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Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought to Be Praised, Not Condemned

I. INTRODUCTION

In 1991, school athletes in Oregon were required to submit to random, involuntary drug tests before they were allowed to participate in school-sponsored sporting events.¹ In 2002, Joseph Frederick received a ten-day suspension for unfurling a 14-foot banner with the inscription “BONG HiTS 4 JESUS” at a school-sponsored event.² And in 2003, April Redding (who was thirteen at the time) was ordered to strip down to her underwear because she was suspected of possessing prescription-strength ibuprofen pills.³ At first glance, these cases appear extreme, but their underlying concerns are not only simple, but commonplace: teachers and school administrators across the nation are asked to deal with drug use, potentially offensive speech, and drug possession on a daily basis, and surely they do not need to be told by the United States Supreme Court that they cannot, for instance, conduct strip searches. And yet, the Supreme Court *was* required to determine, in each of these cases, whether school administrators were acting within the scope of their authority, which should raise the following question: How has the concept of “authority” in public schools been obscured to the point where an administrator actually thought that he had the authority to order a strip search of a student?

In a recent law review article, Professor Susan Stuart has argued that the Supreme Court's continued reliance upon the common law doctrine of in loco parentis (meaning “in the place of a parent”) is to blame for the confusion surrounding our understanding of “authority” in public schools, and forcefully declared that “*in loco parentis*” “would be enormously improved by death.”⁴ Stuart's article

1. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648–51 (1995).

2. *Morse v. Frederick*, 551 U.S. 393, 397–98 (2007).

3. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2638 (2009).

4. Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 983 (2009) (quoting H.H. MUNRO (“Saki”), *The Feast of Nemesis*, in *THE COMPLETE WORKS OF SAKI* 319, 322 (1976)).

presents two main arguments in support of this claim. First, she argues that the doctrine of *in loco parentis*, as originally articulated by Blackstone, was incompletely (and therefore improperly) adopted by American courts.⁵ Second, she contends that, because the doctrine is “anachronistic” within the context of modern education, it should no longer be applied.⁶ In place of *in loco parentis*, Stuart suggests that courts follow the advice of educational experts and adopt “objective norms of educational professionalism” because such norms would govern the relationships between students and school administrators in a more “predictable and noncontroversial fashion” than *in loco parentis*.⁷

This Comment attempts to defend the Court’s continued reliance on *in loco parentis* against Stuart’s assault by arguing that not only do Stuart’s criticisms fail to provide sufficient reason for the Court to reject the doctrine outright, but furthermore her proposed solution is one that should be implemented *by the legislature* rather than the judiciary.

This Comment will proceed as follows. Part II will briefly set forth the historical development of *in loco parentis* and how it came to be adopted by the United States’ judiciary. It will then describe how, within the context of student speech and student search cases, the Supreme Court has relied upon the doctrine in its struggle to define the contours of administrative authority in public schools. Part III will give a detailed explanation of Professor Stuart’s criticisms of *in loco parentis*, its adoption by the Supreme Court, and its application within the context of public education. Finally, Part IV will argue that Stuart’s criticisms ultimately fail to provide sufficient grounds for an outright rejection of *in loco parentis*, and will contend that society, through its duly appointed representatives, is in a much better position to clarify the concept of “authority” within our educational system than the judiciary. Hence the judiciary’s refusal to rewrite the concept of *in loco parentis sua sponte* is an example of judicial restraint that ought to be praised rather than condemned.

5. *Id.* at 985–96.

6. *Id.* at 971.

7. *Id.* at 1000, 1004.

II. HISTORICAL BACKGROUND AND DEVELOPMENT OF IN LOCO PARENTIS

This Part briefly outlines the common law origins of *in loco parentis*, how it was adopted by U.S. courts, and how the Supreme Court has repeatedly relied upon it in its attempts to define the limits of school administrators' authority in public schools.

A. The Historical Roots of In Loco Parentis

Professor Stuart notes in her article that “[t]he origins of the *in loco parentis* doctrine are murky,”⁸ which may be one reason why the doctrine has received a fair amount of attention from legal scholars in recent years.⁹ But whatever its origins,¹⁰ William Blackstone's *Commentaries* are usually cited as the common law source of the doctrine.¹¹ Blackstone declares:

[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.¹²

Stuart, along with others, points out that Blackstone did not cite any authority for this position.¹³ However, John C. Hogan and Mortimer D. Schwartz have argued that “[t]heorists from Aristotle onward have talked about the power of the father to control his

8. *Id.* at 972.

9. *See, e.g.*, John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HIST. 260 (1987); Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986); Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991).

10. Stuart speculates that the doctrine may date back to the Code of Hammurabi or ancient Roman times. Stuart, *supra* note 4, at 972-73.

11. *Id.* at 974 & n.20 (citing other journal articles that attribute the doctrine's origin to Blackstone); *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring); *see also Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2655 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

12. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *441 (1765).

13. Stuart, *supra* note 4, at 974; Hogan & Schwartz, *supra* note 9, at 271 n.4 (“We have seen no British case law that applies the term *in loco parentis* to schooling before this time.”).

children” and that “[t]he English philosophers (Hobbes, Locke, Mill) and the jurists (Grotius, Pufendorf) [also] helped lay a foundation for this subject.”¹⁴ Thus, despite Blackstone’s failure to cite precedential authority for his position relative to *in loco parentis*, his formulation of the doctrine was nevertheless accepted in England, and the formulation quoted above “has been widely quoted and followed by the courts.”¹⁵

However, in her article Stuart emphasizes that regardless of how or where Blackstone came up with the idea, the important thing to note is how *in loco parentis* was ultimately interpreted by scholars and, more importantly, how it was adopted by U.S. courts.¹⁶ Hogan and Schwartz argue that in English law, *in loco parentis* evolved into “a very narrowly defined concept that placed limitations on the rights which were voluntarily given by the parent to the school,” and that these “rights” included “only a ‘portion of the power of the parent,’ that of *restraint and correction*.”¹⁷ The doctrine was then “readily imported [to America] from England as protection for public school teachers who saw the need to corporally punish students in the[i]r charge.”¹⁸ But, in contrast to its development in England, in the United States *in loco parentis* “took the form of a *broad*, although not unlimited, defense in criminal and civil suits for assault and battery.”¹⁹

As evidence of this fact, Stuart cites to *State v. Pendergrass*,²⁰ which is one of the earliest—if not *the* earliest²¹—case to use the concept of *in loco parentis* in the school setting. In *Pendergrass*, North Carolina had charged a teacher with assault and battery for whipping a student.²² At trial, the district court instructed the jury that “if the child was whipped by the defendant so as to occasion the marks described by the prosecutor, the defendant had exceeded her

14. Hogan & Schwartz, *supra* note 9, at 260.

15. *Id.*

16. Stuart, *supra* note 4, at 974–77, 990–96.

17. Hogan & Schwartz, *supra* note 9, at 260 (emphasis added).

18. Stuart, *supra* note 4, at 975 (quoting Zirkel & Reichner, *supra* note 9, at 273) (internal quotation marks omitted); *see also* Hogan & Schwartz, *supra* note 9, at 262–63.

19. Stuart, *supra* note 4, at 975 (quoting Zirkel & Reichner, *supra* note 9, at 273) (emphasis added); *see also* Hogan & Schwartz, *supra* note 9, at 262–63.

20. 19 N.C. (2 Dev. & Bat.) 365, 366–68 (1837).

21. Hogan & Schwartz, *supra* note 9, at 262.

22. *Pendergrass*, 19 N.C. (2 Dev. & Bat.) at 367.

authority, and was guilty as charged.”²³ However, on appeal the North Carolina Supreme Court reasoned as follows:

It is not easy to state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. *It is analogous to that which belongs to parents*, and the authority of the teacher is regarded as a *delegation of parental authority*. One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. *The teacher is the substitute of the parent*; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.²⁴

While not invoking the Latin term *in loco parentis* directly, the concept being described here by the *Pendergrass* court is identical.²⁵ Because the “teacher is the substitute of the parent,” the teacher therefore has the authority to discipline the children entrusted to his care “when he shall believe it to be just and necessary.”²⁶ In other words, the teacher “stands in the place of the parent” while the child is in his care, and thus the *Pendergrass* court reasoned that so long as the punishment inflicted upon the child does not “seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury,” it is not criminally actionable.²⁷ Hence, since the marks observed by the trial court disappeared within a few days, “[n]o permanent injury was done to the child,” and thus the trial court’s verdict was reversed.²⁸

Beginning with *Pendergrass* and continuing throughout the next century, the doctrine of *in loco parentis* was confined exclusively to the context of corporal punishment in schools.²⁹ However, as Perry

23. *Id.*

24. *Id.* at 365–66 (emphasis added).

25. Hogan & Schwartz, *supra* note 9, at 262 (making the same observation); Stuart, *supra* note 4, at 975 (same).

26. *Pendergrass*, 19 N.C. (2 Dev. & Bat.) at 365–66.

27. *Id.* at 366.

28. *Id.* at 367.

29. Stuart, *supra* note 4, at 976.

A. Zirkel and Henry F. Reichner have noted, courts began applying it in two different ways.³⁰ In the first, courts gave great deference to the teacher's discretion, "finding all punishment reasonable where there was no permanent injury or *malo animo*."³¹ In the second, "which purported to be the modern and enlightened view . . . the reasonableness of the punishment [was] a question of fact to be determined by the trier of fact, usually a jury."³² As Zirkel and Reichner go on to note, by the middle of the twentieth century the second, narrower view of *in loco parentis* commanded a majority of the courts.³³ This view, as Stuart points out,³⁴ was endorsed by the Supreme Court in 1977:

The prevalent rule in this country today privileges such force as a teacher or administrator "reasonably believes to be necessary for [the child's] proper control, training, or education." To the extent that the force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability.³⁵

However, twentieth century teachers and administrators not only witnessed the judiciary revoke its grant of broad discretion under *in loco parentis*, but they also saw the doctrine being applied in educational contexts *other than* those dealing with corporal punishment. In fact, the doctrine has been evoked continuously in two of the most controversial lines of Supreme Court cases, namely, those dealing with student speech and student searches; these cases are the subject of the next two sections.

B. In Loco Parentis and Student Speech

Justice Thomas has pointed out in two opinions that, prior to the mid-twentieth century, "[t]he doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way."³⁶ However, as previously demonstrated, American

30. Zirkel & Reichner, *supra* note 9, at 274–75. This phenomenon was also noted by Justice Thomas. See *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring).

