in school can be banned if it is lewd, vulgar, indecent, or plainly offensive.”<sup>180</sup> Because the silhouette image on Alan’s shirt was not lewd, vulgar, indecent, or offensive, and because there was no danger that an observer would believe the image bore

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173. *Id.* at 253. Pitt later contended that it “had the potential to disrupt the instructional process,” was “distracting,” and conflicted with the school’s message that “Guns and School Don’t Mix.” *Id.*

174. *Id.*

175. *Id.*

176. *Id.* (“During the summer of 2002, the student/parent handbook was revised to prohibit students from wearing, *inter alia*, ‘messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group.’”).

177. *Id.* at 254 (parenthetical in original).

178. *Id.*

179. *Id.* at 256.

180. *Id.*

the imprimatur of the school under the *Kuhlmeier* test, the court upheld under the *Tinker* standard Alan's right to wear the shirt.<sup>181</sup>

Similarly, a federal district court in Indiana held that the high school was permitted to ban "symbols of violence," but not Michael's t-shirt supporting the Marines.<sup>182</sup> The t-shirt depicted a picture of an M16 rifle, which is the standard weapon of a Marine, and a stanza of the Marine's Code, including the phrases "I must shoot straighter than my enemy who is trying to kill me. I must shoot him before he shoots me."<sup>183</sup> Michael wore the shirt to show support for the Marines, but the school officials forbid him to wear the shirt again because it was "inappropriate for the educational setting."<sup>184</sup> Michael's father gave him permission to wear the shirt again because he believed that the prohibition was an infringement of Michael's right to show patriotic support for the Marines.<sup>185</sup> The next day Michael was again told to turn the shirt inside out; when he refused, he was sent to the in-school suspension room to await his father's arrival.<sup>186</sup> Ironically, the room in which he waited had a poster of a Marine carrying the same rifle shown on Michael's shirt.<sup>187</sup> Michael sought an injunction allowing him to wear the shirt.<sup>188</sup>

Acknowledging that a general prohibition on wearing depictions of symbols of violence is a reasonable way to address school violence, the court nevertheless distinguished between symbols of violence and firearms in a military context.<sup>189</sup> Significantly, the court noted the School Board's

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181. *Id.* at 257, 260–61. Under *Tinker*, censorship was found inappropriate because there was no evidence that any depiction of any weapon had ever caused a disruption. *Id.* at 259. The court noted that the broad ban on all images "related to" weapons would reach nonviolent, nonthreatening symbols of important organizations—including the spear on Virginia's State Seal, the sabers on the University of Virginia's athletic logo, and the musket on school logo of the high school located across the school. *Id.* at 259–60. The court noted with irony that a shirt bearing the school's message of "Guns and School Don't Mix" would be "related to" weapons and thereby banned. *Id.* The court vacated, remanded, and instructed the lower court to apply the *Tinker* standard. *Id.* at 261.

182. *Griggs ex rel. Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 732–33 (N.D. Ind. 2005).

183. *Id.*

184. *Id.* at 733.

185. *Id.* at 734.

186. *Id.* at 734–35.

187. *Id.*

188. *Id.* at 733.

189. *Id.* at 744.

repeated mischaracterization of the shirt in court documents.<sup>190</sup> The court emphasized that the soldier's words depicted in the creed relate to "only violence perpetrated by the Marines against America's enemies" and not general violence by the soldier or the student who wore the shirt.<sup>191</sup> The court noted that the school's argument that the depiction of a firearm is, by itself, offensive "does not hold water" because a poster hanging in the room where the student was sent for punishment shows a Marine holding a rifle identical to the one on the student's t-shirt.<sup>192</sup>

Cutting to the heart of the matter, the court discerned that the issue was not the message of the t-shirt but the school official's personal feelings about guns. The court noted the principal's "personal objection" to guns, suggesting that this general attitude caused a negative reaction to the t-shirt.<sup>193</sup> The court used the First Amendment to protect Michael against the school's attempt to disseminate an anti-gun bias.

Political speech, like Jared's encouraging others to "Protect Your [Second Amendment] Right" and Michael's support of the military, would appear to be protected under *Tinker*, but the First Amendment protection depends on how courts choose to define the issue. Courts would undoubtedly uphold a school board regulation that bans all words and pictures on t-shirts as a permissible content-neutral dress policy.<sup>194</sup> Additionally, Justice Alito noted

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190. *Id.* at 743. The School District stated in Memoranda that Michael's shirt contained an "obsessive tone and pledge to preemptively kill one's enemies" and implied that Michael was referring to his own enemies. *Id.* at 744. The court rejected the mischaracterizations, noting the clear context of the shirt. *Id.*

191. *Id.* at 744.

192. *Id.* at 745. The line between "symbols of violence" and military emblems is sometimes difficult to discern for those that have an anti-gun disposition. In Genoa, Illinois, an eighth-grade teacher demanded that a student turn his t-shirt inside out because it depicted crossed rifles under the word "Marines." Joshua Rhett Miller, *Father Wants School Dress Code Changed After Son Asked to Remove Marines T-Shirt*, FOX NEWS (Feb. 27, 2013), <http://www.foxnews.com/us/2013/02/26/father-wants-school-dress-code-changed-after-son-asked-to-remove-marines-t/%20-%20ixzz2WFqPitzD>. After being threatened with suspension, the child complied. The Genoa-Kingston Superintendent emphasized that the shirt was *not* in violation of the school's dress code and the demand by the teacher was incorrect. *Id.* The Superintendent lamented that it was "disheartening" that the incident had happened because the schools in the district actively support local military families with special events and letter-writing projects. *Id.*

193. *Griggs*, 359 F. Supp. 2d at 744.

194. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969) (differentiating "pure speech" from such things as "the length of skirts"); see also *Griggs*, 359 F. Supp. 2d at 742 (suggesting that if Michael's t-shirt had featured the M16 only then it

that the term “educational mission” can be manipulated by school officials to advance political and social views.<sup>195</sup> For example, the school district in *Morse* supported its suppression of student speech by defining its “basic educational mission” as “promot[ing] a healthy, drug-free life style.”<sup>196</sup> In the same way, *Fraser’s* rationale that “certain modes of expression are inappropriate and subject to sanctions” and that the determination of what constitutes inappropriate speech “properly rests with the school board” can be used by courts as a basis for finding that certain restrictions do not have to meet *Tinker’s* standards. Finally, Justice Thomas has bluntly advocated overruling *Tinker*,<sup>197</sup> and the Court has limited *Tinker’s* reach in every post-*Tinker* challenge.

### B. *Protecting Private Speech*

B.H., K.G., and N.A. were each engaged in private conversation with their friends outside of the classroom setting and were disciplined merely for using the words “gun” and “shoot.”<sup>198</sup> The question is whether the private speech was constitutionally protected from government censorship under current jurisprudence.<sup>199</sup> None of the speech involved lewd sexual

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probably would not have constituted “speech” and the First Amendment would not have been implicated).

195. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring). Justice Alito rejects the “educational mission” argument but notes that it was advanced in *Morse. Id.*

196. *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006). Notably, the “basic educational mission” involves a value judgment on what constitutes a proper lifestyle and has nothing to do with the acquisition of basic knowledge and skills. It is easy to envision the same argument being used by a school to justify suppressing gun-related speech to encourage a lifestyle free of gun violence. Such a scenario is even more likely when the federal government has pushed the lifestyle by tying grants to promotion of the message it desire—as occurred in *Morse*. See *infra* text accompanying note 261 (noting the current administration’s anti-gun violence grants).

197. *Morse*, 551 U.S. at 410, 422 (Thomas, J., concurring) (“[T]he standard set forth in [*Tinker*] is without basis in the Constitution. . . . I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.”).

198. See discussion *supra* notes 3–19 and accompanying text.

199. As a preliminary matter, none of these incidents fall into the unprotected categories of “true threats” or “fighting words.” To qualify as a “true threat,” the speaker must intend to communicate a serious intention “to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The friendly chatter between these classmates did not demonstrate any intent to commit an unlawful act of violence. Similarly, the children’s speech does not qualify as “fighting words.” Fighting words must “have a direct tendency to cause acts of violence by the person to whom,

content, so *Fraser* does not apply. None of the speech could have been construed as bearing the imprimatur of the school, so *Kuhlmeier* does not apply. None of the speech related to illegal drugs, so *Morse* does not apply. Therefore, *Tinker* should apply. *Tinker* protects the rights of elementary-school children just as it does their secondary-school counterparts.<sup>200</sup> Concededly, however, extending *Tinker* protections to elementary-age students does not necessarily mean that speech rights of young children are co-extensive with those of older children.<sup>201</sup> The school may prohibit speech under *Tinker* only if it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,”<sup>202</sup> but which speech causes interference with the operation of a school or classroom and which speech infringes on the rights of others, may look different in an elementary school than in a secondary school.<sup>203</sup>

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individually, the remark is addressed.” *Gooding v. Wilson*, 405 U.S. 518, 523 (1972). In none of these cases was there any evidence that the comments caused any violent reaction. On the contrary, in each case, the comments were directed to friends of the speaker.

200. *Morgan v. Swanson*, 659 F.3d 359, 385–86 (5th Cir. 2011) *cert. denied*, 132 S. Ct. 2740 (U.S. 2012) (“[T]he student-speech rights announced in *Tinker* inhere in the elementary-school context.”). The Fifth Circuit noted that the Supreme Court upheld the First Amendment right of elementary-aged children *not* to speak in *Barnette*. *Id.* at 386. The court further noted that the Supreme Court upheld the First Amendment free speech rights of young children outside of the school context in *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (2011), which upheld the right of children to purchase violent video games without parental permission. *Id.* at 375 n.27.

201. *Morgan*, 659 F.3d at 386.

In affirming that *Tinker*-based speech rights apply to elementary students, we must be mindful of a long-established countervailing principle: in public schools, the speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students. Indeed, common sense dictates that a 7-year-old is not a 13-year-old[,] and neither is an adult. In other words, to extend *Tinker*’s protections to public elementary schools is not necessarily to hold that the speech rights of elementary students are coextensive with those of older students.

*Id.* at 387 (footnotes omitted) (internal quotation marks omitted). The court also noted that elementary students might be more susceptible to coercion and peer pressure and unable “to filter the potentially hurtful words of their classmates or walk away from speech that bothers or offends them.” *Id.*

202. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

203. *Morgan*, 659 F.3d at 387 (acknowledging that elementary students may not be able to distinguish fact from fiction, process serious issues on their own, or filter harmful words of classmates).

Nevertheless, “there is no reason that the *Tinker* framework cannot accommodate this concern.”<sup>204</sup>

In a case “involv[ing] private speech governed by *Tinker*” in an elementary school setting, the Fifth Circuit looked to whether the incident occurred in a structured educational setting, whether the other students were willing participants and friends, whether the content of the speech was age-inappropriate, and whether there was any indication of disruption.<sup>205</sup> None of incidents described *supra* involving B.H., K.G., and N.A. occurred in a structured educational setting. In each of the incidents, the child was talking to close friends who were participating willingly in the discussions. Nothing indicates that the words used and ideas conveyed were not age-appropriate. Finally, there was no evidence in any of these incidents that the spoken words caused a *substantial* disturbance of school operations.<sup>206</sup> Under the *Tinker* standard, the subjection of the students to disfavor and discipline due to their speech, which portrayed guns in a positive light rather than something to fear and dislike, appears to be a clear First Amendment violation of each child’s speech.

On the other hand, school officials can make several arguments to support their authority to regulate student speech in these situations. First, although the majority of federal appeals courts view *Tinker* as the default test for school speech, the Supreme Court has consistently stressed the political nature of the *Tinker* speech. The Court distinguished the political speech of *Tinker* from the non-political speech in *Fraser*<sup>207</sup> and *Morse*.<sup>208</sup> The Court’s reticence to uphold *Tinker* as a test in the absence of political

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204. *Id.*

205. *Id.* at 387–88 (finding that the elementary school violated a child’s free speech rights to distribute “Jesus loves me” pencils to her friends while waiting for the bus after school).

206. A similar lack of factors supporting suppression of expression is notable in the incidents related to the use of Lego blocks, see *supra* note 21, the creation of toaster pastry shapes, see *supra* note 22, and the use of imaginary weapons to play consensual games at recess, see *supra* note 26.

207. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (noting the “marked distinction between the political ‘message’ of the armbands in *Tinker*” and the sexual content of speech in issue).

208. *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“But not even Frederick argues that the banner conveys any sort of political or religious message.”). Even the superintendent in *Morse* acknowledged that if the sign regarding illegal drugs had been clearly political, advocating legalization of medical marijuana for instance, then the outcome likely would have been different. *Id.* at 398. See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (reasoning that in spite of political content of the speech, schools must have authority to refuse to support the speech).

speech may indicate that if the Court were to issue a coherent and complete framework for school speech that *Fraser* or *Kuhlmeier*, rather than *Tinker*, would be the default. This is the minority view of the Seventh Circuit.<sup>209</sup> The Third Circuit Court of Appeals, likewise, applied a *Fraser-Kuhlmeier* reasoning to the case of a kindergarten student who was suspended for saying "I'm going to shoot you" during a consensual game of "guns" at recess.<sup>210</sup> The court adopted from *Fraser* the principle that "it is a highly appropriate function of public school education to prohibit vulgar and offensive terms in public discourse' and that the 'determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.'"<sup>211</sup> Further, the court culled from *Kuhlmeier* the principle that a "school need not tolerate student speech that is inconsistent with its *basic educational mission*, even though the government could not censor similar speech outside the school."<sup>212</sup> The court labeled as "tenuous" the argument that the children's speech is protected because "[t]here is nothing in the record that even suggests that A.G. and his schoolmates playing cops and robbers were making a political statement about the value of guns in school."<sup>213</sup>

Even under *Tinker*, school officials might prevail. *Tinker* supports restrictions by school officials if the speech involved creates a substantial disruption or infringes on the rights of others. Schools often have to deal with true verbal threats involving gun-speech.<sup>214</sup> One method of addressing those serious threats is to ban all gun-related "threats"—even if the "threat" is obviously made in jest or in play. Although *Tinker* prohibits restriction of

209. *Griggs ex rel. Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 740 (N.D. Ind. 2005). Although eight circuits have adopted *Tinker* as the default, the Seventh Circuit applies the *Kuhlmeier* test to all student speech in a nonpublic forum, regardless of whether it could conceivably bear the imprimatur of the school. *Id.* The school may thereby dictate what speech is appropriate in all aspects of the educational setting. *Id.*

210. *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 421 (2003).

