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

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I. Introduction

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

The crisis is particularly alarming as the economy shifts from one centered on the physical capacity of labor to one centered on its intellectual capacity. Thirty percent of American teenagers fail to finish high school, including nearly half of black and Latino

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teenagers. The numbers are worse in the low income, urban areas that most concern policymakers: In the District of Columbia schools, for example, less than half of students finished high school in 2000. As the economy becomes more sophisticated—and requires more sophisticated workers—a significant number of young Americans are at risk of becoming unemployable because they have an inadequate education.

A number of people have offered solutions to this problem. Yet while proposals to reform the high school curriculum to emphasize math, science, and computer skills sound nice, they will have little impact if the students they are aimed at do not respect the teachers who instruct them. In this sense, policymakers have overlooked the fact that the educational “crisis” in America is as much a “crisis in the legitimacy of school discipline” as anything else. High school students tend to perform better (both academically and in real life) when they feel that the exercise of discipline at their schools is fair. Fairness, in turn, is “a function of legitimacy and moral authority.” But the court decisions that followed Tinker v. Des Moines Independent Community School District have “eroded both student and school personnel confidence in the

6 Id. at 7.


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

10 Id. at 187.

legitimate right of a teacher or administrator to exercise discipline.” 12 That “hesitation, doubt, and weakening of conviction . . . has undermined the effectiveness of school discipline” and undermines efforts to reform the public school system today.

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

Of course, by “in loco parentis,” I do not mean to describe the English notion that parents delegate their authority over their children to school officials. Part II describes that English concept of in loco parentis and explains how it evolved into the American concept of preparing children for their civic roles in the Republic. It also tracks the way courts treated school disciplinary policies, from the laissez-faire attitude of nineteenth century judges to the skepticism of their post-Vietnam counterparts. Part III explains why reformulating the Court’s student discipline doctrine to emphasize a school’s in loco parentis responsibilities is necessary to raise academic achievement and ensure that students finish high school, the most compelling interests in modern education policy. Part IV considers the counter-arguments and explains why we

12 Id. at 169.
should not be as concerned when the government regulates speech in its non-sovereign capacity, such as when it acts as an educator. It also describes how the in loco parentis standard properly defers to the authority of school officials while prohibiting them from disciplining students in a way that promotes one viewpoint over another. Finally, Part V compares how a recent student speech cases would have been decided under the in loco parentis standard, showing that the standard can protect student speech rights better the current student speech doctrine, without compromising the ability of educators to control their classrooms.

II. Background

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

Historically, American students did not have extensive rights when they stepped through the classroom doors. This could have derived from the fact that many early American schools (especially high schools, where we might expect students to start invoking their rights) were private and therefore not subject to the First Amendment or any other constitutional provision. But attendance at even public schools was mostly voluntary. Thus, whether public or private, these schools reflected the strict English model of education, as places that parents sent their children to learn and be disciplined. Even at the college level, administrators and faculty

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13 E.g., Tyler Cowan, Public Goods & Market Failures 77 (Transaction Publishers 1992) (1988). Of course, this should not suggest that all education in America was private. The first free public school in America was established in Dedham, Massachusetts in 1644. George William Hunter & Walter G. Whitman, Civic Science in the Community 272 (American Book Company 1922). And a number of states started providing a free public education to children before the American Revolution. For example, the Massachusetts colony required that intermediate schools be established in every town that had at least fifty homes, and it required that every town of at least 100 homes have a grammar school. Id. But the schools we would compare to high schools were primarily private academies like Andover and Exeter. Id.

14 Massachusetts passed the first compulsory attendance law, but even it did not do so until 1837—fifty years after the Constitution was written. E.g., Gerald Gutek, Compulsory Education, in Historical Dictionary of American Education, at 95 (Richard J. Altenbaugh ed., 1999).

15 See Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring) (“Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their
asserted total control over students inside and outside the classroom. And through the legal doctrine of in loco parentis, courts mostly refused to get involved in the student-school relationship, instead deferring to the judgment of school officials in disciplining students and maintaining order.

But every State in the union had made education mandatory by 1918. That change in the source of school power undercut the argument that parents had delegated their disciplinary authority to schools and teachers. After all, how could a parent voluntarily delegate her authority to discipline her child to a school when the government said she had to send the child to school? Nonetheless, the in loco parentis doctrine had become so entrenched that, even after every State had passed a compulsory attendance law, courts still used the doctrine in refusing to second-guess disciplinary rules and disciplinary decisions made by school administrators.

private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled ‘a core of common values’ in students and taught them self-control.”; see also Patterson v. Nutter, 78 Me. 509, 7 A. 273, 274 (Me. 1886) (“Free political institutions are possible only where the great body of the people are moral, intelligent, and habituated to self-control, and to obedience to lawful authority. The permanency of such institutions depends largely upon the efficient instruction and training of children in these virtues. It is to secure this permanency that the state provides schools and teachers.”).


17 Morse v. Frederick, 127 S. Ct. 2618, 2630–31 (2007) (Thomas, J., concurring); see also State v. Pendergrass, 19 N.C. 365, 365–66 (1885) (describing the in loco parentis rationale and explaining that judicial review “has confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher.”); Patterson, 78 Me. 509, 7 A. at 274 (restating that, under in loco parentis, “[a] schoolmaster has the right to inflict reasonable corporal punishment”). One author has noted that judicial deference to school officials under the in loco parentis doctrine was so broad that it “amounted to blanket judicial approval for all disciplinary actions against students . . . Any rule or regulation, however broad, was enforced.” Lingering Legacy of In Loco Parentis, supra note 17, at 1147–48.


19 See Paul O. Proehl, Tort Liability of Teachers, 12 Vand. L. Rev. 723, 726–27 (1959) (challenging use of the in loco parentis rationale to justify corporal punishment in the public schools when the law mandates attendance).

20 Dupre, supra note 17, at 71–72; see also Gonyaw v. Gray, 361 F. Supp. 366, 369 (D.Vt. 1973) (“Of necessity, parents must delegate some disciplinary authority over their school children to the teachers who, among other things, are responsible for maintaining the order necessary to the educational process.”); cf. People v. Jackson, 319
That surprised a number of legal scholars, who believed that the change in the source of school authority justified destruction of the in loco parentis doctrine. But what those scholars failed to appreciate was that courts had largely abandoned the English rationale for the doctrine in favor of a uniquely American view that justified continued use of the in loco parentis doctrine as an aspect of the school’s role in “educating the young for citizenship.” That political view of in loco parentis mimicked the “social reproduction” model of education promoted by twentieth century education reformers, who argued that “the student depends on his relationship with school and teacher, much like his relationship with his parents, to provide him with the qualities necessary to be a responsible citizen.” And it must have seemed particularly appealing to courts in the 1940s and 1950s, as Americans fought fascism abroad and

N.Y.S.2d 731, 736 (N.Y. App. Term 1971) (calling in loco parentis, in the Fourth Amendment context, a doctrine “so compelling in light of the public necessity . . . that any action, including a search, taken thereunder upon reasonable suspicion should be accepted as reasonable and necessary”).

See, e.g., Proehl, supra note 18, at 726–27 (arguing that in loco parentis “hardly fits a system of compulsory public education, when neither parent nor child has any choice in the matter, and where, if order is to be maintained, an implied and irrevocable delegation of authority would have to be wrested from the parents by some legal fiction”).

West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). This view of the in loco parentis doctrine seems to have arisen out of the “social reproduction” model of schooling that education reformers promoted in the early twentieth century. See Dupre, supra note 17, at 67–68 (“In fact, the student depends on his relationship with school and teacher, much like his relationship with his parents, to provide him with the qualities necessary to be a responsible citizen in the social compact and to participate in our popular form of government.”).

See Dupre, supra note 17, at 67–68, 72 (also arguing that the Supreme Court’s pre-Tinker interpretation of in loco parentis reflected the social reproduction model of education). Do not let the fact that Professor Dupre analogizes the student-school relationship to the child-parent relationship confuse you. This political vision of in loco parentis differs from the source of power theory that drove courts in the nineteenth century: rather than stressing the source of power, it stresses the nature of the school’s responsibility to “maintain[ ] the existing democratic order.” V.T. Thayer, Formative Ideas in American Education: From the Colonial Period to the Present 319 (1966). As Dupre notes, the social reproductionists were largely influenced by Horace Mann, often called the “Father” of the American public school, who said that “[t]he theory of our government is . . . not that all men, however unfit, shall be voters . . . but that every man by the power of reason and the sense of duty [obtained through education], shall become fit to be a voter.” Dupre, supra note 17, at 69 (quoting Mann).
communism at home—institutions that government officials believed would threaten the very foundation of American democracy.\textsuperscript{24}

Then came the 1960s. A decade well known for its dramatic political and cultural changes, the ‘60s also saw a dramatic increase in educational litigation.\textsuperscript{25} Prior to 1965, few individuals used the legal system to challenge school disciplinary rules, especially at the appellate level.\textsuperscript{26} More tried from 1965 to 1968, perhaps inspired by the Fifth Circuit’s decision to enjoin Mississippi school officials from punishing students who wore “freedom buttons” at school.\textsuperscript{27} And in 1965, Congress established the Office of Economic Opportunity to lead President Lyndon B. Johnson’s War on Poverty.\textsuperscript{28} Although Congress did not initially refer to legal services when it created the OEO, the agency immediately started funding legal services for the poor\textsuperscript{29} and Congress emphasized the provision of legal services when it amended the

\textsuperscript{24} Cf. Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (concluding that the federal government could intern Japanese-Americans during World War II so long as the government’s reason for doing so did not fall short of “apprehension by the proper military authorities of the gravest imminent danger to the public safety,” a judgment that the Court deferred to). Other officials used the in loco parentis doctrine to specifically exclude Communist speakers on public schools. For example, officials at Queens College in New York used the doctrine of in loco parentis to justify banning the appearance of John Gates, editor of the socialist Daily Worker. See Seth Cagin & Philip Dray, \textit{We Are Not Afraid} 101 (2006). Indeed, in the facts that gave rise to the \textit{Tinker} case, athletic coaches at one of the Des Moines high schools suggested that the students who wore black armbands to class were Communist sympathizers who might be attacked at school for showing a “lack of patriotism.” John W. Johnson, \textit{The Struggle for Student Rights: Tinker v. Des Moines and the 1960s} 8 (1997). And in 1950, the president of the Chicago Board of Education formed a committee to study ways that teachers could promote patriotism and fight Communism in the classroom.