31. Zirkel & Reichner, *supra* note 9, at 274 (citing nineteenth-century cases from Alabama, Indiana, Pennsylvania, North Carolina, and Maine).

32. *Id.*

33. *Id.* at 275.

34. Stuart, *supra* note 4, at 976.

35. *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) (quoting RESTATEMENT (SECOND) OF TORTS § 147(2) (1965)).

36. *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring); *see also*

courts typically utilized the doctrine in cases dealing with discipline,³⁷ although Justice Thomas notes that the doctrine was eventually extended to permit school administrators to regulate student speech.³⁸ For instance, Justice Thomas points to an early case wherein “the Vermont Supreme Court upheld the corporal punishment of a student who called his teacher ‘*Old Jack Seaver*’ in front of other students.”³⁹ However, this expansive view of school administrators’ authority to regulate student speech appeared to be the main target of the Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District*, wherein the Court departed dramatically from the permissiveness of the *in loco parentis* doctrine.⁴⁰

I. Tinker’s attempt to reject in loco parentis

In *Tinker*, a group of five students (ranging in age from eight to fifteen),⁴¹ along with their parents, decided to show their support for a truce in Vietnam by wearing black armbands during the holiday season.⁴² School administrators became aware of this plan and, in order to avoid a disturbance, instituted a policy prohibiting any student from wearing an armband while on school property.⁴³ According to the policy, any students who came to school wearing an armband would be asked to remove it, and if they refused, they would be suspended until they returned without the armband.⁴⁴ Two students wore the armbands to school on December 16, and another student wore an armband on December 17.⁴⁵ All were suspended and did not return to school until after New Year’s Day.⁴⁶

Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2655 (2009) (Thomas, J., concurring in part and dissenting in part) (“So empowered [by *in loco parentis*], schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms.”).

37. *See supra* Part II.A.

38. *Morse*, 551 U.S. at 414 (“A review of the case law shows that *in loco parentis* allowed schools to regulate student speech as well.”).

39. *Id.* at 414–15 (citing *Lander v. Seaver*, 32 Vt. 114, 114–15 (1859)).

40. 393 U.S. 503 (1969).

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

42. *Id.* at 504 (majority opinion).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

The Court classified the students' decision to wear the armbands as symbolic speech,⁴⁷ and actually went so far as to say that "[i]t was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."⁴⁸ The Court then signaled its departure from the *in loco parentis* standard articulated earlier by famously declaring that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴⁹ However, the Court refused to go so far as to declare that the constitutional rights of students were coequal with those of adults.⁵⁰ Instead, it qualified this sweeping language by stating, "First Amendment rights [must be] applied in light of the special characteristics of the school environment,"⁵¹ and hence these rights survive and are enforceable only if the speech in question does not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."⁵² Because the Court could neither find a "material" or "substantial" disruption resulting from the students' armbands, nor a violation of the rights of other students,⁵³ it held that the First Amendment would not tolerate the suppression of such symbolic/political speech, and, therefore, that the students should have been allowed to wear their armbands in school.⁵⁴ Additionally, the Court declared emphatically that "state-operated schools may not be enclaves of totalitarianism" and that "[s]chool officials do not possess absolute authority over their students."⁵⁵

Interestingly enough, neither the majority nor the dissent mentions the doctrine of *in loco parentis* explicitly, but the majority's heated denunciation of the idea that "school officials possess absolute authority over their students" stands as the polar opposite to Justice Thomas's portrayal of *in loco parentis* seen earlier.⁵⁶ Hence, while it did not attack the doctrine by name, it is

47. *Id.* at 505.

48. *Id.* at 505–06.

49. *Id.* at 506.

50. *Id.* at 514–15 (Stewart, J., concurring).

51. *Id.* at 506 (majority opinion).

52. *Id.* at 513.

53. *Id.* at 509.

54. *Id.* at 514.

55. *Id.* at 511.

56. "The doctrine of *in loco parentis* limited the ability of schools to set rules and

probably safe to say that one of the majority's objectives in *Tinker* was to strike at the heart of the in loco parentis doctrine by recognizing that students have constitutional rights *while they are at school*, which was not true under the prior conceptualization of in loco parentis.⁵⁷ As further proof of this fact, it is interesting to note how the dissent strikes back at the majority's new rule by pointing out how "[s]chool discipline, *like parental discipline*, is an integral and important part of training our children to be good citizens—to be better citizens."⁵⁸ Here, Justice Black's subtle comparison of parental and educational authority and their proper roles in the formation of "good citizens" sounds eerily similar to the arguments given in support of the doctrine of in loco parentis mentioned earlier.⁵⁹ But whatever its motivations, the *Tinker* Court did not succeed in banishing the doctrine of in loco parentis from the field of student speech, for in subsequent student speech cases, the Court called upon the doctrine repeatedly in order to limit the application of *Tinker's* holding.⁶⁰

2. *The Court's return to in loco parentis in Bethel School District No. 403 v. Fraser*

The next student speech case to reach the Supreme Court was *Bethel School District No. 403 v. Fraser*.⁶¹ In this case, Fraser, a high school senior, had delivered a nomination speech for a fellow student who was running for student office at a school-sponsored assembly that was attended by over 600 students, "many of whom were 14-year-olds."⁶² The speech itself was described by the majority as "an

control their classrooms in almost no way." *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring).

57. See generally Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996).

58. *Tinker*, 393 U.S. at 524 (Black, J., dissenting) (emphasis added).

59. See *supra* Part II.A.

60. Justice Thomas has criticized the *Tinker* decision openly on the grounds that the Court has *never* applied the *Tinker* test in *any* subsequent student speech case. In fact, he attributes this reluctance to affirm (and use) *Tinker* because it conflicts with the doctrine of in loco parentis, the very doctrine that *Tinker* seems to repudiate: "*Tinker's* reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling, a role limited by *in loco parentis*. *Perhaps for that reason, the Court has since scaled back Tinker's standard, or rather set the standard aside on an ad hoc basis.*" *Morse*, 551 U.S. 393, 417 (Thomas, J., concurring) (emphasis added).

61. 478 U.S. 675 (1986).

62. *Id.* at 677.

elaborate, graphic, and explicit sexual metaphor,”⁶³ and the Court noted that, in response to the speech, “[s]ome students hooted and yelled” while others “by gestures graphically simulated the sexual activities pointedly alluded to in [Fraser’s] speech.”⁶⁴ However, besides the initial reaction to the speech at the assembly itself, the “disturbance” caused by the speech (if any) appeared rather limited, as the Court noted that only “[o]ne teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.”⁶⁵

However, despite the apparent lack of a “material disruption to classwork” or a “substantial disorder or invasion of the rights of others,” which was the standard set forth by *Tinker*,⁶⁶ the Court found that the school’s decision to suspend Fraser for delivering his speech did *not* violate Fraser’s First Amendment rights because “the essence . . . of the objectives of public education [is] the ‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.’”⁶⁷ Because these “‘fundamental values’ . . . disfavor the use of terms of debate highly offensive or highly threatening to others,”⁶⁸ the power to determine “what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”⁶⁹ Therefore, the Court held that the school board’s decision to punish Fraser was entirely proper.⁷⁰

63. *Id.* at 678. The majority does not quote from the speech directly, but Justice Brennan gives the full text of Fraser’s speech in his concurrence:

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 A.S.B. vice-president—he’ll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

64. *Id.* at 678 (majority opinion).

65. *Id.*

66. 393 U.S. 503, 513 (1968).

67. *Fraser*, 478 U.S. at 681 (alteration in original) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

68. *Id.* at 683.

69. *Id.*

70. *Id.* at 686.

Interestingly enough, one of the concepts that the Court used to justify the foregoing syllogism was none other than the doctrine of *in loco parentis*. First, the Court equated the teacher's duty to model appropriate behavior with a parent's duty to do likewise.⁷¹ The Court stated, "[c]onsciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. *Inescapably, like parents, they are role models.*"⁷² This is indeed quite a shift from the *Tinker* Court's characterization of public schools as potential "enclaves of totalitarianism."⁷³ But the *Fraser* Court continued by citing a number of cases and then concluding that "[t]hese cases recognize 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."⁷⁴

Hence, whatever effect *Tinker* may have had on the *in loco parentis* doctrine, *Fraser* proved that the doctrine was alive and well. In fact, when compared with *Tinker*, *Fraser* appears to be an almost complete reversal of direction. Whereas school administrators and teachers in *Tinker* were characterized as despots intent on running totalitarian regimes,⁷⁵ *Fraser* returns to the *in loco parentis* model where teachers and administrators stand in the place of parents as "role models" with an identical duty to inculcate in the children under their care the "fundamental values necessary to the maintenance of a democratic political system."⁷⁶ Aided by this view, the Court had no trouble deferring to the school board's decision to punish Fraser's speech, despite the fact that neither of *Tinker*'s criteria were met.

3. *Expanding Fraser in Hazelwood School District v. Kuhlmeier*

The Court revisited the subject of student speech just two years after *Fraser* in *Hazelwood School District v. Kuhlmeier*,⁷⁷ wherein a group of high school students sued their principal and the school

71. *Id.* at 683.

72. *Id.* (emphasis added).

73. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1968).

74. *Fraser*, 478 U.S. at 684.

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

76. *Fraser*, 478 U.S. at 681.

77. 484 U.S. 260 (1988).

district for infringing their First Amendment rights by suppressing the publication of two articles in a student-run newspaper.⁷⁸ The newspaper was run in conjunction with the school's "Journalism II" course, was funded by the school, and was supervised by both an adviser and the principal.⁷⁹ Pursuant to the school's policy, on May 10, 1983 the adviser for the course submitted the page proofs for the May 13th edition of the paper (which happened to be the final edition of the school year) to the principal for his approval.⁸⁰ The principal noted that two of the articles—one dealing with teen pregnancy at the school and the other with the impact of divorce—did not properly maintain the confidentiality of the students who were interviewed for the pieces. The principal also feared that the subjects might be inappropriate for the younger students at the high school.⁸¹ Because there was not enough time before the end of the school year for the pieces to be rewritten, the principal decided to go ahead and publish the May 13th edition without the two articles, and his superiors affirmed that decision.⁸²

The Court, as in *Fraser*, acknowledged *Tinker's* attribution of constitutional rights to students by quoting *Tinker's* "schoolhouse gate" language,⁸³ but, like *Fraser*, the Court refused to apply the *Tinker* test to these facts.⁸⁴ Instead, the Court saw fit to distinguish *Tinker* by arguing that it addressed a different question than the one raised by *Kuhlmeier*,⁸⁵ and it then expanded the categories of speech that school administrators can permissibly regulate to include "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."⁸⁶ Hence, while *Fraser* recognized the schoolteacher's duty

78. *Id.* at 263–64.