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

212. *Id.* at 422 (alteration omitted) (internal quotation marks omitted).

213. *Id.* Additionally, the court pointed out that none of the speech involved in *Tinker* and its progeny involved kindergarten students. *Id.* at 423. The court noted that both the Third Circuit and the Seventh Circuit have discussed the necessity of taking the age and maturity of the student into account when rendering First Amendment decisions. *Id.* In concluding, the court held that the speech restriction on the kindergarten playmates was a "legitimate decision related to reasonable pedagogical concerns"—using phraseology from *Kuhlmeier*—and that "the determination of what manner of speech is inappropriate properly rests with the school officials"—using phraseology from *Fraser*. *Id.*

214. *Id.* The school involved had dealt with three incidents. *Id.* at 418.



speech based solely on an undifferentiated apprehension that certain speech might provoke a substantial disruption, the Supreme Court might justify a viewpoint-neutral ban on all gun-related speech by applying the rationale of *Morse* and concluding that school districts must “safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging [violence].”<sup>215</sup>

Further, school officials can often point to students who are purportedly afraid as justification for limiting the speech of others. This flows from *Fraser’s* emphasis on civility and concern for the sensibilities of others. A school official in Suffolk, Virginia asserts that children today are scared about shootings in school and in the community.<sup>216</sup> She said, “Kids don’t think about ‘Cowboys and Indians’ anymore, they think about drive-by shootings and murders and everything they see on television news every day.”<sup>217</sup> Students’ fear may very well be driven by the school’s policy on imaginary guns. The suspension of N.A., for example, was justified by the school in part by the teacher’s statement that the girl who reported the incident felt that her health and safety were threatened when she overheard the conversation about the Nerf guns, which were at home.<sup>218</sup> Her sensibilities were taken seriously even though it is irrational to fear for one’s safety because of an overheard conversation about plastic toys that shoot foam rubber balls.

In summary, *Tinker* likely provides very little protection for the excited conversations of school children about newly acquired plastic gun-shaped toys or the schoolyard expressions of young children seeking to capture the imaginary bad guy or to save the world. Under the current system, school officials have authority to control the environment and decide what is appropriate. In spite of that control, some children are purportedly frightened at the presence of imaginary guns,<sup>219</sup> while others are traumatized by the harsh discipline resulting from their gun-related

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215. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

216. McNamara, *supra* note 25.

217. *Id.*

218. Beaver, *supra* note 15. One wonders if the girl would be better served if the school explained to her that private speech about toy Nerf guns does not actually threaten her health and safety.

219. See, e.g., S.G., 333 F.3d at 419 (noting that the teacher said students in the vicinity were “frightened and upset” when they saw kindergarten boys pretending to shoot each other with their fingers); St. George, *supra* note 20 (describing a ten-year-old boy who was arrested and charged after a girl reported seeing his plastic toy gun on the bus and told her mother that she was “scared”).

speech.<sup>220</sup> The very act of censoring words like “gun” and “shoot” sends a message to young children that these words are the equivalent of swear words or other disfavored speech. The ban thereby establishes an orthodox view within the school about guns.

### C. *Protecting Student Opinions in the Classroom*

Gun-related speech in the context of school assignments has even less protection from content discrimination than other speech. The two Texas high school students threatened with a “zero” grade for mentioning guns, despite directions to write about *any* topic, gained a reversal by the teacher after one parent confronted the teacher and posted the confrontation on YouTube.<sup>221</sup> Case law suggests that they would not have fared so well in court.

Courts have upheld the broad authority of the school officials to define an educational mission and create rules that reasonably accomplish the mission.<sup>222</sup> A rational basis standard requires “only that the educational purpose behind the speech suppression be valid,” not that it survive a

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220. B.H. “was very scared at the fact that he was interviewed by the principal and a sheriff’s deputy” without a parent present. Di Caro, *supra* note 4. Sonya Kumar, an ACLU staff attorney, labeled the suspension inappropriate and suggested that the school’s proper response to the child’s angst about a recent school shooting “should have been [to] assur[e] him that they were going to take steps to keep all students safe, not [to] punish[] him.” *Id.* K.G. was very upset at being suspended for offering to play with bubbles, *see supra* note 10, and her mother reminded her every day that “she’s a good girl and she’s done nothing wrong.” Bohman, *supra* note 11. A ten-year-old was arrested, fingerprinted, and charged with brandishing a weapon after he brought a “cheap fake gun with an orange tip” on the school bus. St. George, *supra* note 20. The public defender warned that facing criminal charges “really affects the child” and criticized the fact that it took three weeks to get the charges dropped. *Id.* A five-year-old uncharacteristically wet his pants after school officials interrogated him for two solid hours without his parents present when he was found in the possession of a plastic cap gun. Donna St. George, *Cowboy-style Cap Gun Gets 5-Year-Old Suspended From School in Calvert County*, WASHINGTON POST (May 30, 2013), [http://www.washingtonpost.com/local/education/cowboy-style-cap-gun-gets-5-year-old-ousted-from-school-in-calvert-county/2013/05/30/a3a8a178-c93c-11e2-9245-773c0123c027\\_story.html](http://www.washingtonpost.com/local/education/cowboy-style-cap-gun-gets-5-year-old-ousted-from-school-in-calvert-county/2013/05/30/a3a8a178-c93c-11e2-9245-773c0123c027_story.html).

221. Alvarado, *supra* note 36; Opelka, *supra* note 36.

222. Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570, 578 (6th Cir. 2008) (citing *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir.2005)) (applying *Kuhlmeier* to uphold the school’s censorship of a student’s religiously themed Christmas ornaments where students were assigned to create, manufacture, and sell *any* homemade product at the school’s Classroom City event).

balancing test with the child's First Amendment rights.<sup>223</sup> Rather, under *Kuhlmeier*, educators have complete editorial and content control of student curriculum-related expression in order to ensure that the activity teaches what it is supposed to teach.<sup>224</sup> Further, a classroom teacher has complete authority to forbid a disfavored topic, even if the teacher mistakenly instructs the students that they may choose *any* topic.<sup>225</sup> "So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere."<sup>226</sup>

#### IV. AN UNCONSTITUTIONAL ESTABLISHMENT OF ORTHODOXY

The *Meyer*, *Pierce*, *Barnette*, and *Tinker* Courts emphatically warned that schools must not attempt to create standardized children or impose a government-created orthodoxy.<sup>227</sup> *Fraser* and *Kuhlmeier* revealed a shift in the Court's thinking toward the use of schools to inculcate "shared community values."<sup>228</sup> *Morse* revealed a further shift, extending power to school officials to suppress speech that conflicts with the school's, rather

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223. *Id.* at 579.