\textsuperscript{25} Arum, supra note 9, at 8.

\textsuperscript{26} Id. at 17.

\textsuperscript{27} Burnside v. Byars, 363 F.2d 744, 748–49 (5th Cir. 1966).


\textsuperscript{29} See Alan W. Houseman & Linda E. Perle, \textit{Center for Law & Social Policy, Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States} 7 (2003) (noting that the OEO’s first director, Sargent Shriver, funded legal services in the early days of the OEO, even though the Economic Opportunity Act did not mention such services).
Economic Opportunity Act in 1966 and 1967, creating a discrete Legal Services program in the 1967 amendments.\textsuperscript{30}

Congress did not simply authorize the provision of legal services to help poor Americans. It directed the Legal Services program to “further the cause of justice among persons living in poverty” by generally “mobilizing the assistance of lawyers and legal institutions.”\textsuperscript{31} And the men who led the program interpreted their mandate broadly, as a mission to “uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope, and ambition.”\textsuperscript{32}

Thus, in the late 1960s and early 1970s, the Legal Services program and the public interest law firms that it funded increasingly challenged school rules and administrators whose disciplinary decisions infringed students’ speech rights. Their efforts were largely fueled by young attorneys who had recent experience with the education system\textsuperscript{33} and rules that had become particularly strict and arbitrarily enforced during the first part of the Cold War and the civil rights movement.\textsuperscript{34} And they flooded the nation’s appellate courts with litigation over

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\textsuperscript{31} Economic Opportunity Amendments of 1967, 81 Stat. at 698 (emphasis added).

\textsuperscript{32} E. Clinton Bamberger, Address to the National Conference of Bar Presidents (Feb. 19, 1966), reprinted in Harry P. Stumpf, Law & Poverty: A Political Perspective, 1968 Wis. L. Rev. 694, 711–12 (1968). Clinton Bamberger was the first national director of the OEO’s Legal Services program. Arum, supra note 9, at 8.

\textsuperscript{33} Arum, supra note 9, at 17. These young attorneys included Hillary Rodham, who advocated using legal challenges as a means of children’s advocacy when she worked as an attorney for the Children’s Defense Fund. See generally Hillary Rodham, Children Under the Law, Harv. Educ. Rev. vol. 43, Nov. 1973, at 487.

\textsuperscript{34} For example, the Fifth Circuit noted in the Burnside case that, while the school prohibited students from wearing “freedom buttons,” it did not prohibit the wearing of other buttons, including buttons that promoted the Beatles rock band and buttons that contained the initials of students. Burnside, 363 F.2d at 746 n.2. And in Tinker, the Supreme Court noted that the Des Moines schools allowed students to wear all kinds of propaganda, including political
school discipline rules. While few cases challenging those rules existed before 1960, and only seventy-two appeared between 1960 and 1968, seventy-six school discipline cases per year were argued in the federal and state appellate courts between 1969 and 1975.35 As one scholar has noted, “[t]here were likely more challenges to school discipline in the case law records of 1969 and 1970 alone[ ] than in all of American history combined.”36

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

Interestingly, though, the case that sparked the decline of the in loco parentis doctrine was not brought by an organization affiliated with the Legal Services program. Rather, the case that would become known as Tinker v. Des Moines Independent Community School District was filed by Dan Johnston, a young Iowa attorney who worked in a two-person Des Moines law firm and who was active in the Iowa Civil Liberties Union.37 Johnston’s fee amounted to no more than a few hundred dollars, but he would become famous as the public face of the Tinker plaintiffs when the case made its way to the Supreme Court.

Tinker arose out of the defining event of the 1960s: The Vietnam War. The United States began fighting in Southeast Asia in 1961. By the end of 1965, 170,000 American soldiers were stationed in Vietnam and over 1,000 soldiers had died in the conflict.38 In November 1965, an estimated 25,000 people descended on Washington, D.C., to protest America’s continued campaign buttons and even the Nazi Iron Cross. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510–11 (1969).

35 Arum, supra note 9, at 18.

36 Id.

37 Johnson, supra note 23, at 62.

38 See generally id. at 1.
involvement in Vietnam. The protest was noteworthy for its moderation: Speakers included civil libertarians and civil rights leaders like Coretta Scott King, not militants or extremist student leaders. Protest monitors urged marchers to hide signs that called for such extreme positions as American surrender or withdrawal. Instead, the activists championed more moderate ideas, including a call by New York Senator Robert F. Kennedy to extend the planned Christmas truce to allow additional time for peace negotiations.

Among the 25,000 marchers were Iowa teenagers Christopher Eckhardt and John Tinker. Eckhardt and Tinker returned from the march energized. Their parents held a meeting with other community activists on December 11, 1965 to find a way for the students to express their disagreement with the nation’s Vietnam policy. They ultimately decided to wear black armbands to school as a sign of protest. The protest was scheduled to occur on Thursday, December 16, 1965—and a fellow student who attended the Tinker/Eckhardt meeting wrote an article for one of the school’s newspaper announcing the plans. However, the student’s journalism teacher refused to publish the article until the student talked with the principal or

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39 Id.
40 Id. at 2.
41 Id.
42 Johnson, supra note 23, at 2.
43 Id.
44 Id. at 3.
45 Id. at 4.
46 Id. at 5.
another school official. The student eventually spoke with two Des Moines school district officials, who said they would not allow the article to be published.

But it turned out that the article was not necessary to alert students to the protest and word about the black armbands spread throughout the Des Moines schools. Thus, on Tuesday, December 14, the principals of five Des Moines high schools, at the urging of the district’s superintendent, hastily called a meeting to determine how they would respond to the protests. They decided to ban the armbands in Des Moines’s secondary schools. Notably, the school district had never adopted a policy regarding the wearing of armbands specifically or political symbols generally: In fact, the Des Moines school board had to hold several meetings in December 1965 and January 1966 to ratify the armband ban. Rather, the high school principals based their decision on the “general school policy against ‘anything that . . . [presents] a disturbing situation within the school.’”

That did not dissuade the Eckhardts or Tinkers, though. Chris Eckhardt went to school on December 16 wearing the black armband. Knowing that the high school principals had resolved to punish anybody who wore an armband to school that day, Eckhardt immediately

47 Id. at 6.
48 Johnson, supra note 23, at 6.
49 Id.
50 Id.
51 Id.
52 See id. at 34 (noting that the school board “had not conceived the policy prohibiting armbands. The high school principals and the director of secondary education had crafted it without consultation with the board”).
53 Id. at 6.
54 Johnson, supra note 23, at 16.
turned himself in to the principal’s office.\footnote{Id. at 16–17.} One of the school officials who spoke with him tried to convince Eckhardt to remove the armband, saying that the suspension would look bad on his record, that he was “too young to have opinions,” and that “colleges didn’t accept protestors so if . . . [he] planned to go to college that . . . [he’d] better take it off.”\footnote{Id. at 17 (omissions and alterations in original) (additional quotation marks omitted).} When Eckhardt refused to remove the armband, the school suspended him.\footnote{Id. at 18.} A similar scenario played out at Harding Junior High School, where John Tinker’s sister Mary Beth was suspended for wearing a black armband to school and refusing to remove it.\footnote{Id. at 19–20.} And on Friday, December 17, John Tinker was suspended from his high school for wearing a black armband to class and refusing to remove it.\footnote{Id. at 24–25.}

The Tinkers and Eckhardts did not immediately sue the school district for violating their constitutional rights. After all, the school district did not have a formal policy that governed the wearing of armbands—the high school principals had informally decided to prohibit the wearing of armbands to protest the Vietnam War and to suspend any student who defied them as violating a school order.\footnote{Johnson, supra note 23, at 34.} The school board had to ratify the decision before the families took any legal action.\footnote{See id. at 30 (noting that “no legal challenge to school policy on armbands could be mounted until the school board had officially had the opportunity to vote on the ban”).} It did so early the next month, holding two open meetings to consider the ban before voting to uphold the policy by a 5-2 vote on January 3, 1966.\footnote{Id. at 45. The school board also held an informal (some would say “secret”) meeting between the two public hearings, where it discussed the armband policy with its attorney, Allan Herrick. Id. at 41–42. For a thorough description of all three meetings, see John Johnson’s elaborate account of the \textit{Tinker} controversy, id. at 31–47.} The Tinkers and Eckhardts,
assisted by the ACLU, filed a complaint against the Des Moines Independent Community School District in federal court on March 14, 1966, arguing that the school district’s armband policy violated the First Amendment.\textsuperscript{63}

The district court in the Southern District of Iowa dismissed the complaint. It reasoned that, while the armband wearing constituted protected symbolic speech, the school district could prohibit it.\textsuperscript{64} Interestingly, to reach that decision, the court relied on the deferential clear and present danger test that the Supreme Court used to uphold the convictions of Communist Party leaders in \textit{Dennis v. United States}.\textsuperscript{65} That test asks “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”\textsuperscript{66} The district court easily found that the school district’s actions, which it viewed as necessary to “maintaining a scholarly, disciplined atmosphere within the classroom,” met that test and were not patently unreasonable.\textsuperscript{67} It also rejected the Fifth Circuit’s judgment, delivered in \textit{Burnside}, that a school official should not infringe a student’s right to speak unless the exercise of the right “‘materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.’”\textsuperscript{68}

\textsuperscript{63} Id. at 67–68.

\textsuperscript{64} \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 258 F. Supp. 971, 972–73 (S.D. Iowa) (“\textit{Tinker I}”). For the purposes of this section, I refer to the district court’s \textit{Tinker} decision as \textit{Tinker I}, the Eighth Circuit’s decision as \textit{Tinker II}, and the Supreme Court’s decision as \textit{Tinker III}. In the rest of the article, any references to “\textit{Tinker}” refer to the Supreme Court’s opinion in the case.