79. *Id.* at 262–63.

80. *Id.* at 263–64.

81. *Id.* at 263.

82. *Id.* at 264.

83. *Id.* at 266.

84. Interestingly, the Court *may* have been able to come to the same conclusion via the *Tinker* test, since while it is doubtful that the publication of the articles would have led to a "material disruption," the privacy rights of the students interviewed for the articles *were* in danger of being infringed, and hence, under *Tinker*, the principal may have been permitted to suppress the speech.

85. According to the Court, *Tinker* dealt with the types of speech that must be tolerated by schools, while *Kuhlmeier* raised the question of what sorts of speech the First Amendment requires the school "affirmatively to promote." *Id.* at 270.

86. *Id.* at 271.

to protect younger students from lewd, obscene, or indecent speech and gave the teacher power to suppress or punish such speech, *Kuhlmeier* expanded this power to include the suppression of speech that third persons might reasonably attribute to the school itself. Hence, if the speech in question is “school sponsored,” as it was here (i.e., the paper was paid for by the school, run by school teachers and administrators, and its purpose was primarily pedagogical in nature), then “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns.”⁸⁷ The Court then concluded that because the principal’s actions were reasonably related to the pedagogical concerns of the Journalism II course, no First Amendment violation had occurred.⁸⁸

Although the *Kuhlmeier* Court did not mention *in loco parentis*, the tenor of the opinion is quite similar to that of *Fraser*’s: students’ First Amendment rights are recognized, but overruled by the Court’s insistence that schools are responsible not just for educating the children in their care, but also for overseeing their development into citizens of a democratic society. In fact, the Court in *Kuhlmeier* cites, in addition to *Fraser*, *Brown v. Board of Education* in support of this idea.⁸⁹ Thus, the *Kuhlmeier* Court, rather than limiting school authority, continued to expand the power that school administrators can exercise over student speech, and it did so by relying on concepts that are closely related to *in loco parentis*.

4. *Limiting Tinker again in Morse v. Frederick*

The most recent student speech case to reach the Supreme Court was *Morse v. Frederick*.⁹⁰ In this case, Joseph Frederick, a high school senior, arrived at school to attend an outdoor assembly where the student body would witness the passing of the Olympic torch.⁹¹ As the torch passed the students (and the television cameras), Frederick and a few friends unfurled a fourteen-foot banner that read “BONG HiTS 4 JESUS.”⁹² Morse, Frederick’s principal, saw the banner and

87. *Id.* at 273 (emphasis added).

88. *Id.* at 276.

89. *Id.* at 272.

90. 551 U.S. 393 (2007).

91. *Id.* at 397.

92. *Id.*

immediately crossed the street and ordered Frederick to take it down.⁹³ Frederick's friends immediately complied, but Frederick refused.⁹⁴ Morse ended up confiscating the banner and suspending Frederick for ten days for violating school policies, a decision which was upheld by the school board.⁹⁵ Frederick subsequently sued, alleging a violation of his First Amendment rights.⁹⁶

Once again, the Court was presented with an opportunity to apply the *Tinker* standard, and once again, it refused to do so. Instead, the Court noted that the *Tinker* standard, when viewed in light of subsequent student speech cases (most notably *Fraser*), "is not absolute" and "is not the only basis for restricting student speech."⁹⁷ Once free from *Tinker*, the Court relied on many of the same concerns that were articulated in *Fraser* and *Kuhlmeier*, most notably the school's "custodial and tutelary responsibility for children,"⁹⁸ and its duty to protect them from harmful speech which, in this case, arguably advocated the use of illegal drugs.⁹⁹ Hence, because of the school's "'important—indeed, perhaps compelling' interest"¹⁰⁰ in deterring drug use; because Frederick's sign, while "cryptic," could reasonably be construed as advocating drug use;¹⁰¹ because it was unfurled at a school-sponsored event and could therefore be viewed as "bearing the imprimatur of the school"; and because it was unfurled in the presence of other students, the Court found that the principal's decision to suppress the speech did not amount to a violation of Frederick's First Amendment rights.¹⁰²

The most interesting pieces of the *Morse* decision, however, are found in the concurring opinions of Justices Thomas and Alito, wherein they debate the future of the doctrine of in loco parentis as applied within the context of student speech. In his opinion, Justice Thomas notes how *Tinker* has been virtually nonexistent in the Court's student speech jurisprudence and actually attributes this fact

93. *Id.* at 398.

94. *Id.*

95. *Id.* at 398–99.

96. *Id.* at 399.

97. *Id.* at 405–06.

98. *Id.* at 406 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002)).

99. *Id.* at 407–09.

100. *Id.* at 407 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

101. *Id.* at 401–02.

102. *Id.* at 410.

to in loco parentis itself: “*Tinker*’s reasoning conflicted with the traditional understanding of the judiciary’s role in relation to public schooling, a role limited by *in loco parentis*. Perhaps for that reason, the Court has since scaled back *Tinker*’s standard, or rather set the standard aside on an ad hoc basis.”¹⁰³ Instead of pursuing this “ad hoc” rejection of *Tinker*, Justice Thomas argues for a full-fledged return to in loco parentis under which students simply would not have a right to free speech.¹⁰⁴

Justice Alito counters this view by arguing the following:

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.¹⁰⁵

Justice Alito then concurs with the majority’s result *not* based on a theory of delegation of parental authority to the school administrators, but based on the special characteristics of the school setting.¹⁰⁶

The differences between Justice Thomas’s and Justice Alito’s approaches highlight the difficulties confronting the Court in the arena of student speech. Originally, as Justice Thomas points out, the contours of the concept of “authority” within a public school were determined by in loco parentis, which gave almost unlimited authority to the teacher.¹⁰⁷ Once *Tinker* recognized the existence of students’ constitutional rights, however, teachers became more like “agents of the State” than agents of the students’ parents, and consequently the extent of their authority was limited severely. Nevertheless, as we have seen in the cases that followed *Tinker*, the Court has proven that it is unwilling to forsake the in loco parentis model entirely. Instead, rather than stick to *Tinker*’s “material disruption” and “third-party rights” standards (and the “agents-of-the-State” model that both imply), the Court has, in three consecutive cases, found ways to avoid applying *Tinker*. The Court

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

104. *Id.* at 418–19.

105. *Id.* at 424 (Alito, J., concurring) (emphasis added).

106. *Id.*

107. *Id.* at 419 (Thomas, J., concurring).

has done this usually by either relying explicitly on *in loco parentis* (as it did in *Fraser*) or by relying on concepts related thereto (as it did in *Kuhlmeier* and *Morse*).¹⁰⁸ Hence, the Court seems to be at a jurisprudential crossroads of sorts: on the one hand is the common law doctrine of *in loco parentis*, while on the other is *Tinker's* implied agents-of-the-state model. As of the date of this Comment, the Court has yet to affirmatively decide between the two.

C. There and Back Again: In Loco Parentis in School Search Cases

Unfortunately, the role *in loco parentis* plays in the Supreme Court's student search jurisprudence is not any clearer than its role in the student speech cases. Nevertheless, as illustrated in the student speech cases,¹⁰⁹ the Court has been reluctant to abandon the concept entirely, which reluctance can also be seen in the Court's student search cases. Furthermore, as in the student speech cases, the same tension between the *in loco parentis* model of authority and that of the agent-of-the-state model emerges from the student search cases.

I. New Jersey v. T.L.O. and the "death" of in loco parentis

For example, the controversy in *New Jersey v. T.L.O.* centered around "what limits, if any, the Fourth Amendment places on the activities of school authorities."¹¹⁰ T.L.O., a high school freshman, was caught smoking in the lavatory and was sent to the principal's office, where she denied smoking at all.¹¹¹ Upon hearing this denial, the principal demanded to see T.L.O.'s purse, wherein he found cigarettes and rolling papers that, in his experience, were associated with marijuana use.¹¹² Given the results of his initial search, the principal believed that a closer search might yield more evidence of drug use, and so he conducted a thorough search of T.L.O.'s purse, wherein he found marijuana, a pipe, empty plastic bags, a large amount of cash (all one-dollar bills), a list of students who owed T.L.O. money, and two letters that implicated her in drug dealing.¹¹³

108. *See infra* Part II.B.

109. *See infra* Part II.B.

110. 469 U.S. 325, 332 (1985).

111. *Id.* at 328.

112. *Id.*

113. *Id.*

The principal then notified the police, and T.L.O. subsequently confessed to selling marijuana at the school.¹¹⁴

During T.L.O.'s delinquency proceedings, T.L.O. moved to suppress the evidence procured by the principal because she argued that the search violated her Fourth Amendment rights.¹¹⁵ The trial court ruled that the Fourth Amendment applied in the school setting but also provides protection to teachers and school administrators if there is "reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies."¹¹⁶ The trial court concluded that because the search was reasonable, no Fourth Amendment violation occurred, and the appellate court affirmed.¹¹⁷ However, the New Jersey Supreme Court reversed, holding that the search was not reasonable, and the Supreme Court granted New Jersey's petition for certiorari.¹¹⁸

The majority begins its opinion by noting the tension between the in loco parentis model of school authority and the agents-of-the-state model:

Some courts have resolved [this] tension . . . by giving full force to one or the other side of the balance. Thus, in a number of cases courts have held that school officials conducting in-school searches of students are private parties acting *in loco parentis* and are therefore not subject to the constraints of the Fourth Amendment.¹¹⁹

The Court goes on to completely reject the in loco parentis approach as being "in tension with contemporary reality and the teachings of this court."¹²⁰ Because state boards of education are creatures of the state,¹²¹ and because the Court has already recognized the First Amendment rights of students,¹²² the Court concluded that "school officials act as representatives of the State, *not merely as surrogates for*

114. *Id.* at 328–29.

115. *Id.* at 329.

