

CONTROLLING STUDENTS AND TEACHERS: THE INCREASING  
CONSTRICTION OF CONSTITUTIONAL RIGHTS IN PUBLIC EDUCATION

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*“Indeed, just as the corporation replaces the factory,  
perpetual training tends to replace the school, and  
continuous control to replace the examination.”<sup>1</sup>*

I. INTRODUCTION

Like many public schools, the administration of Old Saybrook High School in Connecticut held an internet safety assembly for its first-year class.<sup>2</sup> This presentation utilized multiple images of students who attended

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<sup>1</sup> Gilles Deleuze, *Postscript on the Societies of Control*, OCTOBER, Winter 1992, at 3, 5.

<sup>2</sup> See Susan Misur, *Old Saybrook High School Makes Privacy Point; Some Perturbed when Real Students Shown in Social-Media Slide Show*, NEW HAVEN REG. (Apr. 10, 2011), <http://www.nhregister.com/articles/2011/04/10/news/doc4da275267fded093557929.txt?viewmode=fullstory>.

the high school, taken from publicly accessible, social media websites.<sup>3</sup> The school resource officer who prepared the slide show did not obtain consent from those students whose pictures were used.<sup>4</sup> Administrators claimed good intentions for the presentation.<sup>5</sup> However, many students reacted angrily, claiming that it was a violation of their privacy rights.<sup>6</sup> An editorial that appeared in a nearby newspaper after this event chided the students for their naiveté in believing that the use of this content by the school required permission.<sup>7</sup> Reflecting its perspective on the efficacy and importance of the presentation, the editorial was titled, “Old Saybrook High School Students Learn Little is Private.”<sup>8</sup>

At another public school assembly, the administration of Dennis-Yarmouth Regional High School recognized its graduating seniors for a variety of accomplishments, including those students who were entering the military.<sup>9</sup> The assistant principal, a National Guardsman who wore military fatigues to the event, helped to preside over the assembly.<sup>10</sup> At the same time, two teachers stood silently in the bleachers and held a sign that read “end war.”<sup>11</sup> When the students’ names were announced who were enlisting in the military after graduation, these teachers “remained seated when the assembly rose to give the students a standing ovation.”<sup>12</sup> One of these teachers claimed that her actions were intended to be a lesson for students

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<sup>3</sup> See Stephanie Francis Ward, *High School’s Internet Safety Lesson Riles Students Upset That Info Was Shared at Assembly*, A.B.A. J. (Apr. 12, 2011, 2:03 PM), [http://www.abajournal.com/news/article/principal\\_surprises\\_students\\_shows\\_their\\_social\\_media\\_shots\\_at\\_assembly/](http://www.abajournal.com/news/article/principal_surprises_students_shows_their_social_media_shots_at_assembly/).

<sup>4</sup> See Misur, *supra* note 2.

<sup>5</sup> See *id.* (providing the principal’s claim that “[s]chool administrators and police didn’t intend to make anyone upset”).

<sup>6</sup> See Ward, *supra* note 3.

<sup>7</sup> See *Old Saybrook High School Students Learn Little is Private*, NEW HAVEN REG. (Apr. 22, 2011, 12:00 AM), <http://www.nhregister.com/articles/2011/04/22/opinion/doc4db0a484ca958617202839.txt> (advocating for these types of presentations in other high schools).

<sup>8</sup> *Id.*

<sup>9</sup> See Cynthia McCormick, *Teachers’ Anti-War Message Draws Fire*, CAPE COD TIMES (June 15, 2010, 2:00 AM), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100615/NEWS/6150306>.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See Cynthia McCormick, *D-Y Teachers Disciplined for War Protest*, CAPE COD TIMES (June 18, 2010, 2:00 AM), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20100618/NEWS/6180328>.

on “how to dissent.”<sup>13</sup> As a result of this conduct, the teacher was placed on paid administrative leave until the end of the school year and was suspended without pay for the first ten days of the next school year.<sup>14</sup>

These events are only two, among many, examples of how the current public school environment is teaching the lessons that little about students and teachers is private and that dissent from these populations will be punished.<sup>15</sup> Indeed, schools have become places where the diminution of speech and privacy rights is the norm.<sup>16</sup> These restrictions started with policies that were aimed at students—policies that courts have been more than willing to uphold.<sup>17</sup> Although these courts, following the Supreme Court’s seminal opinion in *Tinker v. Des Moines Independent Community School District*,<sup>18</sup> have stated that constitutional rights are not shed at the threshold of the schoolhouse door,<sup>19</sup> the paramount governmental interest in the maintenance of control<sup>20</sup> and order in the schools continues to be used

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<sup>13</sup> Andrew Malcolm, *High School Teacher Marybeth Verani Refuses to Honor Her Students Enlisting in the Military*, L.A. TIMES (June 15, 2010, 3:34 PM), <http://latimesblogs.latimes.com/washington/2010/06/military-marybeth-verani-yarmouth.html>.

<sup>14</sup> See McCormick, *supra* note 12.

<sup>15</sup> See, e.g., Sevil Omer, *Oklahoma High School Valedictorian Denied Diploma for Using ‘Hell’ in Speech*, NBC NEWS (Aug. 20, 2012, 10:24 AM), [http://usnews.nbcnews.com/\\_news/2012/08/20/13377164-oklahoma-high-school-valedictorian-denied-diploma-for-using-hell-in-speech?lite](http://usnews.nbcnews.com/_news/2012/08/20/13377164-oklahoma-high-school-valedictorian-denied-diploma-for-using-hell-in-speech?lite) (detailing a public high school’s decision to withhold the valedictorian’s diploma due to her use of the word “hell” in her valedictory speech).

<sup>16</sup> See, e.g., Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 46 (2008) (discussing the expansiveness of school discipline of student speech, especially in light of the Supreme Court’s decision in *Morse v. Frederick*, 551 U.S. 393, 396 (2007), with its blurring of the lines of “where, for free-speech purposes, the school stops and the public square begins”).

<sup>17</sup> See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (upholding the right of a school district to discipline a high school student who violated a school disciplinary rule by giving a speech at a school assembly that was premised on an extensive sexual metaphor).

<sup>18</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

<sup>19</sup> See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (utilizing the *Tinker* dicta to discuss the nature of schoolchildren’s Fourth Amendment rights); *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 192 (N.D. 1988) (reiterating the *Tinker* dicta in its explanation of teachers’ Fourth Amendment rights).

<sup>20</sup> The notion of control is the central theme of governmental restriction on the educational environment. There are many diverse theoretical foundations for this concept of control. See generally ÉTIENNE DUMONT, BENTHAM’S THEORY OF LEGISLATION (Charles Milner Atkinson

as the rationale to restrict countervailing speech and privacy interests of students.<sup>21</sup> The effect of this oft-repeated balancing test has furthered the dramatic curtailment of the scope of student constitutional rights. As a result, courts have firmly established that students have more circumscribed speech rights and more diminished expectations of privacy than other members of the general population.<sup>22</sup>

Yet, students are not the only individuals on school grounds who are being affected by this sweeping display of governmental control. Teachers have also become subject to equivalent policies that curtail their own constitutional rights.<sup>23</sup> Essentially, public school teachers now find themselves increasingly being subject to similar restrictions on their abilities to speak inside and outside of the classroom and to be free of invasive searches.<sup>24</sup> In reviewing these matters, some circuit courts have upheld the adoption and implementation of these types of policies based on false parallels between students and teachers, which extend the controlled environment of the schoolhouse to the educators.<sup>25</sup> Other circuit courts have

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trans., Oxford University Press 1914) (1802); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975); NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1989).

<sup>21</sup> See, e.g., Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 397 (2011) (discussing the considerable deference given to “school officials’ disciplinary decisions regarding on-campus student speech”); Bd. of Educ. v. Earls, 536 U.S. 822, 831 (2002) (“Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”).

<sup>22</sup> See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)) (The “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”); New Jersey v. T. L. O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) (“In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.”).

<sup>23</sup> See, e.g., Crager v. Bd. of Educ., 313 F. Supp. 2d 690, 692 (E.D. Ky. 2004) (upholding a school district’s random suspicionless drug testing policy for teachers).