\textsuperscript{65} Id. at 972; see also Allan Ides & Christopher N. May, \textit{Constitutional Law: Individual Rights}, § 8.3.2, at 323 (3d ed. 2004) (noting that, in \textit{Dennis}, the “clear and present danger test seemed to veer away from the speech-protective model” and “applied a formula that was more deferential to governmental interests”).

\textsuperscript{66} \textit{Dennis v. United States}, 341 U.S. 494, 510 (1951) (plurality opinion of Vinson, C.J.) (additional quotation marks omitted). The Iowa district court’s opinion, like many since it, quotes this language from Judge Learned Hand’s opinion for the Second Circuit in the \textit{Dennis} case, which the Supreme Court adopted. \textit{See United States v. Dennis}, 183 F.2d 201, 212 (2d Cir. 1950)).

\textsuperscript{67} \textit{Tinker I}, 258 F. Supp. at 972–73.

\textsuperscript{68} Id. at 973 (quoting \textit{Burnside}, 363 F.2d at 749).
wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court.”

A divided en banc panel of the Eighth Circuit Court of Appeals affirmed that decision.

The Tinkers and Eckhardts filed their petition for certiorari in the Supreme Court on January 17, 1968. The Court granted the petition on March 4. Notably, two of the Court’s strongest civil libertarians, Justices Hugo Black and Abe Fortas (who would eventually write the Tinker opinion), voted to deny certiorari. Fortas, for one, was not convinced at the time that the courts should second-guess disciplinary decisions made by school officials, unless the decision was clearly arbitrary or discriminatory. He would change his mind after the case was argued though and, on February 24, 1969, the Supreme Court reversed the district court’s decision. Justice Fortas wrote the majority opinion.

For a case that is almost universally regarded as destroying the in loco parentis doctrine, it is interesting that the Tinker opinion never uses that phrase. Perhaps the Court did not need to mention it. After all, it did say that “[i]t can hardly be argued that either students or teachers

69 Id.

70 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988, 988 (8th Cir. 1967) (per curiam) (“Tinker II”). There is no transcript of either oral argument that occurred before the Eighth Circuit in the Tinker case. However, John Johnson’s description of the controversy provides an excellent account of the arguments, drawn from interviews with the attorneys and parties and from the few newspaper reports that covered them, and summarizes the parties’ appellate briefs. See Johnson, supra note 23, at 110–20.

71 Johnson, supra note 23, at 123.

72 Id. at 128.

73 Id.

74 Id. at 129.

shed their constitutional rights to freedom of speech at the schoolhouse gate.” Many commentators interpreted that language as destroying the in loco parentis doctrine sub silentio. But, in reality, Tinker’s message was more subtle than that. The test it developed did not seem overly restrictive. It did not inquire into the motivation that school officials had for prohibiting certain speech. It did not even purport to challenge a school’s ability to prohibit group demonstrations, which are at the very heart of the First Amendment. Tinker merely required that a school show that the activity it was punishing “would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’” It did not need to prove those by clear and convincing evidence or even a preponderance: the Court simply demanded that school officials show that they “had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” The Des Moines schools failed that test because they punished the Tinker and Eckhardt children “for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”

76 Id. at 506.

77 See Dupre, supra note 17, at 60 (“When the Tinker Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common law doctrine of in loco parentis—slipped out the back door.”); see also Harvard Law Review Ass’n, The Supreme Court, 1984 Term: School Searches, 99 Harv. L. Rev. 1, 235 & n.13 (1985) (recapping the Court’s “rejection of the in loco parentis doctrine”).

78 See Tinker III, 393 U.S. at 508.

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

80 Tinker III, 393 U.S. at 509 (quoting Burnside, 363 F.2d at 749).

81 Id.

82 Tinker III, 393 U.S. at 508 (emphasis added).
Moreover, the *Tinker* decision was as much a product of its times as anything else, a reaction against blatant viewpoint-based discrimination regarding a sensitive topic. For example, the Court noted that the school district had not prohibited the wearing of other symbols at school but rather convened quickly to prohibit the expression of a politically unpopular opinion regarding the Vietnam War. And the school district apparently had no problem with student expression that promoted American involvement in the Vietnam War. Christopher Eckhardt recalled that the gym teachers and coaches at Roosevelt High School encouraged students to chant “Beat the Vietcong” during their calisthenics exercises after news broke of the armband plan. The majority criticized the Des Moines school district for the double-standard, saying that schools “may not be enclaves of totalitarianism,” where school officials have total control over their students and transform them into “closed-circuit recipients of only that which the State chooses to communicate,” those messages that are “officially approved.” This country did not develop its school systems to “‘foster a homogenous people.’”

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

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

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83 *Id.* at 510–11.

84 *Johnson,* supra note 25, at 7–8. One of the coaches later said that this chant sprang from the students themselves but that the coaches decided not to stop the chant because the students were “proving their Americanism.” *Id.* at 8 (additional quotation marks omitted).

85 *Id.* at 511.

86 *Id.* at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

87 See, e.g., *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977) (arguing that *Tinker* put the burden on school officials to show a “reasonable basis for interference with student speech” where “bare allegation that such a basis existed” will not suffice and concluding that, in a situation that involves potential psychological disruption, *Tinker* required that the school demonstrate that the psychological harm would have been “significant” (emphasis added)).
Fraser arose out of a high school assembly speech filled with sexual innuendo. The facts of the case were very simple. The student, a seventeen year-old high school senior named Matthew Fraser, delivered the following speech to nominate a classmate for a student government position:

I know a man who is firm-he's firm in his pants, he's firm in his shirt, his character is firm-but most of all, his belief in you, the students of Bethel is firm.
Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts-he drives hard, pushing and pushing until finally-he succeeds.
Jeff is a man who will go to the very end-even the climax, for each and every one of you. So vote for Jeff for ASB vice-president-he'll never come between you and the best our high school can be.

Predictably, some students responded to the speech in a raucous manner. Some “hooted and yelled.” Some graphically simulated the sexual acts that Fraser’s speech alluded to. Others just seemed bewildered and embarrassed by Fraser’s remarks, causing at least one teacher to cancel part of her lesson the next day to discuss the speech.

The day after he delivered his speech, Fraser was called to the assistant principal’s office and given notice that the school would suspend him for violating its disruptive conduct policy. That rule prohibited students from engaging in conduct that materially and substantially interfered with the educational process, “including the use of obscene, profane language or

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

89 Id. at 1359.

90 Id.

91 Id. at 1360.

92 Id. at 1357.
The assistant principal gave Fraser an opportunity to explain his conduct, then suspended him for three days and denied him a chance to speak at his commencement ceremony.\footnote{Id. & n.1.}

After filing a grievance action with the superintendent of the school district (which was denied), Fraser sued the Bethel School District.\footnote{Fraser II, 755 F.2d at 1357.} The district judge determined that the school district had violated Fraser’s First Amendment rights by punishing him for delivering the speech.\footnote{Id. at 1358.} The Ninth Circuit affirmed that decision. In its view, the school district “failed to carry its burden of demonstrating that Fraser’s use of sexual innuendo in the nominating speech substantially disrupted or materially interfered in any way with the educational process.”\footnote{Id. at 1359.} Although Fraser’s speech had elicited a lively response from the student audience, the court seemed to think that most school assemblies produce some kind of response from their audience, and it found no evidence to suggest that Fraser’s speech caused disorder or delayed the assembly in any way.\footnote{Id. at 1360.} And the fact that several teachers and school officials found Fraser’s speech “inappropriate” did not concern the court: “The mere fact that some members of the school community considered Fraser’s speech to be inappropriate does not necessarily mean it was disruptive of the educational process. The First Amendment standard \textit{Tinker} requires us to apply is material disruption, not inappropriateness.”\footnote{Id. at 1361.} The court also refused to give the school district
the authority to prohibit “indecent” speech in the school setting, saying that it “fear[ed] that if school officials had the unbridled discretion to apply a standard as subjective and elusive as ‘indecency’ in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.”

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

But rather than simply justify its decision under Tinker, as Justices Blackmun and Brennan would have done, the Court wrote sweepingly about the school’s authority to promote “‘fundamental values necessary to the maintenance of a democratic political

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


102 Id.

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

104 See id.
system.”105 These values included consideration of the “sensibilities of others, and, in the case of a school, the sensibilities of fellow students.”106 Why give the school boards the authority to operate a heckler’s veto system?107 The Court justified its decision under the modern in loco parentis doctrine, the version that reflected the reproductive model of “[p]ublic education [as] prepar[ing] pupils for citizenship in the Republic . . . inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government.”108 Under that doctrine, the Court deferred to the schools’ authority in “teach[ing] by example the shared values of a civilized society,” including the determination that “civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.”109

Fraser’s revival of the in loco parentis doctrine marked an important step in the Court’s treatment of student rights cases. Although the Court had discussed the doctrine a year earlier when it upheld the right of schools to search students for drugs based only on reasonable suspicion and without a warrant,110 it rejected the doctrine as “in tension with contemporary reality and the teachings of this Court.”111 Chief Justice Burger’s majority opinion in Fraser

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

106 Id. (emphasis added).

107 Under the heckler’s veto theory, courts have refused to give the government authority to prohibit or punish speech based solely on the reaction of third parties to the speech. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33 (2004) (Rehnquist, C.J., and O’Connor, J., concurring) (“[T]he mere fact that he disagrees with this part of the Pledge [of Allegiance] does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress.”).

108 Fraser III, 478 U.S. at 681 (quoting C. Beard & M. Beard, New Basic History of the United States 229 (1968)).

109 Id. at 683.


111 Id. at 336.
challenged that statement and instead “recognized the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”\(^\text{112}\)

Unfortunately, while invoking the in loco parentis rationale, the Chief Justice’s opinion seemed more concerned with the sexual character of Fraser’s speech, perhaps reflecting the Chief’s personal concerns about teaching human sexuality in the classroom. For example, the Chief Justice described Fraser as a “confused boy” whose “plainly offensive speech” was “acutely insulting to teenage girl students” and potentially “damaging” to the assembly’s less mature audience.\(^\text{113}\) He compared the sexual innuendo in Fraser’s speech to sexually explicit speech, which the Court has given States broad authority to regulate with respect to minors,\(^\text{114}\) although other justices noted that Fraser’s speech did not come near the explicitness of speech regulated in cases like Ginsberg v. New York\(^\text{115}\) and FCC v. Pacifica Foundation\(^\text{116}\)\(^\text{117}\).