116. *Id.* (quoting *State ex rel. T.L.O.*, 428 A.2d 1327, 1333 (N.J. Juv. & Dom. Rel. Ct. 1980,)).

117. *Id.* at 330.

118. *Id.* at 330–31.

119. *Id.* at 332 n.2 (citations omitted).

120. *Id.* at 336.

121. *Id.* at 334.

122. *Id.* at 336 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."¹²³ However, the Court then declared that the procedures for complying with the Fourth Amendment in a school setting should be less strict than those imposed upon law enforcement, and eventually imposed a two-part "reasonableness" test on school searches.¹²⁴ Because the principal did not violate either part of the reasonableness inquiry, the Court ultimately concluded that the search was reasonable and therefore no Fourth Amendment violation had occurred.¹²⁵

Like *Tinker*, on its face *T.L.O.* appears to be an express rejection of the common-law doctrine of in loco parentis, and its language seems to strongly suggest that the Supreme Court wanted to prevent lower courts from using in loco parentis to shield school teachers and administrators from liability for constitutional violations. Under *T.L.O.*, teachers and administrators are clearly treated as agents of the state instead of the students' parents, and hence the scope of their authority is much more limited than it is under in loco parentis. In fact, in her article Professor Stuart notes that after *T.L.O.* (which came on the heels of *Tinker* and before either *Fraser* or *Kuhlmeier*) "scholars were tolling the death knell of *in loco parentis* in public education."¹²⁶ However, as we saw in the student speech cases that followed *Tinker*, in loco parentis was not so easily banished, and the same is true of the Court's student search jurisprudence.

2. Back to in loco parentis in *Vernonia School District 47J v. Acton*

The Court waited ten years before it accepted another student search case, and when it did, it performed an about-face away from *T.L.O.*'s limited view of administrative authority and back towards a more permissive view inspired by in loco parentis. In *Vernonia School District 47J v. Acton*, the Court was confronted with the question of whether a school district can impose mandatory drug tests on student-athletes before allowing them to participate in school-

123. *Id.* 336–37 (emphasis added).

124. *Id.* at 341–42 (holding that a constitutional search must be (1) "justified at its inception" and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." The search also must not be "excessively intrusive." (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968))).

125. *Id.* at 346–48.

126. Stuart, *supra* note 4, at 977.

sponsored sporting events.¹²⁷ In an opinion authored by Justice Scalia relying heavily on *in loco parentis*, the Court held that such a program could withstand a Fourth Amendment challenge.¹²⁸

Justice Scalia begins his argument by making the following observation: “When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.”¹²⁹ Of course, the Vernonia School District consisted of public, not private schools, and thus Justice Scalia had to acknowledge that “[i]n *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints.”¹³⁰ Nevertheless, having acknowledged *T.L.O.*’s apparent rejection of *in loco parentis* within the context of public education, Justice Scalia proceeds to resurrect it by using *Fraser* as a conceptual bridge. Scalia does this by first arguing that *T.L.O.* “did not deny, but indeed emphasized, that the nature of [education authority] is *custodial and tutelary*, permitting a degree of supervision and control that could not be exercised over free adults.”¹³¹ This recognition of “custodial and tutelary” authority, of course, was the same line of logic that led the Court back to *in loco parentis* in *Fraser* after it had been rejected in *Tinker*, and Scalia did not hesitate to use the same reasoning to accomplish the same thing:

While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional “duty to protect,” we have acknowledged that for many purposes “school authorities ac[t] *in loco parentis*,” with the power and indeed the duty to “inculcate the habits and manners of civility.”¹³²

In this passage, Scalia cleverly uses the concept of “custodial and tutelary authority,” which was recognized in both *T.L.O.* and *Fraser*,

127. 515 U.S. 646, 648 (1995).

128. *Id.* at 648, 664–65.

129. *Id.* at 654–55.

130. *Id.* at 655 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985)).

131. *Id.* (emphasis added).

132. *Id.* at 655–56 (alteration in original) (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989); *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).

as the key premise in an argument that allows him to circumvent *T.L.O.*'s apparent rejection of the doctrine of in loco parentis. In essence, the argument looks like this:

1. Public school teachers and administrators have “custodial and tutelary authority” over their students (*T.L.O.*¹³³ and *Fraser*¹³⁴).
2. This “custodial and tutelary authority” includes the “power and indeed the duty to ‘inculcate the habits and manners of civility’” in students.¹³⁵
3. When public school teachers and administrators exercise their power to “inculcate the habits and manners of civility” in their students, they are acting in loco parentis (*Fraser*).¹³⁶
4. Therefore, public school teachers and administrators, by standing in loco parentis, have the power to limit the constitutional rights of the students entrusted to their care.¹³⁷

And thus the circle is complete: by relying on *Fraser* (which, of course, was *not* a student search case and therefore did not implicate the Fourth Amendment) Scalia was able to circumvent the Court's holding in *T.L.O.* and restore the concept of in loco parentis in search cases occurring within the public school context. In other words, under *Vernonia*, a teacher's authority is “custodial and tutelary,” and teachers stand in loco parentis to the extent necessary to fulfill their duty to “inculcate the habits and manners of civility” in the children entrusted to their care.¹³⁸ Thus, whatever rights

133. *T.L.O.*, 469 U.S. at 339 (“[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”).

134. *Fraser*, 478 U.S. at 683–84 (explaining that teachers are role models, who, like parents, have a duty “to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech”).

135. *Vernonia*, 515 U.S. at 655 (quoting *Fraser*, 478 U.S. at 681).

136. *Fraser*, 478 U.S. at 681, 683–84 (stating explicitly that teachers have a duty to inculcate the “fundamental values necessary to the maintenance of a democratic political system,” that teachers are to be role models, and that teachers, especially when acting to protect students, act in loco parentis).

137. *Vernonia*, 515 U.S. at 655–56 (“Thus, while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

138. *See id.* at 665 (“The most significant element in this case is the first we discussed: that the [drug testing] [p]olicy was undertaken in furtherance of the government's responsibilities, under a public school system, as *guardian and tutor* of children entrusted to

students have, they are necessarily limited by the administration's ability to stand in loco parentis and to determine the best way to fulfill their custodial and tutelary responsibilities. Because the Vernonia School District attempted to fulfill these responsibilities by instituting the drug testing program (thereby discouraging drug use), the "relevant question" in the case was whether the policy was "one that a reasonable guardian and tutor might undertake" pursuant to the authority that accompanies a tutor or guardian.¹³⁹ Because the Court found that the search was reasonable, it held that the policy did not violate the Fourth Amendment.¹⁴⁰

This conclusion, however, highlights the same tension seen earlier in the student speech cases, namely the tension between the in loco parentis and agents-of-the-state models of administrative authority in public schools. Under in loco parentis, teachers had almost unlimited authority since their authority derived from a delegation of parental authority. Therefore, a teacher's decision to conduct a search would not be "subject to constitutional constraints" because a parent's authority to conduct such a search would not be.¹⁴¹ However, *T.L.O.* rejected this model as "anachronistic," favoring instead a model that viewed school administrators as agents of the state who had responsibilities and constraints similar to other government officials.¹⁴² Nevertheless, in *Vernonia* the Court balked at affirming this model, and instead returned to the more permissive view of administrative authority afforded by in loco parentis.¹⁴³ However, the Court left administrators in a bit of a bind since it neither restored in loco parentis completely nor disavowed the agents-of-the-state model entirely. Hence, administrators had a right to wonder whether they really stood in loco parentis, with all the powers that doctrine implies, whether they were agents of the state, or whether their authority fell somewhere in between. Unfortunately, in its next two student search cases, the Court failed to answer this question definitively.

its care." (emphasis added)).

139. *Id.*

140. *Id.* at 664–65.

141. *Id.* at 655 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985)).

142. *T.L.O.*, 469 U.S. at 338–39.

143. *See Vernonia*, 515 U.S. at 654–56.

3. *Affirming Vernonia in Board of Education v. Earls*

Almost ten years after *Vernonia in Board of Education v. Earls*, the Supreme Court was again asked to determine whether a school district's mandatory drug testing policy was constitutional.¹⁴⁴ However, unlike *Vernonia*, the school district in this case applied the policy not just to student athletes, but to *any* student who wished to participate in *any* extracurricular activity.¹⁴⁵ Earls challenged the policy as a violation of her Fourth Amendment rights,¹⁴⁶ but the Court, relying on *Vernonia*, upheld the policy as constitutional.¹⁴⁷ Justice Thomas's majority opinion, citing Justice Scalia's opinion in *Vernonia*, again strongly emphasized the "custodial responsibility and authority" given to school administrators,¹⁴⁸ and Justice Breyer's concurring opinion actually equated these "custodial responsibilities" with the doctrine of in loco parentis itself:

The law itself recognizes these responsibilities with the phrase *in loco parentis*—a phrase that draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students) and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child's or adolescent's school-related privacy interest, when compared to the privacy interest of an adult, has different dimensions.¹⁴⁹

Thus in *Earls*, the Court again showed its reluctance to affirm *T.L.O.*'s dismissal of in loco parentis. Instead, like Scalia's opinion in *Vernonia*, *Earls*'s majority and concurring opinions, when taken together, draw an explicit link between *T.L.O.*'s language regarding teachers' and administrators' custodial and tutelary responsibilities and the doctrine of in loco parentis itself. However, as in *Vernonia*, the Court in *Earls* did not restore in loco parentis completely, nor did it reject *T.L.O.*'s agents-of-the-state model. This again raised the question of whether a teacher or administrator's authority was more

144. 536 U.S. 822, 826–27 (2002).

145. *Id.* at 826.

146. *Id.* at 826–27.

147. *Id.* at 825, 838.

148. *Id.* at 831 (indicating that *Vernonia* did not turn on relative expectations for privacy in different extracurricular activities, but rather "upon the school's custodial responsibility and authority").