<sup>24</sup> See, e.g., *id.*; Daniel Bates, *Teacher Sacked for Refusing to Remove ‘Have You Drugged Your Kids Today’ Bumper Sticker*, MAIL ONLINE (Mar. 1, 2011, 10:25 AM), <http://www.dailymail.co.uk/news/article-1361834/Teacher-Tarah-Ausburn-sacked-drugged-kids-today-bumper-sticker.html> (discussing the termination of a teacher for a bumper sticker on her car that she parked on school property).

<sup>25</sup> See, e.g., Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998) (affirming the constitutionality of a suspicionless drug testing policy for teachers in part on the “pervasive[ness of] drug use in our schools” by students); *Crager*, 313 F. Supp. 2d at 702 (relying upon student drug testing cases to support its finding of the constitutionality of a suspicionless drug testing policy for teachers).

placed constricting conditions on the employment of teachers under a government employee analysis,<sup>26</sup> which unsurprisingly dovetails with the notions of control that have been established within public K-12 education.<sup>27</sup> Consequently, teachers now face pressure on both sides—from the perspective that teachers should be treated like students for constitutional considerations on one end<sup>28</sup> to the reasoning that teachers are just like any other government employee with respect to speech rights<sup>29</sup> and like highly regulated employees with respect to privacy rights on the other end.<sup>30</sup> Given the disparity in treatment of these issues by courts and rationales, substantial confusion has been generated as to what teachers can and cannot say in schools and as to what types of tests might be imposed upon them.<sup>31</sup> Despite this generalized confusion, what is clear is that teachers, like students, are now in a vise of governmental control.<sup>32</sup>

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<sup>26</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (finding that speech made by public employees pursuant to their official duties is not protected by the First Amendment).

<sup>27</sup> See Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 745 (2011) (“In *Garcetti*, the Court essentially considered the reverse problem: individuals [like teachers] attempting to speak for themselves may be mistaken for mouthpieces of the government. . . . Courts have extended this reasoning, permitting the government to control even off-duty speech by public employees.”).

<sup>28</sup> See *Crager*, 313 F. Supp. 2d at 701 (“While the Supreme Court has only upheld random testing in the context of student testing, nothing in the language of the cases provides an explicit prohibition against random testing of adults and the Supreme Court has never struck down a testing regime simply because it provided for random tests.”).

<sup>29</sup> See Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers’ First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1306–07 (2009) (“Nowhere is this impact [of the *Garcetti* decision] felt more clearly than in the teaching world, where there is no longer a serious path to follow for a court interested in supporting a teacher’s historic First Amendment rights, a teacher’s role as intellectual leader and challenger, or even as gadfly or critic on ‘matters of public concern.’”).

<sup>30</sup> See *Knox County Educ. Ass’n*, 158 F.3d at 379 n.24, 383–84 (upholding a suspicionless drug testing policy for teachers based on a finding that teachers are engaged in a “heavily regulated industry,” like that of the railroad industry); *Teacher Reps Fight Random Drug Tests*, WASH. TIMES (Mar. 12, 2009), <http://www.washingtontimes.com/news/2009/mar/12/random-drug-tests-test-teacher-privacy-rights/?page=all> (quoting the Missouri state representative who introduced a bill that would require suspicionless drug testing of state teachers as saying, “‘Why should a school employee not be tested? After all, police officers, factory workers and people in most other industries can be randomly tested for drug use’”).

<sup>31</sup> See, e.g., *Allen v. Sch. Bd.*, 782 F. Supp. 2d 1304, 1316 (N.D. Fla. 2011) (discussing how the factual allegations of teacher plaintiffs in a First Amendment lawsuit “demonstrate that confusion exists regarding when they are acting in their official capacity, subject to the restrictions . . . [of] school policies, or when they are free to act or speak in a private capacity at

This article explores the notion of governmental control of both students and teachers inside (and increasingly outside) today's public schools. This piece is not solely concerned with the limits on students and teachers' First and Fourth Amendment rights for their own sakes, even though these protections are vitally important to the democratic forum of governance.<sup>33</sup> Rather, this article demonstrates how the constitutional restrictions in the educational arena, which are created by the state with support from the courts, ultimately undermine the outcomes that society hopes the constraints will produce. Therefore, the purpose of this piece is twofold. It illustrates the way control is woven into the central jurisprudence of constitutional cases in education, despite the face value that is given to the free exercise of constitutional rights in schools, and it explores why this legal implementation of control matters to the quality of education in public schools.

To accomplish this dual purpose, Part II of this Article discusses the way *Tinker* set up the contradictory framework that is currently utilized by the judiciary of rhetorically protecting constitutional rights while ultimately reinforcing fundamental aspects of governmental control. Parts III and IV explore the elements of control in the context of policies that constrict student First and Fourth Amendment rights. Parts V and VI address control in the context of schools' circumscriptions of teachers' speech and privacy rights. The Article's conclusion advocates for the actual allowance of the exercise of constitutional rights in schools while channeling inevitable governmental control in positive directions and away from the current, myopic focus on quashing dissent and infringing on privacy rights. These types of constitutional safeguards are necessary for both students and teachers as they represent the "kind of openness . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."<sup>34</sup>

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school events [and] that confusion exists regarding inconsistencies . . . [about] either permitting or restricting certain types of expressive speech or conduct at school").

<sup>32</sup> See *Knox County Educ. Ass'n*, 158 F.3d at 383–84.

<sup>33</sup> See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

<sup>34</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

## II. *TINKER*, SOCIAL RECONSTRUCTIONISM, AND THE CONTROL DISCOURSE IN PUBLIC EDUCATION

*Tinker* has become the central origination point for the analysis of the regulation and control of student and faculty speech and privacy rights.<sup>35</sup> The case's famous dicta regarding constitutional rights and the schoolhouse gate is oft quoted at the outset of education cases as an apparent nod to the notion of expansive constitutional rights in schools.<sup>36</sup> However, judicial citation to *Tinker* in this manner is not an adoption of a reconstructionist perspective on education,<sup>37</sup> given that the holdings of most of these cases advocate for a constrictive view on the exercise of First and Fourth Amendment rights by students and teachers.<sup>38</sup> Instead, this judicial perspective is illustrative of the control doctrine established within the majority opinion in *Tinker* and reflected in Justice Hugo Black's dissent to that opinion.<sup>39</sup> Consequently, *Tinker*'s ultimate legacy has been how it birthed the modern control standard for school law cases.

In *Tinker*, several high school students planned to demonstrate their disagreement with the Vietnam War by wearing black armbands to their public schools.<sup>40</sup> Upon learning of this intended protest, school officials

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<sup>35</sup> See, e.g., William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949, 949 (1988) ("*Tinker* is the starting point for virtually every judicial discussion of the First Amendment rights of children.").

<sup>36</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (quoting *Tinker*, 393 U.S. at 506) (providing that "[o]ur cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" in a student speech-rights case); *Acton v. Vernonia Sch. Dist.* 47J, 515 U.S. 646, 655–56 (1995) (quoting *Tinker*, 393 U.S. at 506) (providing that "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" in a student Fourth Amendment case (citations omitted)); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010) (quoting *Tinker*, 393 U.S. at 506) (providing that "teachers, like students, do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" in a teacher-speech case); *Knox Cnty. Educ. Ass'n*, 158 F.3d at 374, 383–84 (citing to *Acton*, a derivative case of *Tinker*, to uphold its finding that suspicionless drug testing of teachers is constitutional).

<sup>37</sup> See JOHN DEWEY, MY PEDAGOGIC CREED 13 (1897) ("[E]ducation must be conceived as a continuing reconstruction of experience; that the process and the goal of education are one and the same thing.").

<sup>38</sup> See *infra* text accompanying notes 83–357.

<sup>39</sup> See *infra* text accompanying notes 64–76.

<sup>40</sup> *Tinker*, 393 U.S. at 504.

adopted a policy that prohibited this display.<sup>41</sup> Despite this prohibition, several students attended school with the armbands, which resulted in their suspensions.<sup>42</sup> Subsequently, these students filed a 42 U.S.C. § 1983 action, claiming that the school officials had violated their First Amendment rights.<sup>43</sup> The district court dismissed the complaint,<sup>44</sup> and an equally divided Eighth Circuit, hearing the case en banc, affirmed the lower court's decision without opinion.<sup>45</sup> The Supreme Court granted certiorari.<sup>46</sup>

In discussing the extent of student speech rights, the Supreme Court idealistically stated that individuals do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>47</sup> However, the Court also stated that school authorities could permissibly prohibit student expression if such conduct would reasonably lead to a “substantial disruption of or material interference with school activities . . . .”<sup>48</sup> Such a prohibition would not be considered permissible if it was motivated solely by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>49</sup> However, this type of prohibition could be constitutionally implemented under these circumstances as part of school officials’ “comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and *control* conduct in the schools.”<sup>50</sup> With this framework, the Court enunciated the control doctrine that has been expanded and reinforced in the years and cases since this landmark decision.