224. *Id.* at 577.

225. *See Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012) (upholding the suspension of a student when he wrote that he wished a missile would destroy the school and kill the teachers, after the teacher assured students that they could write any "wish" including those related to missiles). The court reasoned that the school is in the best position to assess dangers of student speech and it was not for courts to set aside the decisions of school officials even if the decisions are lacking in wisdom or compassion. *Id.* at 113.

226. *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (upholding a teacher's decision not to accept a research paper on Jesus, although accepting papers on non-Christian religious topics, where the student failed to get preapproval of the topic as required). The court noted that teachers in classrooms, like judges in courtrooms, may frequently make mistakes, but it is the teacher's responsibility to set criteria and judge student work. *Id.* at 155–56. Judge Batchelder rejected the application of First Amendment speech rights to the classroom, noting that

when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no constitutional question.

*Id.* at 158 (Batchelder, J., concurring in result only).

227. *See* discussion *supra* Part II.A.

228. *See* discussion *supra* Part II.B.1, 2.

than community's, message.<sup>229</sup> When government officials, rather than parents, take the primary responsibility and authority for teaching children values and opinions, then Justice Jackson's "fixed star" no longer operates to guide First Amendment jurisprudence.<sup>230</sup> One's view of who bears responsibility to educate the child determines whether suppression of gun-related speech is a permissible inculcation of shared community values or an impermissible indoctrination of government-taught orthodoxy.

### A. *Competing Ideologies*

Courts have relied on education ideologies to support their rationales. The American system of education has been contrasted with Sparta's educational system on the one hand and compared to common law doctrines like *in loco parentis* on the other. This section provides a very brief discussion of educational ideology in order to put the Court's comments in context.

Ancient Sparta viewed parents as having no responsibility or rights at all. In Sparta, children were considered assets of the State, and Sparta adopted an educational program where children were removed from the influence of their parents and systematically trained by government officials to be "ideal citizens" according to the approved standard.<sup>231</sup> Sparta accomplished its educational objective by removing children from their parents at the age of seven and entrusting them to the care of the State.<sup>232</sup> Individuality was discouraged.<sup>233</sup>

This Nation rejected the Sparta-like relationship between the State and its people and chose instead a relationship where individuals are trusted to make wise choices after a robust exchange of ideas.<sup>234</sup> In early America,

229. See discussion *supra* Part II.B.3.

230. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). See also discussion *supra* Part II.A.2.

231. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

232. *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923).

233. *Id.* ("[T]he wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. \* \* \* The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." (quoting Plato's *Ideal Commonwealth*)).

234. *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). The American ideology borrowed from the Ancient Hebrew educational philosophy, which was the antithesis of the Spartan view. Hebrew parents were commanded

education beyond what the parents could transmit was accomplished primarily by private schools and tutors, who had great incentive to teach the values and views held by the paying parents.<sup>235</sup> Nevertheless, the early colonists believed that the community bore some responsibility to subsidize the tuition of poor families so that all children could receive a basic education. Perhaps the earliest example of American public school creation and funding is the 1647 “Ye Olde Deluder Satan Act,” passed by the Massachusetts Commonwealth, requiring each township to establish a public school governed by a publicly representative board of laymen.<sup>236</sup> In spite of public funds used for education, however, the training of children was viewed as “[o]ne of the most sacred duties of *parents*,” and teachers acted only as a “*substitute of the parent*” to accomplish “*delegated duties*.”<sup>237</sup>

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to train their children by constant interaction within the family structure. *Deuteronomy* 6:7. Children were commanded to listen and heed the instruction of their parents. *Proverbs* 1:8. The responsibility for educating children fell to the parents. *Proverbs* 22:6; *Ephesians* 6:4.

235. *Morse v. Frederick*, 551 U.S. 393, 411 (2007) (Thomas, J., concurring). These educators were literally *in loco parentis*, acting as agents of the parents hired to provide an education consistent with parental expectations. Under English common law, an educator thus employed had a legal right through the doctrine of *in loco parentis* to demand strict and unquestioning obedience. *Id.* at 413. Under this system of education, parents had the broadest possible control in determining what was taught because the educator served at the pleasure of the parents.

236. James W. Guthrie, *American Education Reform: What is Needed is “National” Not Federal*, 17 St. Louis U. Pub. L. Rev. 125, 132–33 (1997). The public school educator was endowed, through *in loco parentis*, with the same iron-fisted discipline authority that the private school tutor had enjoyed. *Morse*, 551 U.S. at 411–12 (Thomas, J., concurring) (“In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”).

237. *Morse*, 551 U.S. at 413–14 (Thomas, J., concurring) (emphasis added) (quoting *State v. Pendergrass*, 19 N.C. 365, 365–366 (1837)). America’s approach to the education of poor children developed differently from that in England. A century after the 1647 public school act in the Massachusetts Commonwealth, Sir William Blackstone wrote his commentary on English law. 1 WILLIAM BLACKSTONE, COMMENTARIES (1753). Blackstone recognized as a principle of natural law the duty of parents to provide, protect, and educate their children. According to Blackstone, not only will parents instinctually and naturally care for their children, but they are obligated to do so by the fact that they voluntarily created the life. *Id.* \*447. The duty to provide an education “suitable to their station” was deemed “[by] far the greatest importance of any” of the duties. *Id.* \*540. To grow up without education was to grow up without a means of support, “like a mere beast, to lead a life useless to others and shameful to himself.” *Id.* \*541. Blackstone faulted the civil law of most countries for not imposing strict sanctions on parents who failed to provide a proper education for their

American colonies, and later the states, funded schools for poor children through a combination of local taxes and tuition.<sup>238</sup> Significantly, all funds raised through tuition and taxes paid the salary of the teacher; buildings and furnishings were paid for exclusively with gifts.<sup>239</sup> As a result, early schools maintained strong connections among the parents, the community, and the teacher. The teacher's employment was directly connected to parental satisfaction. Parents who did not agree with the teaching style, discipline, or values could choose not to send the child to school. Because the educator was an agent of the parent and not the government, the government did not determine values.

In summary, protection from government censorship was hard to find in early American schools, but it was not needed because parents directed the education of their children. The teacher in early America was not a government official but rather an employee or agent of the parents and community. The local community subsidized poor families through voluntary taxation. Teachers were "at will" employees who could be easily fired for poor performance but had complete authority in the classroom under the doctrine of *in loco parentis*.