149. *Id.* at 840 (Breyer, J., concurring).

akin to that of a parent or that of an agent of the state, a failure that would be highlighted by Justice Thomas in his opinion in *Safford Unified School District v. Redding*.¹⁵⁰

4. *Limiting in loco parentis* in *Safford Unified School District v. Redding*

In a sense, *Safford Unified School District v. Redding* is the perfect illustration of the difficulties facing both school administrators and the Court when it comes to determining the extent of an educator's authority within a public school. In this case Kerry Wilson, an assistant principal, received a tip from another student that Savana Redding was distributing prescription-strength ibuprofen pills to other students.¹⁵¹ He escorted Redding to his office and after a search of her backpack revealed nothing, Wilson ordered an administrative assistant to escort Redding to the school nurse's office so that they could search her clothes for pills.¹⁵² Once there, the administrative assistant and the nurse

asked [Redding] to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree.¹⁵³

No pills were found, but Redding filed suit against the school district and everyone involved with the search, alleging that the strip search violated her Fourth Amendment rights.¹⁵⁴ Writing for the majority, Justice Souter agreed, holding that it was not constitutional for a school administrator to order a strip search of a student.¹⁵⁵ The Court also held that because the state of the law was unclear at the time Wilson ordered the search, the school administrators were entitled to qualified immunity.¹⁵⁶

150. 129 S. Ct. 2633, 2646 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

151. *Id.* at 2640 (majority opinion).

152. *Id.* at 2638.

153. *Id.*

154. *Id.*

155. *Id.* at 2644.

156. *Id.*

In his opinion, Justice Souter tacitly acknowledged the role that in loco parentis might have played in Wilson's decision to order the strip search when he stated that "[p]arents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same."¹⁵⁷ Justice Souter acknowledged that there is a similarity between the concern a parent has for children under his care, and that of a school administrator.¹⁵⁸ This idea, of course, is precisely the link that allowed the Court to return to in loco parentis after *T.L.O.* because both parents and school administrators are charged with "custodial and tutelary" responsibilities; in this sense the administrators stand in loco parentis over the children in their charge. However, in *Redding* the Court limited the in loco parentis model further than it had in its prior decisions, arguing that, in addition to it being clear that the administrator was acting in accordance with his "custodial and tutelary" responsibilities, it must also be clear that his actions were "reasonable."¹⁵⁹ Because the Court felt that there was no indication that Redding posed any danger to her fellow students, and because there was no indication that she had concealed pills in her underwear, the Court concluded that "the combination of these deficiencies was fatal to finding the search reasonable."¹⁶⁰

In his opinion, Justice Thomas lambasted the majority for failing to adhere to the "reasonableness" rule set forth in *T.L.O.*, which stated that "the Court was 'unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of school rules.'"¹⁶¹ Furthermore, Justice Thomas argued that "[j]udges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment,"¹⁶² and even if they were, they should not be allowed

157. *Id.* at 2643.

158. Whether or not Wilson viewed himself as standing in loco parentis is, of course, unclear. However, given the more permissive view of administrative authority provided by the doctrine, and the Court's affirmation of it in both *Vernonia* and *Earls*, it is likely that Wilson honestly believed he had the authority to order the search, especially since he did, in fact, order the search.

159. *Id.* at 2642–43, 2646 (Thomas, J., concurring in the judgment in part and dissenting in part) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

160. *Id.* at 2643 (majority opinion).

161. *Id.* at 2651 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985)).

162. *Id.* at 2652.

to do so. Justice Thomas's reason for this conclusion is that such a rule would become unworkable: "School officials cannot be expected to halt searches based on the possibility that a court might later find that the particular infraction at issue is not severe enough to warrant an intrusive investigation."¹⁶³ But, Justice Thomas argued, that is precisely what the majority did in *Redding*.¹⁶⁴ By determining that Wilson's search was unreasonable because Redding (in the Court's view) did not pose a threat to her fellow students, and because there was no evidence pointing towards the necessity of a strip search, the Court was effectively "second-guessing" Wilson's judgment.¹⁶⁵ Such second-guessing, Justice Thomas asserted, runs contrary to both the Court's student search precedent specifically and its Fourth Amendment jurisprudence generally.¹⁶⁶

Additionally, and perhaps out of frustration at the confusing picture *Redding* paints for school administrators going forward, Justice Thomas concluded his opinion by calling for a "complete restoration of the common-law doctrine of *in loco parentis*," under which the strip-search of Redding would be constitutional, since "[t]here can be no doubt that a parent would have had the authority to conduct the search at issue in this case."¹⁶⁷ Justice Thomas's motivations for making this suggestion seem clear: in addition to the fact that such a restoration would make clear the extent of administrative authority within public schools (i.e., it would be virtually limitless), Justice Thomas also believes that it would grant the power of determining how and to what extent this authority should be limited to parents and legislators rather than judges.¹⁶⁸ For instance, if parents disagreed with an administrator's decision or with a school district's adoption of a particular rule, they would have "redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move."¹⁶⁹ In fact, Justice Thomas argued that completely restoring *in loco parentis* would go a long way towards resolving the

163. *Id.* at 2651–52.

164. *Id.*

165. *Id.* at 2648–49, 2651–53.

166. *Id.*

167. *Id.* at 2655–56.

168. *Id.* at 2656–58.

169. *Id.* at 2656 (quoting *Morse v. Frederick*, 551 U.S. 393, 419 (2007) (Thomas, J., concurring in part in the judgment and dissenting in part) (internal quotation marks omitted)).

ambiguities swirling around the concept of administrative authority because it would relieve the judiciary of the burden of resolving those ambiguities, a task that Justice Thomas argues

is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative.¹⁷⁰

5. *Some final, historical observations*

This Part has attempted to show how *in loco parentis* has influenced the Court in its repeated attempts to determine the extent of administrative authority within public schools. Unfortunately, Justice Thomas's snide characterization of the Court's student speech jurisprudence in *Morse* is probably correct: "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."¹⁷¹ Furthermore, in light of *Redding*, this characterization is probably true of the Court's student search jurisprudence as well: generally, administrators have the authority to order student searches except when they don't—a standard that has continuously developed through litigation.

Of course, this is just another way of saying that the Court has failed to accurately determine the extent of administrative authority in public schools, at least when it comes to questions regarding student speech and student searches. Instead, uncertainty and confusion abound in both of these areas, due mainly to the fact that the Court has vacillated between two conceptions of administrative authority: that of *in loco parentis*, where administrative authority is practically unlimited and is derived directly from parental authority, and that of the agents-of-the-state model, where administrative authority is severely limited and derived from the authority of the state. Because the Court has yet to affirmatively choose one over the other, school administrators, teachers, parents, students, and their lawyers have a right to be confused about which model ought to be

170. *Id.* at 2657.

171. *Morse*, 551 U.S. at 418.

used to evaluate an administrative decision. But is the doctrine of in loco parentis to blame for this confusion? Although Justice Thomas's suggestion that the Court completely restore the doctrine strongly indicates that it is not,¹⁷² Professor Stuart, for one, has argued that it is the primary culprit.¹⁷³

III. SHOULD IN LOCO PARENTIS BE "PUT OUT OF ITS MISERY"?

The title of Professor Susan Stuart's article, "*In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*," is a bit misleading, since what Professor Stuart is really arguing for is not a modification of in loco parentis, but its eradication.¹⁷⁴ Professor Stuart argues, "Ultimately, this Article expostulates that the *in loco parentis* doctrine should be put out of its misery: if courts will not allow it to go the way of the dodo, then it will have to be eradicated like the ubiquitous kudzu."¹⁷⁵ In support of this conclusion, Professor Stuart offers two arguments. First, she argues that in loco parentis ought to be abandoned by the courts because "it was never properly implemented by the courts in the United States," and second, she argues that in loco parentis "is no longer appropriate to the modern needs of public education."¹⁷⁶ Each of these arguments will now be explained in detail.

A. The Improper Implementation of In Loco Parentis in the United States

Professor Stuart's first argument for abandoning in loco parentis stems from her view that the doctrine was misinterpreted by American courts.¹⁷⁷ According to Stuart, Blackstone's original articulation of in loco parentis was *not* limited to just the parents' disciplinary power (which was how the doctrine ended up being interpreted in the United States¹⁷⁸). Instead, Stuart argues that:

172. *Safford*, 129 S. Ct. at 2651–52.

173. Stuart, *supra* note 4, at 972.

174. *Id.*

175. *Id.*

176. *Id.* at 970.

177. *Id.* at 985–96.

178. *See supra* Part II.A.

Although Blackstone placed his provision for *in loco parentis* within [a] description of parental power, the overall context¹⁷⁹ places Blackstone's reference to *in loco parentis* as equally referring to both duties and powers of parents to be placed in the hands of the "tutor or schoolmaster" as it can to being limited to just a delegation of disciplinary power. The conjunction "and" and the limiting phrase "as may be necessary to answer the purposes for which he is employed"¹⁸⁰ suggest that the last phrase of Blackstone's charge merely limits the disciplinary power of the schoolmaster or tutor without otherwise diminishing the parental duties of support and protection that he—the schoolmaster or tutor—must likewise undertake.¹⁸¹

In other words, Stuart argues that what Blackstone originally meant when he referred to *in loco parentis* was that the "tutor or schoolmaster" receives from the children's parents *both* the power to discipline *and* the duty to protect the children in his care.¹⁸² "Thus," Stuart concludes, "the *in loco parentis* doctrine for apprenticeship educational programs was not confined to the master's capacity to discipline the apprentice. . . . [P]arents were conveying *both* welfare and tutelary responsibilities, not just disciplinary duties."¹⁸³

However, Stuart points out that in the United States, courts "never really adopted *in loco parentis* as a usable doctrine of behavior for professional educators but merely as a convenient legal Latinism for something distinct from Blackstone's meaning."¹⁸⁴ The American version of *in loco parentis* was "distinct," according to Stuart, because it completely dropped the welfare duty that was part and parcel of Blackstone's original conception and instead focused exclusively on the disciplinary aspects of parental power.¹⁸⁵ In fact,

179. Stuart is referring to the context surrounding Blackstone's oft-quoted statement in his *Commentaries*. See *supra* note 12 and accompanying text.

180. The entirety of Blackstone's formulation is as follows:

[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

BLACKSTONE, *supra* note 12, at *441.

181. Stuart, *supra* note 4, at 988.

182. *Id.*

183. *Id.* at 988, 990 (emphasis added).

184. *Id.* at 991.