Burger’s obsession with the sexual character of Fraser’s speech trivialized his revival of the in loco parentis doctrine. It also caused enormous confusion in the lower courts. Some courts read Fraser to only apply to lewd or indecent speech, speech characterized by its sexual and offensive content.\(^\text{118}\) Others read Fraser as hinging not on the content of the message being conveyed but on the manner and location of its delivery, more tied to the inherent disruptiveness

\(^{112}\) Fraser III, 478 U.S. at 684.

\(^{113}\) Id. at 683–84.

\(^{114}\) Id. at 684–85.

\(^{115}\) 390 U.S. 629 (1968).


\(^{117}\) Fraser III, 478 U.S. at 689 (Blackmun and Brennan, JJ., concurring).

\(^{118}\) See Saxe v. State College Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001) (“According to Fraser, then, there is no First Amendment protection for ‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech in school.”).
of the speech than the message delivered.\textsuperscript{119} Some read Fraser both ways. The Ninth Circuit panel in Morse v. Frederick, for example, construed Fraser as allowing schools to prohibit “sexual speech,” but it never seemed to figure out whether that inquiry focused on the content or the manner of the speech, highlighted by the fact that the panel distinguished the “sexual nature” of the speech that disrupted the school assembly and thus was not protected in Fraser with the “political viewpoint of the speech protected in Tinker.”\textsuperscript{120}

Of course, a few judges recognized that the Fraser analysis, with its revival of in loco parentis, suggested that “the Government’s interest in protecting children extends beyond shielding them from physical and psychological harm” and encompasses protecting children “from exposure to materials that would ‘impair[] [their] ethical and moral development.’”\textsuperscript{121} But those judges were the exception to the rule. Indeed, just two years after the Court decided Fraser, in the final installment of the Court’s student speech trilogy, Justice Byron White interpreted Fraser in extremely narrow terms, holding that “a student could be disciplined for having delivered a speech that was ‘sexually explicit’ but not legally obscene at an official school assembly, because the school was entitled to ‘disassociate itself’ from the speech in a manner that would demonstrate to others that such vulgarity is ‘wholly inconsistent with the

\textsuperscript{119} See E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) (“Fraser speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.”); see also Brief of Respondent at 26, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278) (“In short, Fraser is a case about lewd speech that caused actual disruption in a school-sponsored assembly containing a captive audience of adolescent students. None of those factors is present here. Frederick’s speech was not lewd or sexually suggestive. It did not cause actual disruption, and it did not take place in a school-sponsored speech forum.”).

\textsuperscript{120} Frederick v. Morse, 439 F.3d 1114, 1119 (9th Cir. 2006) (emphasis added) (additional quotation marks omitted).

'fundamental values' of public school education.” He never mentioned the words *in loco parentis*.

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

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

Drug use by high school students peaked in the 1970s and early 1980s: in 1985, more than a quarter of children between the ages of 12 and 17 reported using an illicit drug, thirteen percent within the previous month. Particularly alarming was the changing character of drug use by high school students and the ease with which they could obtain and use drugs. While children in the 1970s might have retreated to their basements to smoke pot and burned incense to cover up the strong smell, children in the 1980s and 1990s could achieve a similar high by quickly ingesting cocaine or amphetamines. Students increasingly used and dealt drugs at school—a situation that the Supreme Court responded to by allowing school officials to conduct warrantless searches of their students on less than probable cause. Of course, it was easy to

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

125 See New Jersey v. T.L.O., 469 U.S. 325, 339–42 (1985). In *T.L.O.*, a teacher had found two girls smoking cigarettes in a school restroom during school hours. *Id.* at 328. A subsequent search of T.L.O.’s purse revealed marijuana, a pipe, several small plastic bags used to distribute marijuana, and a “substantial quantity” of money in dollar bills. *Id.*
understand the Court’s decision to downplay the privacy rights of children in *T.L.O.*: Drug use and drug dealing that occurred on school grounds was illegal and few people believed that a school district should not have the authority to combat illegal activity on school grounds based on reasonable suspicion. But what about drug use that occurs in the family basement, with drugs that the students bought on the street, not in the school halls? In Vernonia, Oregon, for example, school officials maintained that drug use generally led to an increase in discipline problems: Students acted more violently at school and became increasingly rude during class. Football players, who coaches feared were leading the drug culture, seemed to suffer more severe injuries than normal and react more slowly on the playing field. Searching those students for drugs did not solve anything since the drugs were rarely used or dealt at school. But did the school’s concerns for the health of those student athletes give the school the right to test them for drugs without any suspicion whatsoever?

The Supreme Court said yes. In doing so, it relied on the reduced expectation of privacy that students have when they participate in interscholastic athletics. After all, “[s]chool sports

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

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

128 Id. at 649.

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

130 Id. at 657.
are not for the bashful,” the Court said. “They require ‘suiting up’ before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.” Of course, the fact that student athletes got naked in the locker room seems to have little bearing on whether they had a legitimate expectation in not having their urine tested for drugs. So Justice Antonin Scalia, who wrote the majority opinion in Vernonia, relied on more than that. He argued that, while the Court had “rejected the notion that public schools, like private schools, exercise only parental power over their students,” it had “emphasized[] that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” And he reformulated the in loco parentis debate, stating that, while schools do not have a general “‘duty to protect’” their students, they frequently must act “in loco parentis, with the power and indeed the duty to ‘inculcate the habits and manners of civility.’” That interest justified the school in taking reasonable steps to prevent drug use among its students.

Interestingly, Scalia’s discussion of the in loco parentis rationale was probably unnecessary to resolve Vernonia: students who wished to play football at the high school had to submit to a preseason physical exam and give a urine sample, and they had to comply with all sorts of rules governing their conduct, grades, dress, and insurance coverage. In that sense, they had voluntarily chosen to participate in a heavily regulated industry, to which the Court has

131 Id.
132 Id. at 655.
133 Vernonia, 515 U.S. at 655 (quoting DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989)).
134 Id. (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 684 (1986)) (additional quotation marks omitted).
135 Id. at 657.
traditionally given more leeway in search and seizure cases. But Scalia’s opinion sent a clear message. The Court would not just defer to school policies that combated drug use because drug use disrupted the educational process. Rather, schools had an interest in deterring drug use by children because drugs were bad for them.

III. Using In Loco Parentis to Improve Academic Achievement and Better Prepare Students for The New Economy

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

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

137 Vernonia, 515 U.S. at 661–62.

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

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

140 Arum, supra note 9, at 13.
ability of public schools to adequately prepare American children for the challenges they will face in the twenty-first century.

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

To be fair, there is some dispute in social science and policy circles about whether American education is really suffering from a “crisis.” On the one hand, Jay Greene and Marcus Winters—respected researchers at the Manhattan Institute who have been studying and writing about education issues for years—report that nearly 30 percent of teenagers failed to earn a high school diploma in 2002, including nearly half of African-American and Hispanic students.141 But an economist at the Economic Policy Institute has criticized those figures and called the conventional belief that America is in an education crisis “exaggerated.”142 He cites U.S. Census Bureau data that indicates that 80 to 90 percent of Americans have a high school diploma, including 70 to 80 percent of African Americans.143 Regardless of who has more accurate data, the fact remains that American teenagers do not demonstrate the same level of academic achievement as their international counterparts.144

For example, the Organisation for Economic Co-operation and Development (OECD), a consortium based in Paris that studies and compares economic and social statistics in its 30

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143 Id.

member countries,\textsuperscript{145} calculates the secondary school completion rate at 76 percent for American students.\textsuperscript{146} That ranks lower than the 82 percent average in OECD member countries and significantly lower than the 87 percent average in the OECD’s European Union members.\textsuperscript{147} The percentage of American students finishing secondary school surpassed just four of the twenty-two OECD nations that reported secondary-school completion rates: Mexico, New Zealand, Spain, and Turkey.\textsuperscript{148} And those graduation rates capture only part of the problem: A recent study showed that just 34 percent of American students who entered high school as the Class of 2002 finished high school ready to attend college.\textsuperscript{149}

The gap between American students and their international counterparts is particularly alarming because the global economy has shifted from one based on the physical capacity of the workforce to one based on its intellectual capacity. According to one report, 67 percent of today’s new jobs require some sort of post-secondary education or training—a number that is only expected to rise.\textsuperscript{150} As a result, “meeting high educational standards has become a prerequisite for economic growth and social inclusion in the 21st century” and the failure to meet

\textsuperscript{145} See generally About the OECD, \url{http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html} (last visited Nov. 14, 2007).


\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Greene & Winters, supra note 160, at 8. By “college-readiness,” Greene and White mean that a student cleared three hurdles. First, she must have received a regular high school diploma. Second, she must have passed four years of English, three years of math, and two years each of a natural science, social science, and foreign language. Finally, the student must have been “basically literate,” demonstrated by testing at least at the basic level of the reading assessment offered by the National Assessment of Educational Progress (NAEP). Id. at 6–7.

\textsuperscript{150} Achieve, supra note 5, at 7.
those standards leaves workers with little chance of finding a good-paying job. The OEC found that, in 2005, just 57 percent of the American workforce had less than a high school education. And even those who do find jobs face a less stable economic environment.

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

B. The Connection Between Academic Achievement and Student Discipline

Policymakers have offered a number of solutions for narrowing the achievement gap between American teenagers and their international counterparts. They have thrown money at the problem: In 2004, for example, the United States spent more than $8,000 per student at the elementary level and more than $10,000 per student at the secondary level. Only Luxembourg spent more at both levels. They have designed rigorous curricula and graduation requirements, asking that all students complete a program that adequately prepares them for


152 OECD, supra note 165, at 137.

153 Id. at 125.

154 Achieve, supra note 5, at 5.

155 OECD, supra note 165, at 173.

156 Id.
either college or knowledge-based work. And they have demanded more from elementary educators, believing that the best way to improve high school achievement is to make younger kids smarter.