Yet, *Tinker*, unlike many of the cases that cite to it,<sup>51</sup> is one of the few cases whose outcome supports the free exercise of constitutional rights on

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 505.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 506.

<sup>48</sup> *See id.* at 514.

<sup>49</sup> *Id.* at 509.

<sup>50</sup> *Id.* at 507 (emphasis added).

<sup>51</sup> *See, e.g.,* *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (quoting *Tinker* at the outset and subsequently holding in a rights-restrictive manner); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56, 664–65 (1995) (same).



school grounds.<sup>52</sup> In analyzing the schools' punishment of the protesting students, the Court found that the students were engaged in the type of civic, political speech that is at the cornerstone of First Amendment protection.<sup>53</sup> Additionally, the Court ascertained that this conduct was not sufficient for the school officials to reasonably determine that it would "materially and substantially disrupt the work and discipline of the school."<sup>54</sup> Instead, the Court deemed the school's suppression of the speech to be based on the want to avoid the "unpleasantness" that could result from the silent protest of the controversial war.<sup>55</sup> As a result, the Court determined that the students' First Amendment rights had been violated, and it reversed the decision of the circuit court, allowing a small victory for the exercise of dissent by students in schools.<sup>56</sup>

It has been asserted that *Tinker* is representative of a social reconstructionist perspective,<sup>57</sup> which would "allow the student the power the student needs to avoid perpetuating society's flaws" and which would "support those students who rebut the values that the school is trying to inculcate."<sup>58</sup> The reconstructionist model of school power is typically described via a dialectic with the social reproduction model,<sup>59</sup> which

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<sup>52</sup> See Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995) ("Most importantly, the *Tinker* decision is rights-based. Children do not forfeit their rights when they walk into the public school any more than they do when they walk out of the public school.").

<sup>53</sup> See *Tinker*, 393 U.S. at 508–09, 513–14.

<sup>54</sup> *Id.* at 513.

<sup>55</sup> See *id.* at 508–10.

<sup>56</sup> See *id.* at 514. Although *Tinker* is considered to be the landmark constitutional case in terms of student speech rights, in the context of control, it is important to note the nature of the speech at issue was a silent display of a black armband, rather than any type of vocalized protest. See *id.* at 504. Given this crucial fact, the case does not afford sweeping latitude to the exercise of First Amendment rights by students on campus.

<sup>57</sup> See John S. Mann & Alex Molnar, *On Student Rights*, 1974 EDUC. LEADERSHIP 668, 669–70 (discussing *Tinker* as being exemplary of "a growing body of case law which supports the constitutional rights of students against oppressive administrative practices").

<sup>58</sup> Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 65 (1996).

<sup>59</sup> Following Professor Dupre's dichotomy of the social reconstructionist versus social reproductionist models of school power, this Article accepts these educational theories along with their related pragmatic philosophical and legal traditions. See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (Ohio University Press, 1998) (1927). See also Richard Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915

“allow[s] the school the power it need[s] to mold children in society’s image . . . .”<sup>60</sup> One scholar has argued that the reconstructionism of *Tinker* and the education cases decided until the *Vernonia School District 47J v. Acton* case<sup>61</sup> facilitated disorder and disrespect in schools,<sup>62</sup> claiming that “*Tinker* . . . paved the way for the decline in school order and educational quality.”<sup>63</sup> This approach asserts that *Tinker*’s foundational premise regarding constitutional rights and the schoolhouse gate is representative of a deleterious reconstructionist perspective that has “infected to some degree nearly every opinion since *Tinker* was written”<sup>64</sup> and has contributed to the decline in public education outcomes.<sup>65</sup>

This perspective elaborates upon Justice Hugo Black’s reproductionist dissent to the majority opinion in *Tinker*.<sup>66</sup> Justice Black steadfastly denied “that it has been the ‘unmistakable holding of this Court for almost 50 years’ that ‘students’ and ‘teachers’ take with them into the ‘schoolhouse gate’ constitutional rights to ‘freedom of speech or expression.’”<sup>67</sup> Justice Black instead promoted a cabining of the speech rights of students in schools, as “children had not yet reached the point of experience and

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(2007); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 (1990).

<sup>60</sup>Dupre, *supra* note 58, at 65.

<sup>61</sup>515 U.S. 646 (1995).

<sup>62</sup>See Dupre, *supra* note 58, at 51–52 (“The chaos that has overtaken many of our public schools did not happen overnight. . . . Each time that misconduct by an individual student went unquestioned because the teacher or principal was afraid that it did not meet the ‘substantial disruption’ standard set forth by the Supreme Court, we took one more step toward the turmoil that exists in the public school community today. . . . I have little doubt that the ethos the Court has created has discouraged teachers over time in their efforts to maintain order.”).

<sup>63</sup>*Id.* at 99.

<sup>64</sup>*Id.* at 99–100.

<sup>65</sup>See *id.* at 100 (“In undermining the trust between teacher and student, the Court tore at the very fiber of the education enterprise. Even if not singularly responsible for school decline, the Court’s opinions have sent public messages that undermine the school’s efforts to provide students with a serious education.”).

<sup>66</sup>See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting). It is intriguing that Justice Black, who was one of the greatest defenders of the First Amendment in the twentieth century, authored such a vehement dissent in *Tinker*. See Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 613 n.5 (1992) (deeming Justice Black the “First Amendment’s foremost champion on the court”).

<sup>67</sup>*Tinker*, 393 U.S. at 521 (Black, J., dissenting).

wisdom which enabled them to teach all of their elders.”<sup>68</sup> This rights restrictive perspective is now more in line with the approach that most courts ultimately adopt in education law cases. This should be unsurprising given that “[o]n a wide range of issues, Black was a prophet who often began in dissent or in relative obscurity only later to prevail as ultimate and enduring Court orthodoxy.”<sup>69</sup>

In Justice Black’s dissent, he articulated a fear that the majority opinion in *Tinker* would give rise to a tide of youthful disorder: “This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”<sup>70</sup> He further foresaw litigation that would take the public schools away from the control of the state and deliver them into the hands of the students.<sup>71</sup> Specifically, Justice Black warned that “[t]urned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States . . . .”<sup>72</sup> As a result of these beliefs, he “wholly . . . disclaim[ed] any purpose on [his] part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.”<sup>73</sup>

The prophetic nature of Justice Black’s dissent lies, not within the realization of his fears of schools run amok, but instead within the notions of control needed to quash such potential disorder that are at the center of his opinion and that are reflective of the majority’s control doctrine.<sup>74</sup> Quite simply, the power disparities of students controlling schools as a result of *Tinker* never became an actuality.<sup>75</sup> In fact, subsequent Supreme Court (and

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<sup>68</sup> *Id.* at 522.

<sup>69</sup> Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1239 (2002).

<sup>70</sup> *Tinker*, 393 U.S. at 525 (Black, J., dissenting).

<sup>71</sup> *Id.* at 525–26.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 526.

<sup>74</sup> See *id.* at 507 (discussing the state’s “comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools”).

<sup>75</sup> See Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions—For the Law and For the Litigants*, 63 FLA. L. REV. 1407, 1408 (2011) (“On the law, none of the student speech cases reshaped the legal landscape to the extent commonly depicted. *Tinker* never had the impact on actual schools that it

other judicial) jurisprudence has only given face value to the rights-expansive holding of *Tinker*, by first asserting its popular dicta in any case that examines constitutional rights on school grounds and then choosing instead to focus and expand upon the control doctrine within the case.<sup>76</sup> Further, some courts have extrapolated upon this doctrine to now allow the regulation of off-campus conduct deemed to be substantially disruptive.<sup>77</sup> Although students have been the central foci of this type of constriction, the control ideology within *Tinker* has also begun to support the rights restrictive regulation of teachers, “treating them [in many circumstances] like ‘tall children’ for First Amendment purposes.”<sup>78</sup> Consequently, education cases since *Tinker* have become increasingly rights constrictive and are by no means reconstructionist.<sup>79</sup>

It is therefore ironic that these courts continue to genuflect to the *Tinker* dicta prior to holding in ways that constrict the constitutional rights of students and teachers.<sup>80</sup> This genuflection to a rights-expansive judicial approach is only used to preface the utilization of the control discourse that was enunciated within *Tinker* as well. The rhetoric advanced in support of

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had on paper: the infeasibility of most speech litigation left censorship widespread and lawsuits rare.”).