### 1. Progressive Ideas

In 1647, when "Ye Olde Deluder Satan Act" was passed, the townships had authority for permissive taxation only—the towns people had to agree to pay taxes to fund the school.<sup>240</sup> In 1827, the Commonwealth passed a law making school funding compulsory.<sup>241</sup> By the early 1900's, general tax revenue provided over 80% of many common schools, and other

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children. *Id.* Blackstone lauded the English practice of taking children away from poor parents to be raised and trained in apprenticeships by rich families. *Id.*

238. FLETCHER HARPER SWIFT, A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1795–1905 at 28 (1911), available at <http://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t1vd7jq0n;view=1up;seq=33>. In 1658, the colonial town of Weathersfield voted to hire a teacher who was to be paid through collecting tuition from the students who attended, with the remainder being raised by a property tax. *Id.* Plymouth used the inverse approach, laying a tax of twelve pounds on each inhabitant and then requiring families with children attending the school to make up the difference. *Id.* at 29. The Connecticut Code of 1650 required that every township in the commonwealth with fifty households maintain a school but allowed the township the option of funding the school through tuition or through taxes. *Id.*

239. *Id.* at 30.

240. *Id.* at 3–4.

241. *Id.*

government funding generally provided the rest.<sup>242</sup> As the funding structure changed, so did the attitudes about public schools. As the government took more and more in the form of taxes and promised more and more in the form of benefits, the “progressive” notion of universal “free” education took hold, and the connection between what a family paid for the education of its children and the salary of the teacher became attenuated.<sup>243</sup>

Another indicator of this progressive change was the rise of compulsory attendance at school. By 1918, every state had exerted its “police power” to compel school attendance, even over the objection of parents.<sup>244</sup> This view of child custody asserted that a child’s education was not a matter of private family concern, but rather that the State had the authority to dictate both attendance at a school and the prescribed curriculum.<sup>245</sup> Furthermore, parents lost power in educational decision-making because of extensive consolidation of school districts. In 1939, there were 117,000 public school districts in the United States; in 2009, there were less than 14,000.<sup>246</sup> The shift to consolidated school districts run by the government has changed teachers from being agents acting on behalf of the parents to being “agents of the State.”<sup>247</sup>

In summary, in the early twentieth century, parents accepted—albeit “gradually and in the face of bitter opposition”—the principles that “the responsibility of educating the child rests upon the state and not alone upon the parent” and that all citizens should fund the schools through property tax regardless of whether they have children in the school.<sup>248</sup> As a result,

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242. *Id.* at 19.

243. *Id.* at 4. In early America, families were often reluctant to send their children to free schools because of the stigma attached to receiving “free” education. The Constitution of Georgia, for example, provided for free public education funded by the State. *Id.* Communities “often rejected with contempt [the funds offered by the state for free schools] owing to the stigma of the badge of pauperism attached to receiving it.” *Id.* During the nineteenth century, the same attitude prevailed throughout much of the United States. *Id.*

244. Guthrie, *supra* note 236, at 329–330 (noting that Massachusetts enacted the first compulsory attendance law in 1852).

245. *Id.*

246. *Number of Public and Private Elementary and Secondary Schools: Selected Years, 1869–70 through 2009–2010*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DIGEST OF EDUCATION STATISTICS (2011), available at [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_091.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_091.asp).

247. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito concurring).

248. SWIFT, *supra* note 238, at 3.

today's parents "realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school."<sup>249</sup>

### B. *Government Inculcation of Opinions and Values*

The progressive principle that the state, and not the parent, bears the responsibility of educating children introduces a new meaning for *in loco parentis*. Instead of "in the place of the parent" as an agent, the state takes the role of a substitute parent. This allows the government to dictate what is orthodox and desirable in the creation of future citizens. Both *Pierce* and *Meyer* warned against the "standardization of children," yet neither questioned the State's authority to require attendance at a school and to require that a certain curriculum be taught.<sup>250</sup> If the curriculum is essentially the same, the difference between schools is the worldview from which the curriculum is taught. It is in this realm of worldview that the battle for the minds of children takes place.

#### 1. Freedom of the Mind

Thomas Jefferson and James Madison were vocal opponents of using tax money to propagate opinions.<sup>251</sup> In Jefferson's preamble to the Act for Establishing Religious Freedom, he maintained that government officials have no authority in the realm of ideas and opinions.<sup>252</sup> Jefferson viewed using the coercive taxing power of the state to disseminate government-approved opinions as "sinful and tyrannical."<sup>253</sup> Madison agreed that

249. *Morse*, 551 U.S. at 424 (Alito concurring).

250. Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education is it, Anyway?*, 89 NEB. L. REV. 290, 292 (2010) (discussing *Meyer* and *Pierce*). By the time of *Pierce*, in 1925, law professor William Guthrie was warning that use by the state governments of public schools to indoctrinate children was the same tactic used by communist Russia. *Id.* (quoting Brief for William D. Guthrie & Bernard Hershkopf as Amici Curiae Supporting Plaintiff-in-Error at 3, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325)). Nevertheless, the Court merely acknowledged that parents could add to the state-required curriculum and could provide education for their children at a private school and did not question the state's right to compel attendance or control curriculum. *Id.* at 339. *Meyer* and *Pierce* improperly ceded too much power to school officials, and the view that government has the authority to compel school and control the curriculum has been widely accepted for eighty years.

251. Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 507 (1992).

252. *Id.* at 510.

253. *Id.* at 511.



government coercion in the realm of opinions and beliefs violated the law of nature because God created the mind to be free to seek, worship, and obey God in whatever manner the individual believed to be true and right.<sup>254</sup> Because the institutions of the church and school were intertwined in early America, Jefferson and Madison argued that government officials should not have authority, involvement, or taxing power in either the church or school.<sup>255</sup>

Arguably, the early educational systems of private, non-governmental teachers hired and paid for through voluntary taxes and tuition restrained the coercive power of government. Parents typically delegated to the public educator the teaching of “English Language, English Grammar, Arithmetic, and Mathematics.”<sup>256</sup> Such subjects involve little opinion or moral value judgments.<sup>257</sup> The parents thereby relegated to the educator the teaching of knowledge and kept for themselves the inculcation of morals and beliefs. The local community held authority to quickly address incompetent teaching or inculcation of aberrant community values—the parents could refrain from sending their children to the school and the community could decline renewal of the teacher’s yearly contact. That authority no longer exists.<sup>258</sup>

## 2. Government as Purveyor of Ideas

In contrast to private educators, public sector teachers, hired by other governmental officials and paid for through compulsory taxation to

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254. *See id.* at 507.

255. *Id.* at 511. This is in contrast to the view of states like Massachusetts that saw a role for state government in both areas. *Id.* The First Amendment adopted the Virginia view for the federal government, but the restriction did not apply to the states prior to incorporation under the Fourteenth Amendment. *Id.* at 511–12; *see id.* at 512–13 (discussing the hypocrisy of advocating public schools in the name of “peace, good order, and well-being of society” while denying public religion on the same grounds).

256. SWIFT, *supra* note 238, at 24. Mathematics is the general science of numbers and their operation and includes specific branches such as geometry, calculus, and arithmetic, which refers solely to addition, subtraction, multiplication, and division of non-negative real numbers. *Difference Between Math and Arithmetic*, Math Forum, Drexel University (11/06/2001 21:57:04), <http://mathforum.org/library/drmath/view/52282.html> (last visited Aug. 3, 2013).