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

Of course, the connection is not as clear-cut as some of those scholars suggest. Discipline does not necessarily equate with higher achievement in part because “discipline” is so ill-defined. For instance, some scholars have suggested that using “strict disciplinary practices, such as corporal punishment, could lead to lower educational achievement and higher rates of delinquency.” And, in fact, studies have shown that authoritarian disciplinary practices often alienate students, weakening their intellectual curiosity, deadening their interest in educational

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


159 See, e.g., Greene & Winters, supra note 160, at 10 (“[W]e cannot increase attendance at four-year colleges without addressing the problems of the K-12 education system.”).

160 Arum, supra note 9, at 32.

161 Id.

162 Id. (citing James Samuel Coleman & Thomas Hoffer, Public & Private High Schools (1987)).

163 Id. at 33 (citing Wayne Welsh, Patricia Jenkins, & Jack Greene, Center for Public Policy, Building A Culture and Climate of Safety in Public Schools in Philadelphia: School-Based Management & Violence Reduction (1997)).
subject matter, and suppressing their desire to learn.\textsuperscript{164} Recall the final scene of \textit{Dead Poets Society}, where students read dryly from a book of nineteenth century poetry after an authoritarian school official fired their beloved teacher, seeming to care less about a subject that had enthralled them.\textsuperscript{165}

In fact, students accept some form of discipline as necessary and will often tolerate strict disciplinary policies.\textsuperscript{166} But they will not accept unfair disciplinary policies.\textsuperscript{167} Thus, education scholars have missed the more important question in these cases: Whether school discipline, regardless of its strictness, is effective. The \textit{effectiveness} of discipline often hinges on the degree to which students accept and internalize school rules.\textsuperscript{168} Richard Arum’s research, for example, shows that students are most responsive when they perceive discipline as both “fair and relatively strict.”\textsuperscript{169} These students’ schools succeeded “in promoting educational achievement and youth socialization. Students . . . were more likely to demonstrate commitment to the educational process, and had better grades and higher test scores. They were also less likely to assert that it was acceptable to disobey rules or to report being arrested as adolescents.”\textsuperscript{170}

\begin{footnotes}
\item[164] See id. at 32–33.
\item[165] \textit{Dead Poets Society} (Touchstone Pictures 1989).
\item[166] See \textit{Arum, supra} note 9, at 31–32 (“As students reported increasing levels of the strictness of school discipline, higher levels of fairness were also reported up to a certain point.”).
\item[167] See id. at 31. Arum’s research shows that, “[a]s students reported increasing levels of the strictness of school discipline, higher levels of fairness were also reported up to a certain point. When students reported the highest levels of school strictness, however, they said that discipline was applied less fairly than when school discipline was reported at a more moderate level of strictness. This curvilinear association suggests that students believed that increased strictness was legitimate at moderate levels; if discipline became too strict, however, it was often viewed as authoritarian and lost some of its legitimacy.” Id.
\item[168] Id. at 33.
\item[169] Id. at 34.
\item[170] Id. at 34.
\end{footnotes}
the other hand, students in overly strict schools who considered disciplinary practices authoritarian, unfair, and illegitimate “yielded negative consequences in certain areas: Students . . . had lower grades, were more apt to report a willingness to disobey rules, and [had] a higher incidence of arrests.”

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

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

Those findings pose significant hurdles for a country trying to shrink the achievement gap that exists not only between American students and their international counterparts abroad, but between racial groups at home. In order to eliminate those trends, we need to understand why school discipline is ineffective. The Supreme Court can answer that question by looking in

171 Id.

172 Arum, supra note 9, at 179.

173 Id. at 180.

174 Id. at 180–81.

175 Id. at 181.

176 See, e.g., Harold Berlak, Race and the Achievement Gap, Rethinking Schools, vol. 15 no. 4 (2001) (“That there is a race gap in educational achievement is not news. Large numbers of the nation’s children leave school, with and without high school diplomas, barely able to read, write, and do simple math. But the failures of the schools are not evenly distributed. They fall disproportionately on students of color.”).
the mirror. As Arum explains, “discipline is often ineffective—and at times actually
counterproductive or detrimental to students—because the schools’ legitimacy and moral
authority have been eroded.”^177 Court rulings that overturned school disciplinary decisions have
driven that erosion in authority.^178

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

Few people would argue that the Supreme Court reached the wrong result in **Tinker**. The
Des Moines school board’s decision to punish a few good kids for passively expressing
themselves on the most important social issue of the day seemed arbitrary and unjust, a view
reinforced by the fact that the rule the students purportedly violated was surreptitiously drawn up
by high school principals after they learned of the armband plan.^179 But the disruption standard
that the **Tinker** majority used to invalidate the suspensions sent the wrong signals to students and
lower courts. It seemed to say that school officials could only prohibit speech (or expressive
conduct) when the speech would disrupt the educational process. And mere disruption was not
enough: The speech had to **materially and substantially** disrupt the educational process, an
inherently vague standard that gave lower courts a broad license to second-guess the judgment of
school officials.

Those courts often decided on their own what constituted a material and substantial
disruption, without paying serious attention to what school officials thought. No court
showcased that flexibility more zealously than the Ninth Circuit in **Fraser**. The Bethel School

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^177 Arum, *supra* note 9, at 181.

^178 *Id.* at 4; *see also id.* at 13 (“The reason that ‘adversarial legalism’ has been so costly with regard to school
discipline is that the legal challenges produced not only changes in organizational practices, but also undermined the
legitimacy of a school’s moral authority more generally.”).

^179 *See* Johnson, *supra* note 23, at 6 (describing the meeting).
District understood Tinker’s message perfectly when it erected a policy that prohibited conduct that “materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures.”\textsuperscript{180} Furthermore, it offered plenty of evidence to show that Matthew Fraser’s speech had actually disrupted the educational process.\textsuperscript{181} And, indeed, the Ninth Circuit agreed that Fraser’s speech evoked a “lively and noisy response from the students,” including “sexually suggestive movements.”\textsuperscript{182} But it disagreed with school officials about the extent of the disruption, concluding that the level of disruption was not material or substantial enough to justify Fraser’s punishment. For instance, the court determined that the school “had no difficulty in maintaining order during the assembly,” suggesting that nothing short of bedlam would meet Tinker’s disruption standard.\textsuperscript{183}

The flexibility that Tinker gave lower courts to overturn school discipline signaled to students that they should challenge their school officials’ decisions.\textsuperscript{184} The signal worked: While only seventy-two school discipline cases reached the nation’s appellate courts between 1960 and 1968, an average of seventy-six per year reached the appellate courts in the six years following Tinker.\textsuperscript{185} The sheer cost of that litigation, combined with the legal training that schools had to give school officials to guard against imposing unconstitutional discipline, chilled

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\textsuperscript{180} Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 n.1 (9th Cir. 1985).
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\textsuperscript{181} See id. at 1360 (describing how some students hooted and hollered during Fraser’s speech and how one teacher spent ten minutes of class time the next day discussing Fraser’s speech because that was all her students wanted to talk about).
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\textsuperscript{182} Id. at 1360.
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\textsuperscript{183} See id. at 1360.
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\textsuperscript{184} See Arum, supra note 9, at 15 (“Successful legal challenges to school authority taught students that school rules were indeed violatable.”).
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\textsuperscript{185} Id. at 18.
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disciplinary responses to student misbehavior.\textsuperscript{186} So did the fact that, by establishing a constitutional standard to measure school disciplinary procedures, the Court opened up the possibility that school officials would be held personally liable for the monetary damages that a student suffered as a result of impermissible discipline.\textsuperscript{187} Rather than risk exposure to a damages award, school officials simply chose not to discipline students.\textsuperscript{188} That caused teachers

\textsuperscript{186} See id. at 84 ("Court challenges to school discipline imposed significant financial burdens on school systems, both in terms of the cost of hiring lawyers and the time spent by school officials in answering these challenges."). For example, in one recent student speech case, school officials were so concerned about a potential lawsuit that, after removing a student from class for wearing an inflammatory, anti-gay tee shirt, the school officials refused to suspend him, even though the student repeatedly asked them to suspend him. See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1173 (9th Cir. 2006) ("Harper was not suspended, no disciplinary record was placed in his file, and he received full attendance credit for the day.").

\textsuperscript{187} See Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding "that a school board member is not immune from liability for damages . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student"). Naturally, school officials have qualified immunity to shield them from such liability, so long as they do not violate clearly established law. E.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). But some lower courts that are over-concerned with protecting student speech rights have used the student speech doctrine to reject qualified immunity claims. For example, the Ninth Circuit held Alaska principal Deborah Morse personally liable for damages suffered by Joseph Frederick when she suspended him for refusing to take down his "Bong Hits 4 Jesus" banner. Frederick v. Morse, 439 F.3d 1114, 1124 (9th Cir. 2006). The Ninth Circuit panel reasoned that Morse had studied an "advanced school law course" that discussed Tinker, Fraser, and Hazelwood School District v. Kuhlmeier, the third case in the Supreme Court’s student speech trilogy, and therefore determined that she violated Frederick’s clearly established constitutional rights. Id. at 1124–25 (additional quotation marks omitted). Of course, in its zeal to hold Morse personally liable for Frederick’s damages, the court misjudged the fact that, while Morse may have known that she could not punish Frederick for exercising his speech rights absent special justification (be it actual or threatened disruption, school sponsorship, or the speech’s lewd nature), it was almost impossible for a reasonable person to know that she violated a clearly established right when the student speech doctrine involves such nuanced and complicated factual determinations. See Morse v. Frederick, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (explaining how, “unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply,” which suggested that the law Morse purportedly violated was not clearly established); cf. Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity "provides [ ] protection to all but the plainly incompetent or those who knowingly violate the law"). The court’s error may have resulted from the fact that it thought the case was easy to decide. See id. at 1124–25 (denying qualified immunity to Morse because “[t]he law of Tinker, Fraser, Kuhlmeier, Burch, and McMinnville is so clear and well-settled that no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful. In fact, there is nothing in the authorities that justifies what the school did, and no reasonable official could conclude otherwise” (footnote omitted)). Whatever the reason, the Supreme Court did not reach the merits of the qualified immunity issue when it decided the case because it found no constitutional violation in the first place.