<sup>76</sup> See Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 969, 995 (2010) (providing that “the Court [in *Morse v. Frederick*] majority’s primary goal was to walk back the undeniably long-lasting impact of *Tinker*” and detailing the vast expansion of state control over student speech as a result of *Morse*).

<sup>77</sup> See, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 837, 840–41 (N.D. Miss. 2012) (finding that a school could constitutionally punish a high school student for off-campus speech based on the *Tinker* control doctrine).

<sup>78</sup> Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 13 (2001).

<sup>79</sup> See Erwin Chemerinsky, *Isaac Marks Memorial Lecture: Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 728 (2011) (“It is difficult to read *Morse* and see the Roberts Court as protective of free speech. The banner at issue in this case was silly and incoherent. There was not the slightest evidence that it caused any harm; there was no claim that it was disruptive and certainly no evidence that it increased the likelihood of drug use. But, the conservative majority still ruled against speech and in favor of the government.” (footnote omitted)).

<sup>80</sup> See, e.g., Frank D. LoMonte, *Shrinking Tinker: Students are “Persons” Under Our Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1348 (2009) (“When a court refers to the ‘special’ qualities of the school environment, it almost invariably telegraphs that the student is about to lose, because of the extraordinary deference that is afforded to administrators in managing school affairs and the relatively low value afforded to the speech of young people.”); Daly, *supra* note 78, at 41 (“The curtailment of *Tinker*’s protection of student speech by subsequent cases, however, makes it a very weak reed for teachers to lean upon.”).

the holdings in the opinions in these post-*Tinker* cases is most often framed in terms of the promotion of safety and order in schools,<sup>81</sup> which is a positive social and educational policy aim. However, the penalty of promoting this goal through overly broad and suppressive means is often born with a cabining of the rights of students and teachers.<sup>82</sup> Although it is certainly within the power of state governmental entities to determine the general manner in which schools are run, these dictates should not be allowed to infringe upon the rights of students or teachers based on an *argumentum ad populum*. Further, the courts in evaluating these state actions should more appropriately acknowledge that the *Tinker* dicta is just that—dicta—rather than consistently maintaining seemingly idealistic resistance against the truth that control is the primary mechanism in today’s schools.

To substantiate and advance this control argument, the Article will now discuss this discourse as it has been applied to the two primary groups of individuals in schools, students and teachers. Specifically, it will examine two of the most prominent and contested axes of constitutional claims in educational settings—First Amendment speech cases and Fourth Amendment privacy cases. This examination will illustrate that *Tinker*’s lasting precedent is not the principle that constitutional rights are still retained at the schoolhouse gate, but instead is its control discourse.

### III. CONTROLLING STUDENTS’ FIRST AMENDMENT RIGHTS

Since the Supreme Court’s decision in *Tinker*, multiple courts have acknowledged that the case provides the essential framework for the analysis of student First Amendment claims.<sup>83</sup> However, even though

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<sup>81</sup> See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002) (“Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”); *Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690, 703 (E.D. Ky. 2004) (“The suspicionless [drug] tests ensnare more users and have a greater deterrent effect, thus improving school safety.”).

<sup>82</sup> See, e.g., Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 *IND. L.J.* 1113, 1147 (2010) (“Yet the student speech framework currently fails to account for an equally important dividing line: the *method* by which student speech is restricted. . . . [T]he framework . . . lacks the heightened protections that would appropriately counter-balance student punishments.”).

<sup>83</sup> See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (discussing how *Tinker* provides the backdrop for analysis of student First Amendment claims); *J.S. ex rel. Snyder*

*Tinker* has never been directly overruled, the scope of students' constitutional rights and the application of the case's essential rights expansive provision have since been limited by the courts, which have instead relied upon an ever more constrictive control doctrine over student speech.<sup>84</sup> In each of the successive student speech cases that have come before it since *Tinker*, the Supreme Court has provided an increasingly narrower space for the exercise of First Amendment rights by students inside and outside of schools. In this progression of cases, the Court has been very deferential to administrators and school-governing bodies.<sup>85</sup> This expansive level of deference has subsequently been mirrored by many lower courts that have examined student speech rights, resulting in a tightly controlled and circumscribed space for student expressive freedom.<sup>86</sup>

The control discourse articulated in *Tinker* was expanded with the adoption of a new constitutional standard for students' First Amendment rights in 1986, when the Court determined that a school may permissibly sanction and restrict "offensively lewd and indecent speech" by students in *Bethel School District v. Fraser*.<sup>87</sup> In this case, a high school student gave a speech at a school assembly that was premised on an extensive sexual metaphor.<sup>88</sup> Thereafter, the student was informed that he had violated a school rule, which prohibited obscene, profane language or gestures.<sup>89</sup> As a

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v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) ("The Supreme Court established a basic framework for assessing student free speech claims in *Tinker* . . .").

<sup>84</sup> See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 528 (2000) ("In fact, in the thirty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights.").

<sup>85</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 409 (2007) ("School principals have a difficult job, and a vitally important one."); see also Goldman, *supra* note 21, at 430 ("Many restrictions on [student] First Amendment rights are simply required for a school to run efficiently.").

<sup>86</sup> See, e.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 111, 113 (2d Cir. 2012) (providing that "[s]chool administrators are in the best position to assess the potential for harm and act accordingly" in a case that found no First Amendment violation for the suspension of a ten-year-old elementary student for a crayon drawing he intended as a joke); *Doninger v. Niehoff*, 642 F.3d 334, 339, 348 (2d Cir. 2011) (finding that a student's First Amendment right to engage in off-campus speech without being subject to school official regulation was not clearly established); *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 837, 840–41 (N.D. Miss. 2012) (finding that a school could constitutionally punish a high school student for off-campus speech based on the *Tinker* control doctrine).

<sup>87</sup> 478 U.S. 675, 685 (1986).

<sup>88</sup> *Id.* at 677–78.

<sup>89</sup> *Id.* at 678.

result, the student was suspended for three days and removed from the list of possible student graduation speakers for his speech at the assembly.<sup>90</sup> Ironically, “the assembly was part of a school-sponsored educational program in self-government.”<sup>91</sup>

The Court began its substantive analysis in *Fraser* with a reference to the *Tinker* proposition that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”<sup>92</sup> However, employing an analysis distinct from the “substantial disruption” test of *Tinker*,<sup>93</sup> the Court made it clear that “what manner of speech in the classroom or in school assembly [by students] is inappropriate properly rests with the school board.”<sup>94</sup> Further, the Court emphasized the restrictive environment of public schools for students, providing that the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>95</sup> Although the facts of this case were markedly less dignified than the silent war protest of *Tinker*, the control discourse remained the predominant thread between these decisions. Specifically, the *Fraser* Court in outlining its rationale deemed that the circuit court had incorrectly “rejected the School District’s argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity.”<sup>96</sup>

Two years later, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*.<sup>97</sup> This case involved a First Amendment lawsuit brought by high school newspaper staff members based on their principal’s decision not to publish articles on pregnancy and divorce in the student newspaper.<sup>98</sup> Although the first sentence of substantive analysis in the *Kuhlmeier*

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 677.

<sup>92</sup> *Id.* at 680 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>93</sup> See *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (discussing the differences in the analyses of *Tinker* and *Fraser*).

<sup>94</sup> *Fraser*, 478 U.S. at 683.

<sup>95</sup> *Id.* at 682.

<sup>96</sup> *Id.* at 680.

<sup>97</sup> 484 U.S. 260 (1988).

<sup>98</sup> *Id.* at 262–63.

decision quoted the *Tinker* dicta,<sup>99</sup> the Court stated that the *Tinker* standard did not apply when a school makes the decision to “refuse to lend its name and resources to the dissemination of student expression.”<sup>100</sup> Instead, the case introduced a new standard for analyzing the scope of First Amendment protection for “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>101</sup> The notion of control was predominant in the establishment of this new standard, with the Court holding “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>102</sup> Throughout the opinion, the expanding nature of control to regulate the educational environment was presented as a given:

Educators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.<sup>103</sup>

In his dissent to *Kuhlmeier*, Justice William Brennan disagreed with this endorsement of ever-increasing control, even beyond the scope of the control discourse of *Tinker*, in the public schools.<sup>104</sup> Specifically, he argued that the majority opinion was little more than a pretext for greater control:

[The majority] offer[ed] no more than an obscure tangle of three excuses to afford educators “greater control” over school-sponsored speech than the *Tinker* test would permit: the public educator’s prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the

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<sup>99</sup> *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>100</sup> *Id.* at 272–73.