257. Concededly, any instruction conveys values. The mere fact that reading, writing, and arithmetic are taught conveys an endorsement of the value of those subjects. Nevertheless, there can be no legitimate difference of opinion on the correct answer to “2+3” or the correct spelling of “pumpkin.”

258. *See* discussion *supra* Part IV.A.2 (discussing parents’ loss of authority).

inculcate a state-approved curriculum, destroy the "freedom of the mind" that Madison and Jefferson advocated.<sup>259</sup>

The public school teacher is just as much a civil magistrate as is a police officer or a judge. The teacher is employed by the local school board, paid out of local and state tax revenues, and expected to teach according to state and local government policy; namely, to inculcate the fundamental values necessary to maintain a democratic political system and to prepare students for participation as citizens in that system.<sup>260</sup>

All education requires indoctrination; the only question is whether that indoctrination will be controlled by parents or by government officials.<sup>261</sup>

As government has taken the responsibility and authority to educate children, the fundamental values necessary have expanded from grammar, writing, and arithmetic to social issues. A glimmer of expansion, and the Court's embracing of it, is seen in *Morse*, where the Court acknowledged that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use" and that schools receiving funds under certain federal programs must "certify that their drug-prevention programs convey a clear and consistent message that the illegal use of drugs is wrong and harmful."<sup>262</sup> The anti-illegal drug message is just one example of government officials using tax dollars to establish in schools an orthodox message related solely to values and opinion and not related to basic academic knowledge.

The government uses tax dollars to implement its gun-related views in the same way. In 1994, Congress enacted the Improving America's Schools Act,<sup>263</sup> which included a statutory requirement that each state receiving federal funds under any title of the Act include in its disciplinary policy a mandatory one year expulsion for any student who possessed a firearm at

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259. Titus, *supra* note 251, at 515.

260. *Id.*

261. *Id.* at 514.

262. *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (internal quotation marks, citation, and alteration omitted). Arguably, the school's reaction to the "Bong Hits 4 Jesus" sign was as much to prove that the school conveys a "clear and consistent message" on illegal drug use, and thus to protect its federal funds, as to prevent the student from expressing a pro-drug message.

263. The Gun-Free Schools Act (GFSA), which was enacted on October 20, 1994 was part of the Improving America's Schools Act of 1994. 20 U.S.C. § 7151 (2006).

school.<sup>264</sup> The federal government thus sought to influence by the use of tax money school discipline policies related to firearms. In 2012, the Department of Education promoted its program to “protect schools and communities by reducing gun violence.”<sup>265</sup> It offered \$112 million in grants to schools that implement programs, collect data, and adopt discipline policies with which the Department agrees.<sup>266</sup> Like the anti-illegal drug funds in *Morse*,<sup>267</sup> federal funds can be used to promote anti-gun policies and influence how an administrator deals with gun-related incidents.

### 3. Lack of Parental Control

Under current jurisprudence parents have no authority over what is taught to their children in public school, even if the instruction is completely inconsistent with the strongly held moral or religious beliefs of the family.<sup>268</sup> The First Circuit Court of Appeals reasoned that the *Barnette* Court drew a fine distinction between inculcation of values by instruction, which is permissible, and inculcation through compelled statements of belief, which is not permissible.<sup>269</sup> Schools are a means by which a child’s beliefs may be severed from those of the child’s parents and conformed to those of society.<sup>270</sup> Under this rationale, requiring students to draw pictures or write a paper supporting gun control or to read books with an anti-gun

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264. *Id.*

265. *Reducing School and Community Violence: Now is the Time*, U.S. Department of Education, available at <http://www.ed.gov/school-safety>.

266. *Id.*

267. *See supra* note 262 and accompanying text.

268. *Parker v. Hurley*, 514 F.3d 87, 92–93 (1st Cir. 2008) (upholding the schools flat denial of a request by parents that they be given the option of exempting their kindergarten and first-grade children from presentation of literature extolling homosexuality, which was in conflict with their sincerely held religious beliefs).

269. *Id.* at 105.

270. Shulman, *supra* note 250, at 347–48. (“Compulsory education requirements presuppose sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic group into which the child is born. They entail the effort to foster respect for difference and a willingness to entertain, if only for the sake of argument, ideas that go against the familial grain.”) (internal citations and quotation marks omitted). This view of schools is not new. President Woodrow Wilson “often said that the use of a university is to make young gentlemen as unlike their fathers as possible” by taking them out of the “narrow circle” of their fathers’ opinions. Woodrow Wilson, *The Power of Christian Young Men*, SELECTED ADDRESSES AND PAPERS OF WOODROW WILSON 49 (1918) available at <http://www.wallbuilders.com/LIBissuesArticles.asp?id=19484>.

bias would be permissible instructional requirements as long as the child is not asked to verbally affirm a personal belief that guns are bad.<sup>271</sup>

In summary, parents may choose between public and private school, but once they choose public school, it is a "well recognized" proposition that "they do not have a constitutional right to direct *how* a public school teaches their child."<sup>272</sup> If parents are not happy with the education their children are receiving in the public school, then they should simply choose a different educational alternative.<sup>273</sup> The argument is not a new one. The *Barnette* dissent noted that the Court had unanimously held previously that the First Amendment is curtailed in public universities because students choose to attend there.<sup>274</sup> Similarly, the dissent noted that a student may not contest the regulations of a private school to which parents voluntarily send their children.<sup>275</sup> The dissent would have applied the same rationale to the *Barnette* facts and allowed the state to require all children to pledge allegiance with a stiff-armed salute, forcing those who disagree to find alternative educational arrangements.<sup>276</sup> The dissent reasoned that parents may choose the school that they wish their children to attend, and those schools run by the state should have the authority to inculcate the values and beliefs the state sees fit to teach.<sup>277</sup> Similarly, if school officials force upon students instruction that is inimical to the religious or moral beliefs of their parents, the parents should "seek recourse to the normal political processes for change in the town and state."<sup>278</sup>

The court-embraced view that parents are free to leave the public school system ignores the lack of real choices available to parents because of the dominance of public schools and the financial burden of supporting the public schools through taxes in addition to funding an alternative mode of education. Even more unfounded is the view that parents stuck with public schools willingly cede their parental authority to school officials.

271. See *Parker*, 514 F.3d. at 106 ("Requiring a student to read a particular book is generally not coercive of free exercise rights.").

272. *Id.* at 102 (1st Cir. 2008) (emphasis in original) (internal quotation marks omitted).

273. *Morse v. Frederick*, 551 U.S. 393, 420 (2007) (Thomas, J., concurring).

274. *W. Va State Bd. of Educ. v. Barnette*, 319 U.S. 624, 656 (1943) (Frankfurter, J., dissenting).

275. *Id.* at 657–58 (Frankfurter, J., dissenting). The dissent noted the extra burden on these families resulting from paying taxes to support the public schools even though the parents do not use them. *Id.*

276. *Id.* at 657.

277. *Id.* at 658.

278. *Parker v. Hurley*, 514 F.3d 87, 107 (1st Cir. 2008).