\textsuperscript{188} See Arum, supra note 9, at 13.
to lose control of their classrooms as well.\textsuperscript{189} For example, one high school English teacher recounted how she caught a student (the son of a neurosurgeon) cheating on his exam, by holding an open book on his lap during the test.\textsuperscript{190} By the time the teacher made it to the student’s desk, he had put the book back onto the floor.\textsuperscript{191} She sent the student to the principal’s office but the principal, concerned about a potential lawsuit, summoned the teacher instead and asked for documentary proof that the student had cheated before the school took any action.\textsuperscript{192} In another case, Jeffrey Gerstel, a special-education teacher in New York City pulled a student out of his classroom after the student threatened to kill an assistant teacher.\textsuperscript{193} As he was doing so, the boy collided with a bookcase and cut himself.\textsuperscript{194} Gerstel was summoned by the school to a hearing, where the student’s mother announced her intention to sue the school district.\textsuperscript{195} The mother eventually settled her claim with the school out of court, but other damage had been done.\textsuperscript{196} The student went back into Gerstel’s classroom and tormented the teacher for the rest of the year: Anytime Gerstel tried to assert control over his classroom, the students would taunt him with chants of, “I’m going to get my mother up here and bring you up on charges.”\textsuperscript{197}

\textsuperscript{189} Id. at 149–51.
\textsuperscript{190} Id. at 151.
\textsuperscript{191} Id.
\textsuperscript{192} See id.
\textsuperscript{194} See id.
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} See id.
Those may have been foreseeable consequences. After all, we typically prefer to overprotect speech rights and chill the government from punishing other speakers than underprotect the rights and chill people from speaking\textsuperscript{198} and we accept that placing the burden on the government will have financial and administrative costs. But the Tinker majority did not foresee the effect its disruption standard would have on school discipline generally. As noted earlier, the effectiveness of school discipline often turns on the degree to which students accept the legitimacy of school rules and the moral authority of school leaders.\textsuperscript{199} Tinker’s vague and malleable standard, which made judges, not school officials, the ultimate arbiters of proper discipline, undermined that legitimacy and moral authority.\textsuperscript{200} The variation in decisions that Tinker engendered also made it more difficult for schools to implement new disciplinary policies.\textsuperscript{201} But schools could not abandon their disciplinary policies altogether so, in an attempt to guard against student lawsuits, they reduced the use of extreme punishments like expulsion and instead disciplined students extensively with short-term suspensions.\textsuperscript{202} That might have seemed great to students who frequently misbehaved or behaved so poorly that they would have

\textsuperscript{198} For example, the Supreme Court has relaxed its discretionary rule that a party cannot invoke the constitutional rights of third parties in the First Amendment context, allowing an individual whose own conduct is not constitutionally protected to challenge a state policy as facially invalid. As one professor argues, this policy seems to reflect “[t]he special status of First Amendment claims.” See Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 282–83 (1984).

\textsuperscript{199} Arum, supra note 9, at 33.

\textsuperscript{200} Id. at 4.

\textsuperscript{201} Id. Although Tinker enabled courts to routinely second-guess the discipline decisions made by school administrators, the student speech doctrine’s flexibility posed more basic problems. As Arum notes, not all school discipline lawsuits favored students. Rather, “U.S. court decisions have varied over time and across jurisdictions . . . some have tended to favor students, some school authorities.” Id. According to Arum’s research, the chance that a student would win a school discipline case peaked at 49 percent in the mid- to late 1960s. Id. at 88. The likelihood of student success has dropped since then, hovering in the 35 to 40 percent range since the early 1980s. Id. But the mere “variation in the direction of court decisions was partly responsible for the difficulties schools encountered when they attempted to implement disciplinary practices that fostered both learning and effective socialization.” Id. at 4.

\textsuperscript{202} Id. at 13.
been threatened with expulsion in earlier years, but it made school discipline seem less fair, more arbitrary, and unjust.\footnote{Id. at 31, 33 (“[W]hen courts were supportive of student rights, students reported that school discipline was both less strict and less fair: that is, schools were less likely to apply discipline and the limited discipline they did apply was considered even less legitimate than elsewhere.”).} Students did not internalize or respect school rules and, as a result, discipline was ineffective—even when it was justified.\footnote{See id. at 33 (“For discipline to be effective, students must actually internalize school rules. This internalization occurs much more readily when school discipline is equated with the legitimately exercised moral authority of school personnel.”).}

The \textit{Tinker} majority did not intend those consequences. Indeed, the disruption standard that so many courts have culled from \textit{Tinker} was not even necessary to decide the case. The Des Moines school board did not violate the Constitution because it could not demonstrate disruption: It violated the Constitution because it favored one expression over another. Its policy only prohibited the wearing of black armbands, a particular symbol that students wore to school to express their disagreement with the Vietnam War.\footnote{Tinker, 393 U.S. at 510–11.} The Des Moines schools allowed students to wear other expressive symbols, including political campaign buttons and even the Nazi Iron Cross.\footnote{Id. at 510.} And they apparently had no problem with student expression that promoted American involvement in the Vietnam War. Christopher Eckhardt recalled that the gym teachers and coaches at Roosevelt High School encouraged students to chant “Beat the Vietcong” during their calisthenics exercises after news broke of the armband plan.\footnote{Johnson, supra note 23, at 7–8. One of the coaches later said that this chant sprang from the students themselves but that the coaches decided not to stop the chant because the students were “proving their Americanism.” Id. at 8 (additional quotation marks omitted).}
As Justice Fortas recognized, that differential treatment of messages represented a classic form of viewpoint discrimination,\footnote{See Tinker, 393 U.S. at 510–11 (“[A] particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” (emphases added)).} which the First Amendment has always prohibited, regardless of context.\footnote{See, e.g., Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (‘‘The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’’).} The difference in treatment was especially inappropriate in the public school setting, since states did not develop public schools to “foster a homogenous people”\footnote{Tinker, 393 U.S. at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).} or to be “enclaves of totalitarianism,” where school officials have total control over their students and transform them into “closed-circuit recipients of only that which the State chooses to communicate.”\footnote{Id. at 511.} Then disruption came in. Justice Fortas wrote that, “[i]n order for . . . school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”\footnote{Id. at 509 (emphasis added).} In other words, a school could curtail a particular message when it could reasonably forecast that the speech “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”\footnote{See id. (additional quotation marks omitted).} But Justice Fortas did not believe that disruption was the only interest that could justify discipline that restricted speech. Why? Because his opinion explicitly did not address “regulation of the length of skirts or the type of clothing, [ ] hair style, or deportment,” all of which the Tinker majority suggested a school could regulate consistent with
the First Amendment, regardless of whether the regulated conduct “disrupted” school activities. The fact that Justice Fortas considered clothing regulations to be distinct from the regulation at issue in Tinker indicates that the Tinker majority did not intend to limit a school’s ability to discipline its students to situations where the student’s conduct disrupted the educational process. It simply identified disruption as one interest that would justify schools in punishing students for conduct that included constitutionally protected speech.

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

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

214 See Tinker, 393 U.S. at 507–08 (citing Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697 (5th Cir. 1968)). In Ferrell, three students were denied admission into their high school because they wore Beatles-style mop tops, which they insisted were necessary to operate their band, “Sounds Unlimited.” Ferrell, 392 F.2d at 698–99 & nn.1–2. In fact, the students’ contract with their band manager required that they “maintain their dress and personal [sic.] appearance in conformity with accepted STANDARDS and CUSTOMS OF ROCK & ROLL GROUPS, COMBOS & BANDS including so called BEATLE TYPE HAIR STYLE.” Id. at 698 n.2 (capitalization in original). And the Fifth Circuit assumed that the students’ wearing of the hair style was constitutionally protected expression. Id. at 702. Although the school’s principal recited previous incidents involving students who wore Beatles-style hair cuts, including “one occasion [where] a group of boys in his school had decided that a classmate's hair was too long and that they were going to take the matter in their own hands and trim it themselves” id. at 700–01, the Fifth Circuit upheld the school’s actions because it did not consider them arbitrary, unreasonable, or discriminatory, id. at 703. The element of disruption, although it may have been relevant to the Court’s determination that the principal had not acted unreasonably, was not required for the school to punish the students (in fact, a skeptical court like the Ninth Circuit’s Fraser panel would probably have viewed the “disruptions” cited by the school principal in Ferrell as unpersuasive).

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

Simply giving officials that authority, and removing the cloud of judicial activism that currently hovers over school discipline, would have a profound effect in the school setting.

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216 See *Goss v. Lopez*, 419 U.S. 565, 579 (1979) (extending minimum due process protections, including notice and an opportunity to be heard, to students facing even minor suspensions).