<sup>101</sup> *Id.* at 271.

<sup>102</sup> *Id.* at 273.

<sup>103</sup> *Id.* at 271.

<sup>104</sup> *See id.* at 277–78 (Brennan, J., dissenting).



school's need to dissociate itself from student expression.<sup>105</sup>

Despite these purported rationales, Justice Brennan found them to be nothing but pretext for overreaching in terms of the control of the state over speech within the schoolhouse gate, concluding that “[n]one of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.”<sup>106</sup> Quite rightly, Justice Brennan’s dissent in *Kuhlmeier* illustrated that the Supreme Court’s reference to the *Tinker* rights expansive proposition was mere gossamer in light of the significant expansion of the control discourse for governmental regulation of student speech.

The control doctrine reached its greatest extension in the most recently decided student speech case in the Supreme Court, *Morse v. Frederick*.<sup>107</sup> In *Morse*, the Court was asked to determine whether a student’s First Amendment rights were violated when he was suspended for refusing to remove a banner, which read “BONG HiTS 4 JESUS,” at an off-campus, school-sanctioned and supervised event.<sup>108</sup> The opinion, like the antecedent cases, quoted at the outset the rights-expansive dicta of *Tinker*.<sup>109</sup> Ultimately, however, the Court issued a very constrictive decision, holding that the actions of the school officials were not violative of the Constitution.<sup>110</sup> In *Morse*, the Court introduced a new level of regulation of student speech—that of control over “speech that can reasonably be regarded as encouraging illegal drug use.”<sup>111</sup> The rationale the Court used first outlined its jurisprudence in the school context, highlighting previous findings that “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”<sup>112</sup> From there, it found that “[t]he ‘special characteristics of the school environment,’ and the governmental interest in stopping student drug abuse . . . allow schools to restrict student

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<sup>105</sup> *Id.* at 282–83 (Brennan, J., dissenting).

<sup>106</sup> *Id.* at 283.

<sup>107</sup> 551 U.S. 393 (2007).

<sup>108</sup> *Id.* at 396–97.

<sup>109</sup> *Id.* at 396 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>110</sup> *Id.* at 397.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 407 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

expression that they reasonably regard as promoting illegal drug use.”<sup>113</sup> Consequently, the Court found that the principal did not violate the student’s speech rights as the speech at issue was “reasonably viewed as promoting illegal drug use.”<sup>114</sup> The fact the speech took place outside of school property did not affect the Court’s holding, as it took place during normal school hours at a school-sanctioned activity.<sup>115</sup>

*Morse* signifies the furthest evolution of the control doctrine that began in *Tinker*, as it extends the constriction of student speech beyond the schoolhouse gate. The Court justified this extraordinary extension of control by highlighting the difficult nature of employment as a school administrator and by emphasizing the dangers for schoolchildren that are inherent in messages regarding illegal drug use.<sup>116</sup> Although this type of content-specific discrimination normally would be considered an anathema to traditional viewpoint neutrality in constitutional speech cases,<sup>117</sup> it demonstrates how far the Court is willing to reach with respect to controlling students.<sup>118</sup>

Justice Samuel Alito’s concurrence in *Morse* revealed the extent of constriction of student speech that resulted from the case, identifying “such regulation as standing at the far reaches of what the First Amendment

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<sup>113</sup> *Id.* at 408 (citation omitted).

<sup>114</sup> *Id.* at 403.

<sup>115</sup> *See id.* at 400–01.

<sup>116</sup> *See id.* at 409–10 (“When [student] Frederick suddenly and unexpectedly unfurled his banner, [administrator] Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”).

<sup>117</sup> *See, e.g.,* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). *See also* *M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841, 847 (6th Cir. 2008) (stating that a school could permissibly “put time, place, and manner restrictions on hallway speech so long as the restrictions are *viewpoint neutral* and reasonable in light of the school’s interest in the effectiveness of the forum’s intended purpose”) (emphasis added).

<sup>118</sup> *See* Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 LEWIS & CLARK L. REV. 27, 27–28 (2008) (“If any other resident [aside from Joseph Frederick of the *Morse v. Frederick* case] standing on that crowded public sidewalk—the epitome of a quintessential public forum—had engaged in this simple act of self-expression, the First Amendment would have protected him from such blatant viewpoint-based censorship.”).

permits.”<sup>119</sup> Although Justice Alito hedged his concurrence with the proviso that he “join[ed] the opinion of the Court with the understanding that the opinion does not endorse any further extension” of governmental control over student speech,<sup>120</sup> the line of Supreme Court cases to date seems to indicate that the Court would be willing to continue to allow the expansion of the control doctrine in school speech and privacy cases. For example, Justice Clarence Thomas, in his concurrence to *Morse*, urged for an even more expansive reach of the control doctrine, by providing a forceful assertion for the complete abandonment of the famous *Tinker* precept: “In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.”<sup>121</sup>

In looking at *Morse* holistically, it is clear that the forum of education has become a forum of rigid control over student speech. What is particularly unique about *Morse* are the distance and message of the speech. It was not on school grounds,<sup>122</sup> and the message essentially was “nonsensical.”<sup>123</sup> However, the disciplinary actions taken by the school officials were sanctioned by the Court, in effect asserting the near absolute control over any speech that happens on, near, or tangentially connected to the schoolhouse grounds.<sup>124</sup> Given this extreme deference of the court to

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<sup>119</sup>*Morse*, 551 U.S. at 425 (Alito, J., concurring).

<sup>120</sup>*See id.*

<sup>121</sup>*Id.* at 418–19 (Thomas, J., concurring); *id.* at 410 (stating that the *Tinker* standard “is without basis in the Constitution”); *id.* at 421 (citing favorably Justice Black’s dissent in *Tinker* and Professor Dupre’s *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, *supra* note 58, at 50); *id.* at 422 (advocating the “approach . . . to dispense with *Tinker* altogether” and providing that “given the opportunity, I would do so.”).

<sup>122</sup>Frederick testified that the display of the banner was done intentionally off of school grounds. *See* Joint App. to Petition for Certiorari at 28, *Morse v. Frederick*, 551 U.S. 393 (2007) (No. 06-278), 2007 WL 119039, available at [http://www.oyez.org/sites/default/files/cases/2000-2009/2006/2006\\_06\\_278/briefs/Joint%20Appendix.pdf](http://www.oyez.org/sites/default/files/cases/2000-2009/2006/2006_06_278/briefs/Joint%20Appendix.pdf) (“We purposely avoided the high school grounds itself. We wanted to be on a public sidewalk but not on school grounds so there would be no reason for the school to bother us and so it would be clear that we had free speech rights.”).

<sup>123</sup>*Morse*, 551 U.S. at 446 (Stevens, J., dissenting) (“Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.”).

<sup>124</sup>*See, e.g.,* West, *supra* note 118, at 43 (providing that “Frederick had misjudged the reach of his school’s control over him”).

school officials, it seems that if a student speaks in any of these ways, a school administrator can constitutionally regulate it.<sup>125</sup>

What this line of cases demonstrates is that even though the Supreme Court is willing to give an initial hortatory nod to *Tinker* by noting that students do not leave all of their constitutional rights at the door, the Court is quite comfortable narrowing the scope of student speech rights if it fits within its preferences or within the policy agenda of school governing authorities.<sup>126</sup> Justice Black's concerns regarding sweeping social reconstructionism in public schools can be allayed, given the Supreme Court and lower courts' constriction of student speech rights.<sup>127</sup> Indeed, most lower federal courts and state courts have followed and applied the *Tinker* control doctrine and its reproductionist rationales in the regulation of student expression for both on-campus<sup>128</sup> and off-campus activities.<sup>129</sup>

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<sup>125</sup> See Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 33–34 (2012) (discussing how the majority of the Supreme Court “embraced deference” and asserting that “when deference is bestowed on school officials, it results in censorship”).