185. *Id.* (arguing that after the U.S. courts adopted *in loco parentis* to justify educators')

Stuart remarks that American courts were “loath to impose a high level of responsibility on teachers” and, “[a]s a consequence, most jurisdictions that have weighed in on the issue typically hold that a teacher only has a duty of supervision, not a duty to the child’s welfare.”¹⁸⁶ Therefore, Stuart concludes that “U.S. courts did not properly adopt the *in loco parentis* doctrine as likely envisioned by Blackstone to include both the welfare and disciplinary powers of the parent.”¹⁸⁷

Having established that only half of the *in loco parentis* doctrine was adopted in the United States, Stuart goes on to argue that the Court’s recent reliance upon the doctrine in student search cases is inappropriate for three reasons. First, because the American version of *in loco parentis* includes only the parent’s authority to discipline, it is inappropriate to use *in loco parentis* to justify student searches because “[s]earches are not disciplinary measures. . . . Instead, searches are a police function—perhaps a uniquely institutional function—designed to create a safe educational environment, not a parental function delegated to the school.”¹⁸⁸ Hence, *in loco parentis* cannot provide school administrators with the authority to conduct student searches since searches do not fall within the disciplinary power given to schools via *in loco parentis*. Second, even if the ability to conduct a search could somehow be circumscribed by a parent’s disciplinary power, it still would not justify school administrators’ searches because any such search is conducted on “behalf of *third parties*” and therefore “[a] parent’s delegation of power would not, logically, cover that analysis. Searching a student for the health and safety of the student body and the educational environment is an *institutional goal*, not a delegation of power from a parent.”¹⁸⁹ The equivalent of allowing such searches under *in loco parentis* is, according to Stuart, like allowing “a mother’s searching the *neighbor* children before they can play with *her* children,”¹⁹⁰ which would not be condoned by *in loco parentis* anyway. Finally, Stuart argues that because *parents themselves* are suing the schools

disciplinary power, they “did not also invoke the doctrine to hold public schools accountable for the welfare of students”).

186. *Id.* at 991–92 (citing sources).

187. *Id.* at 992.

188. *Id.* at 993.

189. *Id.* at 994 (emphasis added).

190. *Id.*

because they *disagree* with what the schools have done, it is difficult to see how the school's power to conduct the challenged searches came from the very parents who are challenging those searches, which is precisely the conclusion that in loco parentis demands.¹⁹¹ For these reasons, Stuart argues that in loco parentis ought to be abandoned by the courts.

B. Why In Loco Parentis Is Anachronistic

Professor Stuart argues that in loco parentis ought to be abandoned because it is anachronistic and does not meet the needs of our modern system of public education. First, Stuart argues that in loco parentis was developed within an educational system where education was completely voluntary and financed almost entirely by private parties, either through apprenticeships, private tutors, or private schools.¹⁹² Thus, because the apprentice typically lived with the master (or the tutor with the student), it was natural and appropriate to assume that the master stood in loco parentis over his apprentice, and that therefore he had the power and the duty to both discipline and care for the apprentice.¹⁹³ However, Stuart argues that neither of these duties make much sense within an "era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function."¹⁹⁴ If parents have no choice about to whom they send their child for an education, does it make sense to say that when the student does go, the parents have "voluntarily" delegated their authority to that school? But, Stuart argues, this is precisely what in loco parentis implies, namely, a voluntary delegation of authority, which is impossible in the context of public schools.¹⁹⁵ Hence, because of the involuntary nature of our modern educational system and because modern educators often have responsibilities that extend beyond education, Stuart concludes that the doctrine of in

191. *Id.*

192. *Id.* at 988–89; *see also id.* at 971 (“*In loco parentis* assumes a voluntary delegation of parental authority and was envisioned during a time of either home-schooling tutors or small residential, private schools.”).

193. *Id.* at 988.

194. *Id.* at 971.

195. *Id.*

loco parentis, whatever its merits, is simply inapplicable within that system.¹⁹⁶

Stuart's second argument stems from the fact that modern educators themselves do not view themselves as standing in loco parentis.¹⁹⁷ And if the educators themselves do not know what in loco parentis means, Stuart argues, why should the Court continue to rely upon it? "As a term of art," Stuart asserts, "[in loco parentis] provides teachers no guidance in classroom management, and professional educators would not touch the doctrine with a ten-foot barge pole because it is descriptive, not normative. It is a legalism not modern reality."¹⁹⁸ Instead, Stuart contends that the Court ought to abandon in loco parentis entirely and follow the example of other "modern educational managers" who have already adopted "more professional standards."¹⁹⁹ Stuart argues that such standards, which are typically developed by educational experts, would be much more useful in determining the extent of administrative authority in public schools because they would provide "objective norms of educational professionalism" that could be easily evaluated by the courts.²⁰⁰ The lack of such guidelines has caused the Court to improperly use in loco parentis and put its

imprimatur on . . . outliers and the outermost boundaries of collective institutional behavior, not based on any coherent standards but on some loosely defined doctrine that allows courts to throw up their collective hands and say, "We don't understand how to run schools so we won't interfere, regardless of what we really think."²⁰¹

IV. IN DEFENSE OF IN LOCO PARENTIS

Professor Stuart's arguments against the Court's reliance upon in loco parentis fail to provide a compelling case for abandoning the doctrine entirely. Furthermore, her proposed solution to the

196. *Id.*

197. *Id.* at 984 ("[A] fairly recent, albeit small, survey of teachers indicated that many did not know what *in loco parentis* means; the majority of respondents stated that they had no right to react to students as a parent would").

198. *Id.*

199. *Id.* at 993.

200. *Id.* at 1000, 1004.

201. *Id.* at 1004 (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002)).

problem facing the Court in this area is one that ought to be adopted by local school boards and state legislatures rather than imposed by the judiciary.

A. What Constitutes “Improper Adoption” of Common Law Principles?

Professor Stuart’s first argument against in loco parentis is a curious one. As discussed previously, Stuart contends that Blackstone’s understanding of in loco parentis was different than the concept that was later adopted by American courts.²⁰² In essence, this argument boils down to a quasi-originalist position regarding the common law, one that asserts that common law principles are “properly adopted” only if they remain faithful to the principle as it was originally (i.e., historically) understood. As mentioned earlier, Stuart argues that in loco parentis was originally understood to impose *both* disciplinary and custodial duties on the person standing in the place of the parent.²⁰³ However, since American courts only imposed the disciplinary duties and ignored or rejected the custodial side of the doctrine, according to Stuart in loco parentis was “improperly adopted” in American jurisdictions and therefore ought to be rejected.²⁰⁴

This position, however, seems to fly in the face of what most scholars consider to be the strengths of the common law system, namely the common law’s ability to adapt and evolve over time. As Oliver Wendell Holmes famously said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²⁰⁵

If Holmes is right, then it necessarily follows that as our experiences, moral and political theories, intuitions of public policy, and prejudices change, so should the common law. Indeed, most scholars

202. *See supra* Part III.A.

203. Stuart, *supra* note 4, at 988, 990.

204. *Id.* at 991–92.

205. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963).

consider the adaptability of the common law to be a *strength* of the system, not a weakness.

For instance, as the following table shows, there are a number of common law doctrines whose modern forms differ from the way they were originally conceived:

Doctrine	Original Understanding at Common Law	Current Understanding
Intestate succession: <i>Filius nullius</i>	Illegitimate children have no right to inherit from either parent. ²⁰⁶	Inheritance from mother permitted. ²⁰⁷
Duty of landlord to deliver possession to lessee ²⁰⁸	Landlord has an implied duty to oust holdover tenants (“English Rule”).	No such duty: lessee has a cause of action against the holdover tenant, <i>not</i> the landlord (“American Rule”).

206. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 115 (8th ed. 2009).

207. *Id.*

208. Both the American and English rules are discussed in *Hannan v. Dusch*, 153 S.E. 824, 826–28 (Va. 1930). Dukeminier’s textbook on property also discusses both of these rules, using *Hannan* as the case-in-chief. DUKEMINIER ET AL., PROPERTY 384–87 (6th ed. 2006). After presenting *Hannan*, the textbook authors note that “[c]ase law on the matter of delivery of possession remains divided, with substantial support for both the English and the American rule.” *Id.* at 387.

Revival of wills	A subsequent will could revoke a prior will only if the subsequent will remained in force until the testator's death. ²⁰⁹	A subsequent will revokes a prior will <i>upon the subsequent will's execution</i> , but the prior will can be revived by revoking the subsequent will if the testator so intends. ²¹⁰
Negligence ²¹¹	Liability for negligence required privity of contract; third parties had no cause of action.	Liability does not require privity of contract; third parties may sue for negligence.

And yet, no one has argued that these doctrines ought to be abandoned simply because their current forms differ from the way in which they were originally conceived.

Consider, for instance, the evolution of liability for negligence at common law. Originally, the common law required privity of contract before a negligence claim could be sustained.²¹² This rule made its way to the United States, where an exception to the privity rule was created for products that “put human life in imminent danger,”²¹³ but otherwise the privity rule survived intact.²¹⁴

209. *DUKEMINIER ET AL.*, *supra* note 206, at 304.

210. *Id.*

211. *See infra* notes 212–16 and accompanying text for a detailed discussion of these two principles.

212. *See, e.g.*, *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402, 405 (Ex.); 10 M. & W. 109, 114–15 (holding that “[u]nless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue”).

213. *Thomas v. Winchester*, 6 N.Y. 397, 409 (1852) (holding defendants liable for mislabeling a poison as an herb); *see also* *Statler v. Ray Mfg. Co.*, 88 N.E. 1063, 1064–65 (N.Y. 1909) (holding the manufacturer of a defective coffee urn liable when the urn

However, in *MacPherson v. Buick Motor Car Co.*, Judge Cardozo famously rejected the privity of contract requirement, and instead adopted a much broader theory of negligence:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, *irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.*²¹⁵

Of course, the common law theory of negligence continued (and still continues) to evolve, but post-*MacPherson*, negligence looked a lot different than it did originally. Manufacturers were now liable to third parties who were injured by defectively manufactured “things of danger”—a principle originally rejected at common law because of fear that it would create “the most absurd and outrageous consequences.”²¹⁶ Cardozo apparently disagreed with this assessment, however, and thus changed negligence completely.

Following the logic of Stuart’s argument, Cardozo’s change to negligence law in *MacPherson* is evidence that the concept of “negligence” was “improperly adopted” by American courts, and as such, it should be rejected because it was not in accordance with how the doctrine was originally conceived.

But why should we accept Stuart’s contention that departure from a common law doctrine as it was originally conceived is grounds for its rejection? In *MacPherson*, there appear to be very good reasons for departing from the privity of contract rule: automobiles are inherently dangerous, and if they are not manufactured properly, large numbers of people could be seriously injured or killed. Manufacturers know that their products are

exploded).