217 In a way, the *in loco parentis* standard is a twist on the time, place, and manner analysis that the Supreme Court traditionally uses to review content-neutral regulations that restrict speech in a particular public setting. See, e.g., *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 764 (1994) (reiterating that the Court reviews content-neutral regulations that govern conduct in a traditional public forum for “whether the time, place, and manner regulations were narrowly tailored to serve a significant governmental interest” (additional quotation marks omitted)). I based the model on this test because regulations in the school setting, by their nature, only affect speech in a particular setting and leave open many alternative channels of communication—a point I will return to in Part IV of this Article. Given how deferentially the Court typically applies the time, place, and manner test, I assume that it would probably recognize any non-discriminatory educational interest as significant enough to meet the test. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1368 (2006) (“[B]oth the ‘time, place, or manner’ and ‘content-neutral’ labels have essentially become terms of art to express a conclusion by the Court that a given regulation will be subjected to a fairly deferential level of scrutiny.”). Thus, the *in loco parentis* model would merely measure whether the disciplinary policy was so patently unreasonable that the Court had no reason to defer to the school officials’ judgment in developing it. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (“[T]he requirement of narrow tailoring [in the time, place, and manner analysis] is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation” and “[i]f the means chosen are not substantially broader than necessary to achieve the government’s interest.” (omission in original) (additional quotation marks omitted)).
Truly deferring to school officials in designing disciplinary policies and making disciplinary decisions would restore the moral authority that school boards lost in the student speech revolution. It would send a signal to students that, except in the rare cases like Tinker where a school has arbitrarily singled out a particular opinion for punishment, the courts are an inappropriate place to challenge school disciplinary policies. And by removing the threat of a lawsuit from every discipline decision that is made, the in loco parentis standard would allow school officials to discipline students more fairly. They could deal with serious infractions—or students who violate multiple school rules—more seriously, without the fear that a court will step in and decide for itself what amount of punishment is appropriate.\textsuperscript{218} That matters because, as Richard Arum’s research has shown, the effectiveness of school discipline depends on its legitimacy, and the extent to which students accept the discipline as fair.\textsuperscript{219}

The in loco parentis standard also appreciates that school boards, especially those in urban areas where the achievement gap is widest,\textsuperscript{220} have a legitimate interest in using discipline as a policy tool to promote safe schools. Indeed, studies have shown that stricter disciplinary policies help combat the threat of school violence and help prevent students from falling into

\textsuperscript{218} For instance, under the current student discipline doctrine, the Eighth Circuit held that school officials violated the “substantive due process” rights of two students when they suspended them for three months for spiking the punch at a school activity with two 12-ounce bottles of malt liquor. Strickland v. Inlow, 485 F.2d 186, 187, 190 (8th Cir. 1973). The court apparently thought that the school board’s decision to suspend the girls was unreasonable because it made no finding regarding the actually alcoholic content of the spiked punch: it read the school’s policies to only prohibit “intoxicating liquors,” not all alcoholic beverages” and the court interpreted Arkansas state law to define an “intoxicating liquor” as a drink that has an alcohol content exceeding 3.2 or 5 percent of its overall weight. \textit{Id.} at 190. The spiked punch would have failed that test because it only included 24-ounces of malt liquor, to go with 60-ounces of a soft drink and enough water to concoct one and a half gallons of punch. \textit{Id.} at 187. The Supreme Court disagreed with the Eighth Circuit’s interpretation of the school policy, saying the court was “ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement.” Wood v. Strickland, 420 U.S. 308, 324–25 (1975). The Court unanimously vacated that portion of the Eighth Circuit’s decision. \textit{See id.} at 327 (Powell, Blackmun, and Rehnquist, JJ., and Burger, C.J., concurring in part and dissenting in part).

\textsuperscript{219} Arum, supra note 9, at 33.

\textsuperscript{220} See Kathleen Porter & Stephanie Soper, Nat'l Clearinghouse for Comprehensive Sch. Reform, Closing the Achievement Gap: Urban Schools 1 (2003) (arguing that the problem at the root of the American education “crisis” is the achievement gap in urban schools that serve a majority of low-income and minority students).
criminal behavior.\textsuperscript{221} For example, in one study, “stricter discipline led dramatically to reduced rates of individual arrest . . . the probability of individual arrest decreas[ing] from six percent to two percent as perceptions of school strictness increased.”\textsuperscript{222} But those results did not just depend on the strictness of the policies themselves; rather, they hinged on a combination of the strictness of the policy and the degree to which students accepted the policy as fair. Thus, “when discipline was considered unfair, stricter discipline was actually associated with higher rates of fighting.”\textsuperscript{223} And, “[i]n schools that were perceived as least fair, student perceptions of strictness had less significant effects” on the arrest rate.\textsuperscript{224}

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

\textbf{IV. The In Loco Parentis Model of Measuring Student Discipline Adequately Protects Speech Rights}

The main concern with adopting a deferential \textit{in loco parentis} standard to govern student discipline cases is the fear that the standard will chill the expression of certain messages, especially opinions with which the government disagrees.\textsuperscript{225} But we should be less worried about overprotecting the right to speak in the school setting. For one, when the government

\textsuperscript{221} See Aruma, supra note 9, at 34, 183, 185 (“School disciplinary climates, while important for all students, were likely to be of greatest significance to youth at risk for delinquency and incarceration.”).

\textsuperscript{222} See id., at 185.

\textsuperscript{223} Id., at 183.

\textsuperscript{224} Id., at 185.

\textsuperscript{225} See, e.g., Morse v. Frederick, 127 S. Ct. 2618, 2637 (Alito and Kennedy, JJ., concurring) (rejecting the Petitioners’ argument that school officials should have broad authority to regulate student speech that interferes with the school’s “educational mission” because “some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups”).
(acting through local school boards) regulates student speech, it acts as an educator, not as the sovereign. Its conduct has virtually no impact outside the school environment, rendering any “chill” on free expression minimal. More importantly, the in loco parentis standard protects against the most serious threat to free expression by prohibiting schools from discriminating against students on the basis of their viewpoint. In that way, the in loco parentis standard would ensure that schools do not become “enclaves of totalitarianism,” tools for government officials to use to indoctrinate students with the government’s preferred message.

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

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

But, as then-Justice Rehnquist once noted, “the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice.”

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


For example, the Supreme Court has long recognized that the government has discretion to limit speech that occurs on certain government property, because when it does so it acts more as a property owner than as a sovereign.\textsuperscript{229}

Similarly, the Court has said that the government can place more serious restrictions on its employees’ speech than it can on a common citizen’s speech because the government, acting as employer, “has interests . . . that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”\textsuperscript{230} Most notably, the government-employer has an interest “in promoting the efficiency of the public services it performs through its employees.”\textsuperscript{231} In deference to that non-sovereign interest, the Court eschews strict scrutiny and balances the government’s interest against the employee’s interest in speaking out on matters of public concern.\textsuperscript{232} Employee speech that does not touch on a matter of public concern receives \textbf{no} First Amendment protection.\textsuperscript{233} But the Court does not worry that the government-employer

\textsuperscript{229} See Adderley v. Florida, 385 U.S. 39, 47 (1966) (“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicate.”).

\textsuperscript{230} See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). In the government employment context, the Court has said that the First Amendment protects a government employee’s right to engage in speech on matters of public concern so long as the speech does not interfere with the employee’s job. \textit{See id.} at 572–73 (concluding, in that case, that a school could not fire a teacher for speaking when the teacher’s speech did not impede his performance or interfere with the general operations of the school). However, “where a government employee speaks ‘as an employee upon matters only of personal interest,’ the First Amendment does not offer protection.” Garcetti v. Ceballos, 126 S. Ct. 1951, 1973 (2006) (Breyer, J., dissenting) (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

\textsuperscript{231} See Pickering, 391 U.S. at 568.


will chill expression in the citizenry at large because it recognizes that the regulation of
government employees has virtually no impact outside the public employment context.\(^{234}\)

The same is true when the government acts as educator. School rules do not apply to the
citizenry at large, but only affect the conduct of certain individuals (most of them minors, no
less). Indeed, school rules seem even less restrictive than rules that govern the conduct of
government employees, since they only apply in certain locations and at certain times of the
day.\(^{235}\) Even school officials themselves recognize that, once a student steps outside the school
grounds, she is outside the school’s jurisdiction and cannot be punished for violating “school”
rules.\(^{236}\) And the government’s interests in educating our children certainly differ from its
interests in regulating conduct of the general citizenry: Most importantly, it has the primary
responsibility for preparing American children to compete for the more sophisticated jobs that
will dominate the New Economy. The federal government considers that interest so important
that it has conditioned federal funding to states based on their development of rigorous

\(^{234}\) See Connick, 461 U.S. at 147 (“We in no sense suggest that speech on private matters falls into one of the narrow
and well-defined classes of expression which carries so little social value, such as obscenity, that the State can
prohibit and punish such expression by all persons in its jurisdiction. For example, an employee’s false criticism of
his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same
protection in a libel action accorded an identical statement made by a man on the street.” (citations omitted)).

\(^{235}\) See, e.g., Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1044–45 (2d Cir. 1979) (“[O]ur
willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon
the supposition that the arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to
extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind
all other institutions of government.”).

\(^{236}\) E.g., Michael Imber & Tyll Van Geel, A Teacher’s Guide to Education Law 67–68 (3d ed. 2004). Of course,
this is an overly simplistic statement. Many courts have recognized that a school’s jurisdiction extends off-campus
during school hours, or at least during school-sanctioned events. See, e.g., Morse v. Frederick, 127 S. Ct. 2618,
2624 (2007) (rejecting Frederick’s argument that his off-campus activity should not even have been subject to the
Court’s student speech doctrine because “[t]he event occurred during normal school hours . . . was sanctioned by
Principal Morse ‘as an approved social event or class trip,’ and the school district’s rules expressly provide that
pupils in ‘approved social events and class trips are subject to district rules for student conduct’” (citations
omitted)). Some have even said that a school can discipline a student for activity that occurred solely outside of
school, and during non-school hours, if the student’s off-campus activity had a “sufficient nexus” to the school
environment—such as “where speech that is aimed at a specific school and/or its personnel is brought onto the
school campus or accessed at school by its originator.” See J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864–
65 (Pa. 2002). This article does not consider the issues posed by those decisions.
curriculum and academic standards. Surely that interest justifies the deference that the in loco parentis standard would show to school officials in making disciplinary decisions.

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

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

A deferential standard like in loco parentis does not need to show unfettered discretion to school officials to be effective. Nor should it. Although the government has different interests when it acts as educator rather than sovereign, its behavior can still violate certain First

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


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

For example, the First Amendment broadly prohibits the government from forcing individuals to affirm or adopt a message with which they disagree.\(^{240}\) The general reasoning behind such restrictions on “compelled” speech is our view that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind,’” which is the heart of the First Amendment.\(^{241}\) But our practical fears about compelled speech run deeper than that. Compelled speech endangers core principles at the root of the First Amendment, including cognitive dissonance, “a psychological process whereby an individual who has been forced to express a view contrary to her own eventually rationalizes her actions by subconsciously adopting the positions she has been forced to express.”\(^{242}\) That harm “interferes with the autonomy of the individual's mental processes” and “therefore breaches the wall between government and the mentally autonomous private individual—a central tenet of a healthy democratic system of government.”\(^{243}\)

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

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\(^{240}\) See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

\(^{241}\) *Id.* (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (Murphy, J., concurring)).