<sup>126</sup> See Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1578 (“The First Amendment right to speak free of state suppression has been only partially and patronizingly extended to children and youth. The traditional understanding of children as incomplete adults or pre-citizens, needing always to be under adult control and lacking the capacity for active engagement and independent thought, has been a formidable barrier to children’s rights to participation as members of a democratic society.”(footnote omitted)).

<sup>127</sup> See *supra* text accompanying notes 66–82.

<sup>128</sup> See, e.g., *Lowery v. Euverard*, 497 F.3d 584, 588, 596 (6th Cir. 2007) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring)) (finding, through the utilization of the *Tinker* control doctrine, that there was no First Amendment violation for the removal of high school students from a football team after signing a petition that was critical of the football coach) (“‘Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.’ Public schools are necessarily not run as a democracy. . . . The authority of school officials does not depend upon the consent of the students. To threaten this structure is to threaten the mission of the public school system.”); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416, 419–20 (3d Cir. 2003) (expressly acknowledging the *Tinker* framework doctrine in support of its finding that a school district did not violate an elementary school student’s First Amendment rights in barring her from circulating a petition against animal cruelty on a school playground).

<sup>129</sup> See, e.g., *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39–40 (2d Cir. 2007) (finding that the *Tinker* control framework applies to student speech that is generated off-campus); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107–08 (C.D. Cal. 2010) (same); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850, 868–69 (Pa. 2002) (finding that there was no First Amendment violation for the disciplinary action taken against a middle school

Ultimately, this has resulted in an educational jurisprudence that consists of a majority of rights-restrictive holdings for student speech and that has a central theme, not of preservation of constitutional rights, but instead, of control.<sup>130</sup>

#### IV. CONTROLLING STUDENTS' FOURTH AMENDMENT RIGHTS

Notions of control are not within the exclusive provenance of student speech cases; cases that implicate students' Fourth Amendment rights mirror these First Amendment cases and their adoption of the control doctrine. Specifically, the Supreme Court and many lower courts have utilized the same approach in cases involving bodily integrity and privacy of students, by first enunciating the *Tinker* dicta that constitutional rights are not shed at the schoolhouse gate and subsequently holding in a rights-

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student for the off-campus creation of a derogatory website regarding the faculty and principal of the school).

<sup>130</sup>See, e.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 111–13 (2d Cir. 2012) (providing that “[s]chool administrators are in the best position to assess the potential for harm and act accordingly” in a case that found no First Amendment violation for the suspension of a ten-year-old elementary student for a crayon drawing he intended as a joke); *Doninger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2008) (finding that there was no First Amendment violation when a school district punished a high school student for online speech generated off-campus that was critical of the school administration); *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 573–80 (6th Cir. 2008) (using the control doctrine to find that there was no First Amendment violation when an elementary school student was barred from selling candy canes with a religious message attached as part of an exercise on commerce, the instructions for which did not bar the promotion of religious items). *But see J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920, 926, 929 (3d Cir. 2011) (finding that a school district violated a middle school student's First Amendment rights when it suspended her for the off-campus creation of a fake MySpace profile parody of her principal under the *Tinker* substantial disruption standard); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (finding that a school district violated a high school student's First Amendment rights when it suspended him for the off-campus creation of a fake MySpace profile parody of his principal as it was “expressive conduct that originated outside of the schoolhouse, did not disturb the school environment and was not related to any school sponsored event”). It is important to note, though, that even in the cases that found student speech rights were violated, the Court employed the *Tinker* control doctrine in its evaluation of the speech, setting the precedent that this is the appropriate framework for the regulation of student speech. See, e.g., *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 297 (3d Cir. 2013), *cert. denied*, 134 S.Ct. 1515 (2014) (starting its rights recognitive opinion by framing the issue as a need “to find the balance between a student's right to free speech and a school's need to control its educational environment”).

restrictive manner premised on control.<sup>131</sup> This section of the Article will specifically examine these cases that involve suspicionless drug testing policies for students, as these cases have integral connections to the furthest extent of control that has been exerted in student speech rights cases.<sup>132</sup> As a logical nexus to the rationales underlying the subsequent *Morse v. Frederick* holding, the control discourse has come to a fore in this growing body of student Fourth Amendment case law.<sup>133</sup>

Despite the Supreme Court's statement that students still maintain some "legitimate expectations of privacy,"<sup>134</sup> federal courts have consistently eroded the extent of student privacy rights within the public school environment.<sup>135</sup> The paradigmatic example of this curtailment of student

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<sup>131</sup> See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 826, 829–30 (2002) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (finding that "[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse," a suspicionless drug testing policy for students who engage in extracurricular activities is constitutional); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650, 655–56, 666 (1995) (quoting *Tinker*, 393 U.S. at 506) (providing that "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" in finding that a suspicionless drug testing policy for student athletes was constitutional (citations omitted)); *Todd v. Rush Cnty. Schs.*, 983 F. Supp. 799, 801, 804, 806–07 (S.D. Ind. 1997) (quoting *Tinker*, 393 U.S. at 506) (stating that "it is without question that students do not 'shed their constitutional rights . . . at the school-house gate'" and subsequently upholding the constitutionality of a suspicionless drug testing policy for all students who engage in any extracurricular activities or who drive to school); *Joye ex rel. Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 803 A.2d 706, 707, 710, 715 (N.J. Super. Ct. App. Div. 2002) (quoting the *Tinker* dicta and subsequently finding that a suspicionless drug testing policy for students who engage in extracurricular activities or who have permits for on-campus parking was not unconstitutional under the state constitution). *But see York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995, 999, 1006 (Wash. 2008) (quoting the *Tinker* dicta and subsequently finding that a suspicionless drug testing policy for student athletes was violative of the Washington state constitution).

<sup>132</sup> This Article does not explore in depth the other manifestations of control over student populations in the Fourth Amendment context in order to maintain a focal point on the types of student privacy cases that are deeply intertwined with the student speech cases. For a discussion of these other types of Fourth Amendment constrictions on student rights, see generally Diana R. Donahoe, *Strip Searches of Students: Addressing the Undressing of Children in Schools and Redressing the Fourth Amendment Violations*, 75 MO. L. REV. 1123 (2010).

<sup>133</sup> See 551 U.S. 393, 409–10 (2007) (sanctioning "viewpoint discrimination" of student speech based on the important interest of deterring drug use in schools in the furthest extension of the control doctrine in student First Amendment cases).

<sup>134</sup> *New Jersey v. T. L. O.*, 469 U.S. 325, 338 (1985).

<sup>135</sup> See, e.g., *Earls*, 536 U.S. at 825–26 (upholding the constitutionality of a suspicionless drug testing policy for all middle and high school students who engage in any extracurricular activity).

privacy rights and the extent of schoolchildren's Fourth Amendment rights involves the increasing implementation of suspicionless drug testing policies for students.<sup>136</sup> The somewhat limited judicial examination of the constitutionality of these cases demonstrates an extension of control beyond simply what students are able to express to include the potentially invasive nature of what students' bodies could be subject to in compulsory education. These types of policies have been deemed expressly constitutional by the Supreme Court under a special needs analysis.<sup>137</sup>

The special needs analysis is utilized by federal courts when evaluating suspicionless searches.<sup>138</sup> Typically, a valid search requires an "individualized suspicion of wrongdoing."<sup>139</sup> However, a suspicionless search may still be within the bounds of the Fourth Amendment when it is conducted for "special needs, beyond the normal need for law enforcement."<sup>140</sup> The Supreme Court has determined that these special needs "exist in the public school context."<sup>141</sup> Specifically, the Court has delineated "the substantial need of teachers and administrators for freedom to maintain order in the schools" as a special need that supports the constitutionality of suspicionless drug testing policies for students.<sup>142</sup> When the justification for a suspicionless search is that of special needs, a context-specific inquiry is required.<sup>143</sup> In this inquiry, the court balances the "scope of the legitimate expectation of privacy" for the individual against the character of the government's intrusion to determine the reasonableness of the search.<sup>144</sup>

The Supreme Court first examined the constitutionality of a random, suspicionless drug testing policy for students in *Vernonia School District v. Acton*.<sup>145</sup> In the majority decision authored by Justice Antonin Scalia, the

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<sup>136</sup> See, e.g., Mary Pilon, *Middle Schools Add a Team Rule: Get a Drug Test*, N.Y. TIMES, Sept. 23, 2012, at 4 (discussing the implementation of suspicionless drug testing in middle schools in eight states).

<sup>137</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650, 653 (1995).