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 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*.<sup>279</sup>

The solution is to give parents real choice and control in making the educational decisions for their children.<sup>280</sup>

#### V. PROTECTING CHILDREN'S FREEDOM OF THE MIND

The issue of gun-related speech in schools is important on both an individual and societal level. For the individual student and her family, the battle is for the freedom of the mind and the fundamental question of who has the responsibility and authority to train a child's mind to hold certain values and opinions. For society, the issue is related to whether society should value uniformity or diversity of opinion. Gun-related speech weighs heavily in these ideological discussions because two liberties recognized in the Bill of Rights are implicated: freedom of speech and the right to keep and bear arms. The *Barnette* Court was concerned that schools would indoctrinate children to view those rights recognized in our founding documents as mere platitudes.<sup>281</sup> Although the *Barnette* Court was speaking of religious and speech rights, the Court's concern is equally applicable to inculcating a negative view of the Second Amendment.

The solution is to give parents real choice in the education of their children. Parents who choose government-run schools are choosing inculcation of those opinions and views taught there. Parents, rather than government officials, then become the ones to prescribe what shall be taught to their children and Justice Jackson's "fixed star" remains a guiding principle. At the same time, because parents are controlling their children's

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279. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

280. Arguably, the most complete solution might be to eliminate all government involvement in education and return responsibility to parents completely. This view of education would align most closely with the views of Madison and Jefferson who believed that the use of tax subsidies for the teaching of opinions was contrary to the law of nature and that tax money is no more proper for subsidizing schools than it is for subsidizing churches. See Titus, *supra* note 251, at 511. But Virginia was the exception. So the solution presented here will be preliminary steps that could be realistically accomplished in a majority of jurisdictions.

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

education, Justice Thomas's view that the First Amendment has little application within school operation becomes a complementary guiding principle. Any policy, then, that increases parental choice is a step in the right direction.

#### A. *The Universal Voucher as Solution*

Government-run schools enjoy the advantages of being subsidized so that they do not have to be efficient, of being able to offer "free" education to families, and of holding a virtual monopoly of school facilities while mandating school attendance.<sup>282</sup> A universal voucher system is the most direct, immediate, and efficient method to restore choice to parents.<sup>283</sup> Vouchers provide competition to public schools and thereby increase efficiency and responsiveness to the wants and needs of families. Further, a wide range of options exist for education if financial constraints are removed. These include private tutors, charter schools, private schools, and traditional public schools.<sup>284</sup>

Where vouchers have been implemented, parents often, but certainly not always, choose a private school where the power of the consumer is the strongest.<sup>285</sup> Approximately 28,000 private schools educate 5 million students annually.<sup>286</sup> Studies consistently show that children enrolled in

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282. Allen M. Brabender, *The Crumbling Wall and Free Competition: Formula for Success in America's Schools*, 79 N.D. L. REV. 11 (2003) (citing Thomas L. Good & Jennifer S. Braden, *The Great School Debate* 90, 100 (2000)). In Newark, New Jersey, for example, only 22% of students graduated on time, in spite of spending over \$22,000 per student, twice the national average. In Washington, D.C., roughly 50% of students graduate on time, in spite of \$24,000 spent per student. Nicholas Dagostino, Note, *Giving the School Bully A Timeout: Protecting Urban Students from Teachers' Unions*, 63 ALA. L. REV. 177, 180 (2011).

283. An "educational voucher" has been defined as "an entitlement extended to an individual by a government permitting that individual to receive educational services up to the maximum dollar amount specified. The holder can normally redeem the voucher according to preference at any institution or enterprise approved by the granting agency." Brabender, *supra* note 282, at 12 (quoting AUSTIN D. SWANSON & RICHARD A. KING, *SCHOOL FINANCE: ITS POLITICS AND ECONOMICS* 414 (2d ed. 1997)).

284. Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & Educ. 139, 141 (2003).

285. The Supreme Court has upheld the constitutionality of school vouchers, even when the vouchers are used at parochial schools as long as parents have a genuine and independent choice. Brabender, *supra* note 282, at 30-31 (discussing *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000), *rev'd*, 122 S. Ct. 2460 (2002)).

286. Suzanne Hansen, *School Vouchers: The Answer to a Failing Public School System*, 23 HAMLINE J. PUB. L. & POL'Y 73, 89 (2001).

private schools through voucher programs outperform their public school peers.<sup>287</sup> Additionally, providing parents with a choice resulted by itself in increased involvement by parents even when the education was “free” to the parents.<sup>288</sup>

Charter schools,<sup>289</sup> which are neither private schools nor typical government-run schools, provide parents with another educational option. Charter schools have the same strong incentive to fulfill the desires and expectations of the parents who choose to send their children there. Although the schools are often paid for with vouchers, and thus “free” to the parent, the parent still has power to affect school policy because the parent can easily choose to go elsewhere.

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287. *Id.* at 90 (noting that children using vouchers in San Antonio, Texas to attend private schools “were more challenged academically, experienced less fighting and disorder than their public school peers, and their parents were more involved in their school and with their studies”). Parents using vouchers to proactively choose a school for their children have high “customer satisfaction” and low-income, low-achieving, and minority students show academic improvement in a short time. Brabender, *supra* note 282, at 37 (citing a study by the RAND organization, a nonprofit research and analysis organization). On the other hand, children trapped in inner-city public schools remain casualties of an ineffective and failing system. *Id.* at 37–38 (noting that before the Cleveland implemented its voucher system, “one in fourteen students” was the ratio that marked both the number of students assaulted on school property and the number of students that passed the twelfth grade proficiency test). Students forced to attend failing schools risk lifelong consequences. Bloom, *supra* note 284, at 179–80 (noting that New York City alone has fifty-eight schools under Registration Review for very poor student results on standardized tests and that parents are seeking alternatives because students who have not completed high school have an unemployment rate twice as high as those who finish).

288. Hansen, *supra* note 286, at 90 (discussing a private voucher system in San Antonio, Texas where the voucher paid the entire amount of the tuition).

289.

Charter schools are independent public schools, initiated and operated by entities and groups such as teachers, parents, community organizations, colleges, universities, and educational entrepreneurs. . . . Charter schools: 1) operate based upon a detailed written agreement—the charter—for a specified period; 2) exist as public legal entities, separate in some way from the local school district in which they are located; 3) operate free from many state and local regulations applicable to public schools; 4) receive operational funding from public funds, and make budget decisions at the school level; 5) are relatively free to adopt instructional and curriculum protocols; 6) are free to manage decisions, including hiring and budgeting, at the school level; and 7) give sponsors, including in many cases teachers and parents, the opportunity to participate in the design of schools.

Bloom, *supra* note 284, at 151–52.