\(^{243}\) See *id.*
especially impressionable and vulnerable to government brainwashing.\textsuperscript{244} That is why the Supreme Court has consistently prohibited the government from compelling students to support a particular message, even if that message is a show of patriotism during a time of war.\textsuperscript{245} As Justice Jackson noted, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\textsuperscript{246}

The same dangers result when the government, rather than forcing students to affirm a particular belief, promotes one viewpoint over another in the school setting. When school officials discipline students because of their viewpoint, they effectively compel students to adopt the school’s favored message. That understanding drove the Court’s opinion in Tinker and was reflected when the Court said “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate” or “confined to the expression of those sentiments that are officially approved.”\textsuperscript{247} Furthermore, “‘[t]he classroom is particularly the ‘marketplace of ideas,’” and, in order to develop the type of citizens that we want to lead America in the future, we want our education system to promote “‘wide exposure to that robust

\textsuperscript{244} See Sandra L. Hofferth & John F. Sandberg, How American Children Spend Their Time, 63 J. of Marriage & Family 295 (May 2001) (indicating that children under age 13 spend an average of 21 hours per week in school, with another four-plus hours in day care services).

\textsuperscript{245} See West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) (striking down a compulsory flag salute in the West Virginia public schools); see also Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring) (noting that the Court has traditionally viewed government promotion of religion more skeptically when the government acts as educator in the school environment because “when government-sponsored religious exercises are directed at impressionable children who are required to attend school, . . . [the] government endorsement is much more likely to result in coerced religious beliefs”); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking down a Nebraska law that prohibited educators from teaching their students in any language except English).


exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” Viewpoint discrimination destroys that wide exposure.

The in loco parentis standard would protect against those harms by subjecting educational policies that compel students to affirm a particular belief to strict scrutiny. It would also strictly scrutinize any disciplinary policy that discriminates against among viewpoints or speakers on the basis of the message those speakers convey—a standard that the Tinker Court could have easily used to strike down the Des Moines schools’ ban on black armbands. To further protect student speech interests, the standard would allow for as-applied challenges, so that school officials do not draft facially neutral disciplinary policies but apply them in a way that discriminates among viewpoints. But it better serves the legitimate interests that the government has in educating public schoolchildren than the current student speech doctrine, which invites judges to make disciplinary decisions that school officials are better trained to make.

C. What School Officials Can Learn From Morse in Arguing For An In Loco Parentis Standard to Govern All Student Discipline Cases

Of course, the Supreme Court would have to accept the in loco parentis standard and extend it to school discipline cases itself, which might seem unlikely given the hostility that several of the Court’s current members have shown to the in loco parentis concept. But at

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

250 See Morse v. Frederick, 127 S. Ct. 2618, 2637–68 (2007) (Alito and Kennedy, JJ., concurring in the judgment) (“When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students’ parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes...
least three justices appear comfortable with such a standard, and two of the justices who appear most hostile to the in loco parentis standard, Justices Kennedy and Alito, could be swayed by redefining the in loco parentis doctrine in terms of the government’s special interest in acting as educator, rather than in terms of parental delegation. Indeed, that was how the attorneys that represented principal Deborah Morse in Morse v. Frederick won their case in the Supreme Court in 2007.

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

relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis.”).

These three are Chief Justice John Roberts and Associate Justices Antonin Scalia and Clarence Thomas, who provided the strongest votes for reversing the Ninth Circuit’s decision in Morse. In fact, Justice Thomas seems most willing to adopt a modern in loco parentis standard. See Morse v. Frederick, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring) (“I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don’t—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.”).

127 S. Ct. 2618 (2007) [hereinafter Morse].

See Frederick v. Morse, 439 F.3d 1114, 1115 (9th Cir. 2006) [hereinafter Frederick].

Id.

Id.

Id.

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

258 Id.
259 Frederick, 439 F.3d at 1116.
260 Id.
261 Id.
262 Id. at 1116–17.
263 Id. at 1118.
264 See id. at 1119 (“Our case differs from Fraser in that Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly.”).
265 Frederick, 439 F.3d at 1123. Indeed, in the Ninth Circuit, the school and principal Morse did not even argue that Frederick’s punishment was justified under Tinker: They “conceded that the speech . . . was censored only because it conflicted with the school’s ‘mission’ of discouraging drug use.” Id.; see also Brief of Appellees at 47–48, Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006) (No. 03-35701) (arguing that the disruptiveness of Frederick’s actions was “immaterial” because “[u]nder Fraser a showing of disruption is not required”).
266 Id. at 1124–25.
The Supreme Court re-listed Morse four times before granting certiorari in the case, suggesting that the Court considered summarily reversing the Ninth Circuit on qualified immunity grounds. But when the case reached the merits, Morse’s attorneys (led by former Solicitor General and D.C. Circuit Judge Kenneth Starr) made a critical decision: Rather than try to justify Morse’s actions under Tinker’s disruption standard, they argued that the school was justified in prohibiting messages that it reasonably believed promoted illegal drug use. Without saying so, that argument echoed the in loco parentis rationale of cases like Fraser and Vernonia and focused the Court’s attention on the important non-sovereign interests the government has in educating American children, interests that were largely glossed over by lower courts that mechanically applied Tinker’s disruption standard.

The strategy worked. The Court reversed the Ninth Circuit and, in doing so, it applied neither Tinker’s disruption standard nor Fraser’s “offensiveness” standard. True, it interpreted Fraser to refine the “‘special characteristics of the school environment’” that allow schools to more closely regulate student speech. But when the Court said that the government’s interest in stopping student drug use combined with the “special characteristics of the school

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

268 See Transcript of Oral Argument at 4–5, Morse, 127 S. Ct. 2618 (No. 06-278) (arguing that “Tinker articulated a rule that allows the school boards considerable discretion both in identifying the educational mission and to prevent disruption of that mission,” which included deterring illegal drug use). Of course, Morse’s attorneys may have used this argument as much out of necessity as for strategic reasons: One student described the scene outside the Juneau high school as “chaos,” with students getting into fights and throwing snowballs and plastic soda bottles as they awaited the arrival of the Olympic torch. Brief for Respondents at 2–3, Morse, 127 S. Ct. 2618 (No. 06-278). Frederick and his companions, by contrast, were “calm and orderly,” id. at 3, a characterization that Morse did not dispute. Thus, Morse would have had a difficult time convincing the Court that Frederick’s actions physically disrupted the educational process in any way.

269 Morse, 127 S. Ct. at 2629.

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

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

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

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

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

274 See Eugene Volokh, How the Justices Voted in Free Speech Cases, 1994–2002 (2002) (unpublished update of Professor Volokh’s 2000 article, How the Justices Voted in Free Speech Cases, 48 UCLA L. Rev. 1191 (2000), on file with the author), available at http://www.law.ucla.edu/volokh/howvoted.htm (noting that, since Justice Breyer joined the Court in 1994, Justice Kennedy has voted with the speaker in free speech cases seventy-five percent of the time, while the other five active justices’ records were more mixed, supporting the speaker only fifty to sixty percent of the time).
threat of violence in school hallways.\textsuperscript{275} Lest we forget that, although Justice Alito described such deference “as standing at the far reaches of what the First Amendment permits,”\textsuperscript{276} that reasoning allowed the Court to sidestep some of the difficult issues that Morse presented, including the fact that many people who saw Frederick’s banner interpreted it as nonsense, a catchy phrase designed to attract television cameras rather than promote illegal drug use.\textsuperscript{277} Furthermore, Frederick’s demonstration took place on the sidewalk across the street from the school, during a public event that the school allowed its students to attend: It was not the type of on-campus speech that the Court had traditionally allowed schools to regulate under its student speech doctrine.\textsuperscript{278}

For that reason, Justices Alito and Kennedy might reconsider their opposition to an in loco parentis standard that gives significant deference to school officials to discipline students, so long as they do not discriminate among viewpoints. The standard might even win over Justice Breyer, often recognized as the quintessential First Amendment pragmatist.\textsuperscript{279} It was Justice Breyer, after all, who suggested that, when a law chills the freedom of the press in order to

\textsuperscript{275} Morse, 127 S. Ct. at 2638 (Alito and Kennedy, JJ., concurring in the judgment).

\textsuperscript{276} Id.

\textsuperscript{277} See id. at 2644 (Stevens, Souter, and Ginsburg, JJ., dissenting); see also Frederick v. Morse, 439 F.3d 1114, 1117–18 (9th Cir. 2006) (“Frederick says that the words were just nonsense meant to attract television cameras because they were funny.”).

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

\textsuperscript{279} Lyle Denniston, Once Again No First Amendment Champion, Am. Journalism Rev., Oct. 1994, at 70; but see Morse, 127 S. Ct at 2638–39 (Breyer, J., concurring in the judgment in part and dissenting in part) (“[T]o hold, as the Court does, that ‘schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use’ (and that ‘schools’ may ‘restrict student expression that they reasonably regard as promoting illegal drug use’) is quite a different matter. This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.” (internal citations omitted)).
protect another constitutional right, the Constitution merely “demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with [the competing right].”  But the in loco parentis standard has to be introduced as one that derives from the government’s interests in acting as educator, and its desire to improve the quality of education that American children receive in our public schools, rather than on the antiquated notion that parents delegate their parental decision-making to school officials when their children step through the schoolhouse gates.

V. Conclusion

The No Child Left Behind Act expires this year. Once lauded as one of President George W. Bush’s greatest achievements, it has since been vilified (even by Republicans) as a failure. Of course, the NCLB Act may have failed for a number of reasons, including inadequate funding—although America still spends more money per student than virtually every other country in the world—and there is nothing that the courts can do to change that. But what the struggles of the No Child Left Behind Act demonstrates is that rigorous education reforms are meaningless if schools do not have the moral authority to control the environment the reforms take place in. Courts can do something about that, and scrapping the current student speech doctrine in favor of a more deferential in loco parentis standard would go a long way to restoring that moral authority.


282 See Megan Boldt, GOP Urges State to Opt out of ‘No Child’, St. Paul Pioneer Press, Dec. 7, 2007, at B3 (quoting a Republican state senator who called the law “a failure” and said “the state is ‘held hostage’ by what amounts to meager federal funds”).