<sup>138</sup> See *id.* at 653–54 (discussing the special needs framework for the constitutional analysis of suspicionless searches and seizures).

<sup>139</sup> *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998).

<sup>140</sup> *Acton*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (quoting *New Jersey v. T. L. O.*, 469 U.S. 325, 340–41 (1985)).

<sup>143</sup> See *Chandler v. Miller*, 520 U.S. 305, 309, 314 (1997).

<sup>144</sup> *Acton*, 515 U.S. at 652–54, 658.

<sup>145</sup> See *id.* at 650, 655–56.

Court analyzed an Oregon school district's policy that authorized the suspicionless drug testing of student athletes.<sup>146</sup> The Court utilized the special-needs analysis in its examination of the constitutionality of the policy, and it specifically premised that analysis on a special need reflective of the control doctrine established in *Tinker*—that of maintaining order in the public schools.<sup>147</sup> With this framework as the foundation of its decision, the Court proceeded to determine that “while children assuredly do not ‘shed their constitutional rights at the schoolhouse gate,’”<sup>148</sup> students have diminished privacy interests compared to “‘members of the population generally.’”<sup>149</sup> In extrapolating upon this finding, the Court provided that “[s]omewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”<sup>150</sup> So, like the student speech cases,<sup>151</sup> the Supreme Court again provided an acknowledgement of the *Tinker* dicta and then swiftly proceeded in a rights-restrictive manner in defining the extent of student Fourth Amendment rights.

After finding a diminished expectation of privacy for student athletes, the Court turned to the other side of the balancing test for its special needs analysis by examining the nature of the governmental intrusion and concern at issue.<sup>152</sup> In doing so, it determined that the level of intrusion of the urinalysis drug testing was “relative[ly] unobtrusive[.]”<sup>153</sup> Further, in ideological language that previewed some of the argument that was used to justify the later *Morse* decision,<sup>154</sup> it proclaimed that the need to deter drug use among students was an important governmental need.<sup>155</sup> Consequently, due to each of the examined factors—“the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met

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<sup>146</sup> *See id.* at 648–50.

<sup>147</sup> *See id.* at 653, 656.

<sup>148</sup> *Id.* at 655–56 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>149</sup> *Id.* at 657 (quoting *New Jersey v. T. L. O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)).

<sup>150</sup> *Id.* (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 627 (1989)).

<sup>151</sup> *See Acton*, 515 U.S. at 657.

<sup>152</sup> *Id.* at 658.

<sup>153</sup> *Id.* at 660, 664.

<sup>154</sup> *See supra* text accompanying notes 107–125.

<sup>155</sup> *See Acton*, 515 U.S. at 661.



by the search,” the Supreme Court held that the suspicionless drug testing policy for student athletes was reasonable, and, therefore, constitutional.<sup>156</sup>

Despite passing mention “against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts,”<sup>157</sup> the Court concluded its decision by reaffirming its reproductionist approach to the evaluation of Fourth Amendment claims in the public school contexts.<sup>158</sup> Specifically, it identified “[t]he most significant element in this case” as the element “that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”<sup>159</sup> The Court undergirded this assertion with a footnote that highlighted the originalist view that children had much fewer rights at the time of framing and the adoption of the Fourteenth Amendment when compared to the rights that are afforded to them by present-day courts and legislatures.<sup>160</sup> This proposition highlighted the juxtaposition between the usage of the *Tinker* dicta and the ultimate rights restrictive holding based upon the control discourse in this student privacy case, mirroring the pattern of constriction that is prevalent in the student speech cases.<sup>161</sup> It further cemented the Court’s perspective on American public schools as a place of social reproduction, rather than reconstruction.

Justice Sandra Day O’Connor’s dissent in *Acton*, with which Justice John Paul Stevens and Justice David Souter joined, rejected this approach to the educational environment.<sup>162</sup> At the core of the dissent, Justice O’Connor stressed that even student athletes, with their diminished expectations of privacy, cannot be so controlled by the government as to be required to submit to “a mass, suspicionless search,” because it is “categorically unreasonable” and, therefore, unconstitutional.<sup>163</sup> The dissent defined the key question of the case as “whether [the Fourth Amendment] is *so* lenient that students may be deprived of [its] only remaining, and most

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<sup>156</sup> *Id.* at 664–65.

<sup>157</sup> *Id.* at 665.

<sup>158</sup> *See id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 665 n.4 (“Of course at the time of the framing, as well as at the time of the adoption of the Fourteenth Amendment, children had substantially fewer ‘rights’ than legislatures and courts confer upon them today.”).

<sup>161</sup> *See supra* text accompanying notes 83–130.

<sup>162</sup> *See Acton*, 515 U.S. at 666–67 (O’Connor, J., dissenting).

<sup>163</sup> *See id.* at 680–81.

basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people.”<sup>164</sup> Although Justice O’Connor recognized that “the Fourth Amendment is more lenient with respect to school searches,”<sup>165</sup> she answered this key question in a way that highlights how far the control discourse has evolved since the *Tinker* decision.<sup>166</sup> First, she provided an analogy between student athletes and prisoners, implying that students should have at least more rights than those of prisoners,<sup>167</sup> a proposition that runs contrary to many of the student speech cases, where courts equate the limited speech rights of students with those of prisoners.<sup>168</sup> Subsequently, Justice O’Connor hearkened back to the *Tinker* dicta and, unlike the Supreme Court’s majority decisions since that case, she asserted a rights cognitive approach: “if we are to mean what we often proclaim—that students do not ‘shed their constitutional rights . . . at the schoolhouse gate’—the answer must plainly be no” that the Fourth Amendment deprives students of the individualized suspicion requirement.<sup>169</sup>

Despite *Acton*’s cautionary proposition that it did not mean “that suspicionless drug testing [would] readily pass constitutional muster in other contexts,” the Supreme Court, when presented with an even more expansive student privacy rights case involving blanket testing, relied upon *Acton* to justify its finding of the constitutionality of these searches.<sup>170</sup> The 2002 case of *Board of Education v. Earls* involved a Fourth Amendment challenge to an Oklahoma school district’s policy that “require[d] all students who participate in competitive extracurricular activities to submit to [suspicionless] drug testing.”<sup>171</sup> Like in *Acton*, the Court, in a decision

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<sup>164</sup> *Id.* at 681.

<sup>165</sup> *Id.* at 680.

<sup>166</sup> *See id.* at 680–81.

<sup>167</sup> *See id.* at 681 (“It is not at all clear that people in *prison* lack this categorical protection [regarding the individualized suspicion requirement for a constitutional search].”).

<sup>168</sup> *See* Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 73 (2010) (“Courts litter their decisions about prisoner speech with citations to decisions about student speech and vice versa. Many judges treat the analogy as if it were innately persuasive, requiring no special justification or explanation.”).

<sup>169</sup> *Acton*, 515 U.S. at 681 (O’Connor, J., dissenting) (citations omitted).

<sup>170</sup> *See* Bd. of Educ. v. Earls, 536 U.S. 822, 826, 829–30 (2002) (expressly applying “the principles of [*Acton*]” to the case); *Acton*, 515 U.S. at 665.

<sup>171</sup> *Earls*, 536 U.S. at 825, 838.

authored by Justice Clarence Thomas, firmly denied the need for individualized suspicion in the context of student searches as “‘special needs’ inhere in the public school context.”<sup>172</sup> Also, similar to *Acton*, the Court articulated the *Tinker* dicta regarding the retention of students’ constitutional rights within the schoolhouse,<sup>173</sup> and then, in the same sentence, provided the basis for a rights-restrictive holding.<sup>174</sup>

From this premise, the Court essentially mirrored the articulation of *Acton* for the expanded scope of restriction for students who participate in extracurricular activities in upholding the constitutionality of the much broader drug testing policy at issue.<sup>175</sup> The control discourse is prevalent throughout the opinion. To support its finding that students who participate in regulated extracurricular activities had a diminished expectation of privacy,<sup>176</sup> the Court bluntly stated that “[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”<sup>177</sup> The majority subsequently found the urinalysis testing to be minimally intrusive<sup>178</sup> and the drug testing to be “a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”<sup>179</sup> Consequently, the Court upheld the constitutionality of the policy, holding that it was “a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren.”<sup>180</sup>

Justice Ginsburg’s dissent in *Earls* rejected the expansive use of the control discourse in upholding the constitutionality of the policy.<sup>181</sup> While recognizing the inherent nature of “special needs” in public schools, she argued that “those needs are not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to

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<sup>172</sup> See *id.* at 829–30.