214. *See, e.g.*, *Cadillac Motor Car Co. v. Johnson*, 221 F. 801, 803 (2d Cir. 1915) (refusing to hold a car company liable to a third party who was injured by a defectively manufactured wheel because the third party lacked privity of contract: “one who manufactures articles dangerous only if defectively made, or installed, e.g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in case of willful injury or fraud”).

215. 111 N.E. 1050, 1053 (N.Y. 1916) (emphasis added).

216. *Winterbottom*, 152 Eng. Rep. at 405.

dangerous, and they know that these products are going to be sold to third parties. Hence, as a matter of policy it seems just and fair to hold manufacturers of “things of danger” liable for lapses in craftsmanship, and hence Cardozo’s departure from the traditional privity of contract requirement seems justified.

Likewise, in the case of *in loco parentis*, there appear to be good reasons why American courts accepted only the disciplinary side of the doctrine as traditionally understood, while rejecting the custodial side. For one, the fact that the doctrine was initially invoked *only* in cases where discipline was concerned indicates that courts felt the need to justify a teacher’s power to impose discipline and order in the classroom but were reluctant to give the teacher enough control so as to give rise to a constitutional duty to protect. Justice Scalia made this clear in *Vernonia* when he said “[w]hile we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional ‘duty to protect,’ we have acknowledged that for many purposes ‘school authorities ac[t] *in loco parentis*.’”²¹⁷ Thus, with regards to *in loco parentis*, it appears as though courts only wanted to accept *part* of the doctrine, as it was traditionally understood, while rejecting the other, just like the courts initially accepted part of the doctrine of negligence, as it was originally understood, only to reject part later. In both cases, the “new” doctrine differed from the original understanding, but in both cases the courts’ adoption of the “newer” doctrine appears justified. Hence, it is unclear why a deviation from the traditional understanding of a common law doctrine should provide grounds for rejecting it entirely.

B. Dispelling Three More Arguments Against In Loco Parentis

The fact that the courts “improperly adopted” *in loco parentis* is not Stuart’s only argument for its rejection. As outlined above,²¹⁸ she also argues that, even if the doctrine was “properly adopted,” there are three other conceptual difficulties surrounding the Court’s recent reliance upon it. However, these other difficulties also fail to provide grounds for a complete dismissal of *in loco parentis*.

217. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (alteration in original) (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).

218. *See supra* Part III.

1. Searches are not “disciplinary”

First, as noted above,²¹⁹ Stuart argues that since the American version of *in loco parentis* includes only a parent’s disciplinary power, it therefore cannot be used to justify student searches because a search is not a form of discipline (although discipline might result from the search).²²⁰ However, while Stuart’s distinction here between disciplinary authority and search authority might be plausible, the fact remains that the Supreme Court has recognized that parents undeniably have the power to conduct searches, including strip searches.²²¹ It is therefore plausible that, *contra* Stuart’s contention, searches *could be*, via the application of *in loco parentis*, “a parental function delegated to the school.”²²²

In fact, once the parental authority to conduct a search is recognized, further analysis of the conceptual link between searches and discipline brings Stuart’s initial distinction into question. However, in order to understand just how discipline and searches are related, a few observations must be made. First, searches are usually conducted only upon suspicion of wrongdoing and upon the belief that evidence of wrongdoing will be discovered by the search. Second, parents and school administrators share the same motivations for conducting a search. That is, both parents and administrators (a) want to protect other children and (b) want to deter the wrongdoer from engaging in further wrongdoing by administering punishment should evidence of wrongdoing be discovered. While an analysis of the philosophical underpinnings of penal theory are beyond the scope of this paper, when viewed through this larger lens, the link between disciplinary authority and the ability to conduct a search does not appear as tenuous as Stuart claims it to be. In fact, the authority to conduct searches seems to stem directly from one’s authority to administer punishment, especially since any punishment administered without evidence is unjust. Thus, *contra* Stuart, it appears as though the disciplinary

219. *See supra* Part III.A.

220. Stuart, *supra* note 4, at 993.

221. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2656 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (“There can be no doubt that a parent would have had the authority to conduct the search at issue in this case.” (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336, 337 (1985); *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987))).

222. Stuart, *supra* note 4, at 993.

authority of school administrators *does* provide sufficient justification for student searches.

2. Student searches are motivated by institutional rather than individual concerns

As outlined earlier,²²³ Stuart argues that under *in loco parentis*, parents give school officials the authority to search *their child*, individually, but in the student-search cases, the searches were conducted *on behalf of third parties*, namely the other students. Hence, Stuart tries to conclude that just as a parent does not have the authority to search the neighbors' children before they can play with her children, schools do not have the authority to search *some* children in order to protect *other* children. The authority to conduct such a search must stem from the parents of the child that was actually searched and not from the student body as a whole.

This analogy, however, appears to be faulty because Stuart fails to recognize that for any student at school, that student's parents have, by virtue of the *in loco parentis* doctrine, given the school the authority to search *their child*. Hence, to return to Stuart's analogy, it is not clear why a parent would not have the authority to search the neighbors' children *if the neighbors had given that parent the authority to do so*, which appears to be precisely what *in loco parentis* does within the context of public schools. Hence, it seems irrelevant that student safety is an "institutional goal": if the school has the authority to search *every* student, it does not matter whether the "goal" stems from the parents giving that authority or the desire to preserve a safe learning environment. In fact, it seems entirely likely that one of the reasons why parents would consent to allow schools to search their children would be because they *want* their students to be learning in a safe environment. Thus, the disconnect that Stuart is complaining about between *in loco parentis* and the "institutional goal" of safety does not appear to be very critical. Rather, it appears as though *in loco parentis* is more than capable of supporting the institutional goal of safety rather than undermining it.

223. *See supra* Part III.A.

3. Parental challenges to administrative decisions are incompatible with in loco parentis

Stuart's final argument in this area could be formalized as follows:

1. In loco parentis stands for the proposition that school administrators obtain their authority to curtail student speech, conduct student searches, etc., from the parents' voluntary delegation of parental authority.²²⁴ (Premise)
2. Voluntary delegation of authority implies agreement with or ratification of the decisions made pursuant to that authority. That is, unless the grantor would agree with or ratify the exercise of the delegated authority, she cannot be deemed to have granted it in the first place.²²⁵ (Premise)
3. As evidenced by the amount of litigation in this area, parents often do not agree or ratify administrative decisions.²²⁶ (Fact)
4. Hence, these parents cannot be viewed as having "voluntarily delegated" their authority to school administrators. (Follows from (2) and (3))
5. Hence, in loco parentis cannot be used to justify administrative authority in situations where the parents disagree with the administrator's decisions.²²⁷ (Follows from (1) and (4))

In short, Stuart seems to be arguing that if a parent challenges an administrative decision, it is inconsistent to argue that the administrator's authority to make that decision came from the very person who is disagreeing with or challenging that decision.

However, as the formalization above is meant to show, Premise (2) is dubious at best. To predicate "voluntary delegation" upon "agreement with" or "ratification" of the exercise of the delegated authority is a stringent standard indeed, and one that is rarely implemented in agreements of this sort. For instance, consider the following situations:

224. See Stuart, *supra* note 4, at 994.

225. See *id.*

226. *Id.*

227. See *id.*

1. U.S. citizens bestow decision making authority upon elected representatives, whom they trust will exercise that authority in their best interest.
2. Parents delegate their disciplinary and custodial duties (and the authority that comes with those duties) to babysitters, with the understanding that this authority will be used to accomplish the demands of these duties.
3. A principal gives an agent power to make legally binding agreements on behalf of the principal, and the fiduciary duties that arise from this relationship ensure that the agent will behave in a manner that is consistent with the principal's desires.

In each of these situations, the grantor believes (and probably should believe) that the grantee will exercise the delegated authority in a manner similar to the way the grantor would exercise it. In fact, Stuart is probably right to point out that were it otherwise, the grantors would probably never trust the grantees with their authority. However, that is not what Premise (2) claims. Premise (2) *requires* conformity as a *precondition of the grant*, which seems to be very rare in situations like this. To illustrate, if Premise (2) were true, then it seems that in each situation mentioned above, the grantee's authority would be destroyed if the grantor disagreed with the grantee's exercise of that authority. And yet, an elected representative's authority is not destroyed simply because his constituency disagrees with his decisions; a babysitter's authority is not destroyed merely because she decides to put the children to bed before their normal bedtime; and an agent's authority is not destroyed just because he handles a situation differently than the principal would have (assuming that the agent adequately defended the principal's interests without breaching his fiduciary duties).

In other words, in each of these situations it seems much more likely to claim that, while the grantor *expects* conformity, she does not *require* it as a precondition of the grant of that authority. Rather, the grantor probably realizes that the grantee will still be allowed to exercise independent judgment, particularly in high-pressure or emergency situations, and while the grantor *may* have acted differently in these situations, as long as the grantee did his or her best to conform to what he or she believed was proper under the circumstances, the grantor cannot reasonably claim that the grantee did not possess the authority to act. Likewise, in the case of *in loco parentis*, while it is true that parents challenging the decisions of

school administrators would have acted differently, that does *not* automatically imply that the administrator's authority to make that decision was destroyed. Instead, given the observations above, whether the grantor would have done the same thing under similar circumstances appears to be irrelevant as far as the validity of the grant of authority is concerned. Once the authority is given, the grantee can (and should) expect some reasonable amount of discretion to make independent decisions without fearing that she might undermine that authority simply because her decision does not conform to what the grantor would have done. Hence, even if the parent who gave the administrator the authority would not have conducted the search or would not have suppressed the speech in question, it does not follow that the administrator could not do so *under the authority that was originally delegated*. In short, Premise (2) is invalid: mere nonconformity with the grantor's expectations is not sufficient to revoke the initial grant of authority; and when viewed in this way, the apparent contradiction between parental challenges to administrative authority and in loco parentis disappears.

C. Is In Loco Parentis Really Anachronistic?

In addition to the foregoing arguments, Professor Stuart makes two more arguments that stem from her contention that in loco parentis is anachronistic.