Some voucher programs target specific groups, such as those who have low incomes or those in a district with a poor-performing school. The Milwaukee school district program, for example, provides vouchers for school children whose families have income not more than 1.75 times the federal poverty level.<sup>290</sup> In contrast, Florida implemented a voucher program open to families regardless of income if the public school to which they were assigned received a grade of "F" based on student academic performance for two out of four years.<sup>291</sup> In both programs, students showed gains in math and reading tests almost immediately.<sup>292</sup>

Although targeted voucher programs are designed to solve specific deficiencies, these limited programs do not address the basic problem that parents lack control over their children's education. As long as parents en masse have no realistic alternatives to government-run schools, then government officials will be free to create "standardized children." Where a universal voucher program is implemented, however, parents may choose the school that teaches students consistent with community and family values.<sup>293</sup> Parents will choose private schools or charter schools where those schools best meet the educational goals of the parent. Those children left in public schools will be there either because their parents choose the school's educational policies or because the parents are simply too uninterested to make another choice.

A small-scale universal voucher system has been tried for over ten years in San Antonio, Texas. A non-profit organization created the Horizon Program, which allows any student in the Edgewood School District to attend a private school, or another public school, if they choose.<sup>294</sup> The vouchers are not contingent on any criteria, including income, school

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290. Hansen, *supra* note 286, at 80.

291. *Id.* at 86–87.

292. *Id.* at 89. Similarly, the voucher program in Cleveland, which suffers from low graduation rates, gives vouchers to children of low-income families. *Id.* at 83. By the second year of the program, low-income children using vouchers to attend private schools showed a five percentile gain in reading scores and a fifteen percentile gain in math scores on national standardized tests. *Id.* at 89.

293. A detailed discussion of the logistics of a universal voucher system is beyond the scope of this Comment, but see Jacob Blizzard, *Where Have All the Taxes Gone: Creating and Administering a Working Education System for Texas Through Universal Vouchers*, 13 TEX. TECH. ADMIN. L.J. 209, 211 (Summer 2012), for a discussion on implementation, funding, and logistics of a universal voucher system.

294. *Id.*



performance, or affiliation of the private school.<sup>295</sup> Interestingly, only 10% of the students receiving vouchers chose a private school over transferring to another public school.<sup>296</sup> The impact on the public school, as well as the students who received vouchers, was impressive almost immediately. Within four years, reading scores improved by 21%, and math scores improved by 28%.<sup>297</sup> Many other benefits also accrued because of the program,<sup>298</sup> but the primary reason for adopting a universal voucher program is not because of the outstanding increases in student achievement and community development. If these were the goals, then parents should be *forced* to use vouchers and place their children in private schools. But forcing parents to make choices that would seem to benefit their children is the very evil to be combatted. Universal vouchers provide parents with a realistic choice in their child's education. If parents choose public schools, then that choice too should be respected.<sup>299</sup>

#### B. *Choice of Teachers*

Choice only exists if private or charter schools retain control over those things that make a school distinctive. Foundational to that distinction is the ability to establish a particular worldview and to hire teachers who can competently teach from that worldview—and fire those who cannot. Individual public schools should be given the same authority as charter schools to hire and retain competent teachers and fire incompetent ones. In order to give parents realistic choice, a program must allow parents to choose the *teacher*. In early American schools, the parents chose teachers,

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295. *Id.*

296. *Id.* at 229. The families that did choose private school were in the lowest income bracket and were almost exclusively minorities. *Id.*

297. *Id.* at 230.

298. *Id.* The program created many first generation graduates, 92% of which attended college after graduation. The school district itself rose from “acceptable” to “recognized” for the first time in its history. Teacher salaries increased. Property values rose, and new housing construction began. *Id.*

299. Surprisingly, of the 900 students who qualified for a Florida voucher because their school received an “F” for student academic performance, only 140 chose to participate in the voucher program. Thus, the vast majority of students in the failing school remained there. Importantly, the “fact that some children are left behind is the result of parental choice. Parents could have elected to send their children to a higher performing public school, or to the private school of their choice.” Hansen, *supra* note 286, at 87–88. Out of the 140 using vouchers, only 57 enrolled in private schools.

not schools.<sup>300</sup> In this way, parents controlled the worldview from which their children were trained. Today, tenure statutes and collective bargaining contracts result in poorly performing teachers being protected from dismissal from government because teachers are retained based on seniority rather than excellence.<sup>301</sup> Teacher effectiveness is never a criteria for determining which teachers gain tenure, and thereby cannot be fired.<sup>302</sup> As long as public schools are saddled with incompetent teachers, parents have less chance of choosing a teacher who can effectively teach as an agent of the parent. Therefore, control over hiring and firing should be returned to the school level, not the school district level, and the principal must have the ability to respond to parental concerns. A voucher system whereby money is directed to the teacher and school of the parent's choice will reward those teachers who are competent and those schools that operate well.

For the same reason, "school boards" need to be at the *school* level and not the district level. The consolidation of districts has resulted in a lack of representation and control for parents whose children attend a particular school. Where a school board is concerned with the policies of a particular school, rather than a conglomerate of schools, it will be more responsive to parental input and community needs.

Parents cannot have real choice unless they also have reliable information upon which to make the choice. Arguably, the government can fulfill a legitimate role by ensuring that parents have information about their children's progress and the academic progress of students taught by a

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300. See discussion *supra* Part IV.A (noting that education was accomplished through tutors or community employment of an educator on a yearly basis).

301. Dagostino, *supra* note 282, at 179. For example, an elementary school in a violent California neighborhood, a 93% poverty rate, and a history of academic failure dramatically increased the scores of its students on standardized tests by replacing the teaching staff. This is the type of school administration and teaching staff that should command contract renewals and merit pay rewards. Quite the contrary, when the district needed to lay off teachers due to an economic downturn, the new teachers were laid off first under a statute-mandated "last-in, first-out" policy. The connection between quality teaching and pay and retention is extremely attenuated. *Id.*

302. *Id.* at 193. Some of the more notorious examples include a Los Angeles teacher who told a student who had attempted to commit suicide that next time he should cut his wrists deeper and another Los Angeles teacher who kept pornography, marijuana, and cocaine at school. *Id.* The average cost to get rid of an incompetent teachers like these is \$500,000. *Id.* As a result, students in New York City are "protected" from the worst teachers when the school district pays the teacher for performing no service.

particular teacher and in particular schools.<sup>303</sup> This information is usually obtained through standardized testing. Only when a neutral third party oversees the testing can reliable information be assured.

#### V. CONCLUSION

The answer to whether censorship of innocent gun-related speech and play is an inculcation of community values or an unconstitutional establishment of orthodoxy depends on one's view of the role of schools. If, as the most recent Supreme Court cases seem to advocate, the state bears the responsibility to train children to be good citizens, then school officials have the role of determining what is appropriate speech and conduct. But if, in keeping with America's early history and Court decisions, it is the parents who should have the responsibility for and control over their children's education, then parents must be given realistic choice. This choice can be accomplished quickly and effectively through a universal voucher program. When parents, not government officials, determine how the child should be educated, then Justice Jackson's "fixed star" that no government official should establish an orthodoxy is realized. The judicial system is poorly suited to balancing the speech rights of children against the need of schools to maintain order. But only where educational choices are under the jurisdiction of parents can the courts justly withdraw its protection of student speech rights.

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303. Bloom, *supra* note 284, at 179 (noting that the No Child Left Behind Act of 2001 required schools to establish a way to measure that they had met yearly progress targets).