1. In loco parentis is anachronistic because of mandatory attendance laws

Stuart's first argument alleges that the "involuntary delegation [of parental authority] occasioned by compulsory attendance laws" renders the in loco parentis doctrine inapplicable within the modern context of public education.²²⁸ However, upon closer inspection, our modern educational system does not appear as "mandatory" as Stuart claims it to be. Instead, as Professor Anne Proffitt Dupre has pointed out, "all fifty states have passed statutes that allow parents, subject to various checks and conditions, to teach their children at home."²²⁹ Professor Dupre continues: "[Under these statutes], the parents also choose whether to keep to themselves all of the parental

228. *Id.* at 971.

229. Dupre, *supra* note 57, at 89.

power that is necessary to restrain and correct the child so that he may obtain an education, or, instead, to delegate the duty and the accompanying power to someone else.”²³⁰ Furthermore, in addition to the homeschooling option, the rise of legislation permitting the creation of charter schools has also provided parents with an alternative to public schools.²³¹ Finally, as Justice Thomas pointed out, even if there were no private school, charter school, or homeschool options available to parents, modern public education would still not be completely “mandatory” because parents could “simply move” if they disagreed with the decision of their local school board or school administrators.²³² Hence, in light of these facts, even though students must go to school in our “modern” system of public education, it does not follow that the parents are not *choosing* to send them to public schools. Given the presence of other educational options and the ability to “simply move,” even within our modern system *in loco parentis* is anything but anachronistic.

2. *Educators do not view themselves as standing in loco parentis*

Stuart’s second argument that *in loco parentis* is anachronistic stems from the fact that teachers do not view themselves as standing *in loco parentis*.²³³ In her article, Stuart points to a survey given to teachers wherein “the majority of respondents stated that they had no right to react to students as a parent would.”²³⁴ From this survey, Stuart draws the following conclusion:

A more comprehensive survey is likely unnecessary to conclude that educators do not rely on the *in loco parentis* doctrine because it is meaningless to them As a term of art, it provides teachers no guidance in classroom management, and professional educators

230. *Id.* at 90 (citing cases).

231. According to the U.S. Department of Education Institute of Education Sciences in 2008-09 there were 1,433,116 students enrolled in 4694 charter schools nationwide. U.S. Dep’t of Educ. Inst. of Educ. Scis., *Digest of Education Statistics*, NAT’L CENTER FOR EDUC. STAT., http://nces.ed.gov/programs/digest/d10/tables/dt10_100.asp (last visited Oct. 17, 2011).

232. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2656 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Morse v. Frederick*, 551 U.S. 393, 419 (2007) (Thomas, J., concurring)).

233. Stuart, *supra* note 4, at 984.

234. *Id.*

would not touch the doctrine with a ten-foot barge pole because it is descriptive, not normative.²³⁵

As a substitute for in loco parentis, Stuart argues that the courts should adopt more “objective” educational standards, as they are developed by educational experts.²³⁶ These standards, Stuart argues, would govern the relationships between students and school administrators in a more “predictable and noncontroversial fashion” than in loco parentis.²³⁷ This would also simultaneously allow teachers and administrators to better manage their classrooms and schools (since their responsibilities and authority would be clearly articulated)²³⁸ and courts to more consistently settle disputes arising within the context of public education (since these normative standards are easier to consistently apply).²³⁹

Like those that have preceded it, there are a number of problems with this argument. First, the conclusion drawn from the survey is suspect because of the survey’s size. Stuart herself recognizes that the survey was small,²⁴⁰ which amounts to an implicit recognition that, if its size were increased, a different result might be obtained. But even more problematic than its size is the fact that the survey’s results seem to directly contradict Stuart’s sweeping conclusion that “[a] more comprehensive survey is likely unnecessary to conclude that educators do not rely on the in loco parentis doctrine because it is meaningless to them.”²⁴¹ According to the survey, teachers were asked whether they had a right to respond to disciplinary issues as parents would.²⁴² In response, 31% of the teachers surveyed said that they *did* have that right, and 41% answered “perhaps.”²⁴³ On the other hand, only 18.3% said that they could *not* respond as a parent would.²⁴⁴ Hence, the fact that 72% of teachers believed that they

235. *Id.*

236. *Id.* at 996–1003.

237. *Id.* at 1000, 1004.

238. *Id.* at 999–1000 (arguing that these normative professional standards “are nevertheless much easier to follow and understand for teachers and school administrators”).

239. *Id.* at 1000 (arguing that these normative standards “would allow courts to judge school district behavior against an objective standard”).

240. *Id.* at 984. In fact, the sample size included only sixty teachers. Anthony E. Conte, *In Loco Parentis: Alive and Well*, 121 *EDUC.* 196, 196–97 (2000).

241. Stuart, *supra* note 4, at 984.

242. Conte, *supra* note 240, at 196.

243. *Id.* at 197.

244. *Id.*

either do have or might have the ability to act in loco parentis seems to indicate that in loco parentis is anything but a meaningless concept to modern educators.

Furthermore, even if we grant Stuart's argument that educators do not rely upon the concept of in loco parentis, it does not follow that the doctrine is deficient. Stuart's conclusion here (i.e., that in loco parentis is anachronistic and ought to be rejected) would be much stronger if she could show that teachers do not rely upon in loco parentis because the doctrine *itself* is inconsistent or incomprehensible. However, as the prior sections have attempted to show, the doctrine itself is not to blame for the current state of confusion among educators. Rather, in loco parentis and its applicability within the context of public schools has been clouded by the Supreme Court's extremely inconsistent application of it, and hence, some confusion amongst educators ought to be expected.

After all, as shown previously, prior to the twentieth century there appears to have been little to no confusion respecting a teacher's authority and its source.²⁴⁵ It was the apparent rejection of in loco parentis in *Tinker* and *T.L.O.*—and the Court's refusal to bury the doctrine in its subsequent decisions—that has led to the current state of confusion, and currently the Court seems to be torn between the traditional in loco parentis model of educational authority and the agents-of-the-state model. Until that tension is definitively and soundly resolved, there will continue to be confusion regarding the extent of educational authority in public schools. But this does *not* mean that in loco parentis itself is anachronistic and, as a result, confusing to educators. Rather, it simply means that the Court is undecided about the extent to which it ought to be applied, as illustrated by Justice Thomas's and Justice Alito's concurring opinions in *Morse*.²⁴⁶ Absent a showing that the confusion surrounding the doctrine stems from the doctrine itself, Stuart's conclusion that the doctrine ought to be rejected on these grounds is not justified.

Finally, Stuart's ultimate conclusion that in loco parentis ought to be replaced by "objective norms of educational professionalism"²⁴⁷ is problematic because it represents a solution to the problem that

245. See *supra* Part II.A.

246. See *supra* Part II.B.4.

247. Stuart, *supra* note 4, at 1000.

should be imposed by the legislature, *not* the judiciary. Even if Stuart's proposed norms could provide all of the advantages she mentions, the fact remains that in order for the judiciary to implement her suggestions, it would have to overrule a large part of its jurisprudence in this area and adopt these new models of administrative authority wholesale. This is problematic for two reasons: first, as already indicated, Stuart's proposal calls for the judiciary to usurp the role of the legislature, and second, it calls for judges to make a decision that they are simply not qualified to make. Judges are not educational experts. Nor are they familiar with the policy considerations that would be implicated by the drastic reforms being proposed by Stuart. Both of these facts point to a single conclusion—that the judiciary should not be making this decision. As Justice Thomas has pointed out:

In the end, the task of implementing and amending public school policies is beyond this court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative.²⁴⁸

Of course, this statement raises the question of *why* the legislative branch or school boards are in a better position to tackle the reforms proposed by Stuart. Presumably, like judges, legislators are also not educational experts, and so why would they be in a better position to reform the educational system? The answer is political accountability. While it is true that legislators themselves are not educational experts, unlike judges, their role is to carefully consider suggestions like the ones proposed by Stuart, and if they determine that more expertise is needed, committees can be formed, the proper experts can be consulted, and informed decisions can be made. These resources are simply not available to judges, and judges are not charged with the task of implementing such reforms. Furthermore, legislators, unlike most judges, are politically accountable to their constituencies. Hence, if reforms like the ones proposed by Stuart are, in fact, desired by parents, teachers, school administrators, and

248. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2657 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

school boards, the legislature should theoretically be more responsive and motivated to make a detailed inquiry into such proposals.

For these reasons, even if Stuart is right and the doctrine of *in loco parentis* “would be enormously improved by death,”²⁴⁹ her proposed substitute is one that the Court arguably cannot adopt without usurping the legislature’s role, and furthermore it is one that the Court is simply not qualified to implement. Hence, even though *in loco parentis* is currently mired in confusion, and even though Stuart’s “objective norms of educational professionalism”²⁵⁰ would arguably improve the situation, the Court’s refusal to abandon *in loco parentis* and its continued reliance on its own precedent in this area (of which *in loco parentis* is a part) is a shining example of judicial restraint that ought to be praised, rather than condemned.

V. CONCLUSION

Professor Stuart has argued that the common law doctrine of *in loco parentis* itself is responsible for the sorry and confusing state of the Supreme Court’s student search and student speech jurisprudence, as well as for the general absence of clarity in legal discussions concerning administrative authority within public schools. Furthermore, she has also argued that *in loco parentis* would be “enormously improved by death” because the doctrine (a) was improperly adopted by the courts in the United States and (b) is anachronistic within the context of modern, public education. This Comment has shown how each of these arguments fails to provide sufficient grounds for rejecting the doctrine of *in loco parentis* outright. Instead, this Comment has explained the confusion surrounding authority in public schools by showing how the Court has been torn in its recent decisions between its common law explanation of administrative authority in education, which is embodied in *in loco parentis*, and its recent conception of authority, as embodied in the Court’s “agents-of-the-state” model of authority.

While Stuart has proposed that the Court adopt “objective norms of educational professionalism” in order to resolve this debate and dispel the confusion, this Comment has also shown how this proposal is unsatisfactory because it would not require the Court to usurp the role of the legislature, but it would also force judges to

249. Stuart, *supra* note 4, at 1000.

250. *Id.* at 983.

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make policy determinations that they are simply not qualified to make. Hence, rather than condemn the Court's reliance on in loco parentis, such reliance ought to be praised as a prime example of judicial restraint, for by relying on in loco parentis rather than rejecting it, the Court has stayed well within the bounds of its constitutional authority. Unfortunately, until society, through its duly appointed representatives, makes a firm decision regarding the extent of administrative authority within public schools, this area of the law will probably remain muddled and unclear. Let's just not blame in loco parentis for that.

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