<sup>173</sup> See *id.* (providing that “schoolchildren do not shed their constitutional rights when they enter the schoolhouse” and citing to *Tinker*).

<sup>174</sup> See *id.* (quoting *Acton*, 515 U.S. at 656) (“Fourth Amendment rights . . . are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”).

<sup>175</sup> See *id.* at 830–31.

<sup>176</sup> See *id.* at 831–32.

<sup>177</sup> *Id.* at 831.

<sup>178</sup> *Id.* at 834.

<sup>179</sup> *Id.* at 837.

<sup>180</sup> *Id.* at 838.

<sup>181</sup> See *id.* at 843 (Ginsburg, J., dissenting).

install.”<sup>182</sup> Justice Ginsburg subsequently highlighted the extent to which the Court had pushed the bounds of the control doctrine for student privacy rights: “Had the [*Acton*] Court agreed that public school attendance, in and of itself, permitted the State to test each student’s blood or urine for drugs, the opinion . . . could have saved many words.”<sup>183</sup> Justice Ginsburg concluded her dissent by stressing the importance of civic modeling and constitutional safeguarding:

It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting “the schools’ custodial and tutelary responsibility for children.” In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school’s custodial obligations may permit searches that would otherwise unacceptably abridge students’ rights. When custodial duties are not ascendant, however, schools’ tutelary obligations to their students require them to “teach by example” by avoiding symbolic measures that diminish constitutional protections.<sup>184</sup>

Overall, the Supreme Court cases involving suspicionless drug testing for students illustrate the growing notion of control over students’ physical bodies based on the special restrictions of the school environment.<sup>185</sup> *Earls* represents the paradigmatic example of the significant jurisprudential expansion of the scope of the “special needs” analysis for Fourth Amendment student privacy claims.<sup>186</sup> This increased willingness to

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 845.

<sup>184</sup> *Id.* at 855 (citations omitted) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

<sup>185</sup> See Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1522–23 (“Thus in special-needs cases it is typically the context of the search, and not its object, that earns it the appellation. For example, in *Vernonia School District 47J v. Acton*, *Board of Education v. Earls*, and *New Jersey v. T.L.O.*, the Court held that the scholastic environment provided a special need justifying searches that would have been unconstitutional if conducted elsewhere.” (footnotes omitted)).

<sup>186</sup> This is a concern articulated in Justice Ginsburg’s dissent: “[*Acton*] cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, engage in dangerous activities on their own time; that the children are enrolled in

constrict student privacy rights in the United States' highest court has also been reflected in state court examinations of the constitutionality of these types of drug testing policies under state constitutions.<sup>187</sup> Similar, then, to the student First Amendment cases, most courts in analyzing the protections of the Fourth Amendment for students proffer passing references to the *Tinker* proposition regarding constitutional rights within the schoolhouse gate. However, this proffer does not represent any semblance of social reconstructionism, whereby students are enabled with "the power [they] need[] to avoid perpetuating society's flaws."<sup>188</sup> Instead, the majority approach is one of pure reproductionism (aside from the pointed difference that elected officials, like school district board members, cannot be constitutionally subject to suspicionless drug tests).<sup>189</sup> These Fourth Amendment cases, like the student speech cases, evidence the evolution of the control discourse, to a point of almost complete rights constriction, in the regulation of public school students.<sup>190</sup> Ultimately then, *Tinker's* application to the Fourth Amendment rights of students has become a hollow recitation of dicta.<sup>191</sup>

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school scarcely allows government to monitor all such activities." *Earls*, 536 U.S. at 844–45 (Ginsburg, J. dissenting).

<sup>187</sup> See, e.g., *Joye ex rel. Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 803 A.2d 706, 707, 710, 715 (N.J. Super. Ct. App. Div. 2002) (quoting the *Tinker* dicta, expressly relying on the *Earls* rationale, and subsequently finding that a suspicionless drug testing policy for students who engage in extracurricular activities or who have permits for on-campus parking was not unconstitutional under the state constitution).

<sup>188</sup> Dupre, *supra* note 58, at 65.

<sup>189</sup> See *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (holding that a Georgia statute that required all "candidates for state office [to] pass a drug test . . . [did] not fit within the closely guarded category of constitutionally permissible suspicionless searches").

<sup>190</sup> See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1202 (2004) (characterizing the *Acton* decision as follows: "Since [student athletes] voluntarily expose themselves through this 'communal undress,' they have a 'reduced expectation of privacy' with regard to whether their urine will be tested for the presence of drugs . . . . The fact that students have willingly appeared naked in one circumstance says strictly nothing about whether they have broadly surrendered their right to control access to data about them, and certainly nothing about whether they have consented to a urine test." (footnote omitted)).

<sup>191</sup> See Meg Penrose, *Shedding Rights, Shredding Rights: A Critical Examination of Students' Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 NEV. L.J. 411, 412–13 (2003) ("For this reason, *Earls* single-handedly sounds the death knell of the assurance that students do not shed their Constitutional rights at the school house gate.").

## V. CONTROLLING TEACHERS' FIRST AMENDMENT RIGHTS

The control discourse in today's public schools no longer encompasses just the student population. Adult teachers have become subject to similar restrictions, as well. Teachers' constitutional rights are under pressure from multiple sides, as the lower courts have adopted a variety of rationales in construing teacher speech rights post-*Tinker*.<sup>192</sup> Although the Court has only squarely addressed the First Amendment public speech rights of teachers in schools in one instance, in *Pickering v. Board of Education*, a right cognitive case that was decided a year prior to *Tinker*, subsequent Supreme Court governmental speech cases and intermediate appellate court decisions have resulted in a reproductionist approach to construing teacher speech rights.<sup>193</sup> Essentially, lower courts have either falsely co-opted student speech cases to diminish teacher speech rights,<sup>194</sup> or they have grafted restrictive speech controls enunciated by the high court for governmental employees onto teachers without addressing the unique nature of the educational scope of employment within public schools.<sup>195</sup> Regardless of the prevailing rationale in construing teachers' First Amendment rights, each judicial approach shares a common trait: the adoption of control mechanisms to constrict the speech of teachers as a way to enforce a prescribed notion of order in the schools.<sup>196</sup> This common trait

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<sup>192</sup> See Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 255–259 (2013) (discussing the circuits' split on the evaluation of teachers' First Amendment rights claims); Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 79–86 (2008) (same).

<sup>193</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

<sup>194</sup> See, e.g., *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719, 724 (8th Cir. 1998) (utilizing *Tinker*, *Fraser*, and *Kuhlmeier* as the basis for the court's rationale in determining that an English teacher's First Amendment rights were not violated by a school terminating her contract for permitting students to use profanity in their written classwork).

<sup>195</sup> See, e.g., *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010) (expressly finding that the governmental employee speech analysis of *Garcetti v. Ceballos* barred a teacher's First Amendment action as “she made her curricular and pedagogical choices in connection with her official duties as a teacher”).

<sup>196</sup> Compare *Lacks*, 147 F.3d at 724 (allocating the *Kuhlmeier* control standard to the school board in disciplining a teacher for her curricular choices as such discipline was “reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards”), with *Evans-Marshall*, 624 F.3d at 342 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006)) (noting that the “insight” that “the government . . . retains ‘control over what the employer itself has commissioned or created’: the employee’s job. . . has particular resonance in the context of public education.”).

is a direct outflow of *Tinker*'s control discourse.<sup>197</sup> Consequently, the overall effect of the student control doctrine from *Tinker* and its reproductionist progeny is an educational environment in which teacher speech rights have become equally cabined to, if not more cabined than, student speech rights.<sup>198</sup>

The foundational case for the evaluation of speech rights of teachers in public schools is *Pickering v. Board of Education*.<sup>199</sup> In this case, a public school teacher was terminated from his teaching position after writing a critical letter to a local newspaper regarding a school board's bond proposals and financial resource allocation.<sup>200</sup> The letter also alleged that the school superintendent attempted to suppress teachers "from opposing or criticizing the proposed bond issue."<sup>201</sup> In evaluating the First Amendment considerations of the teacher's speech, the Court utilized a balancing test "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>202</sup> The Court determined that the former outweighed the latter, emphasizing that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."<sup>203</sup> As a result, the Court found that the teacher's termination was a First Amendment violation as he had a "right to speak on issues of public importance,"<sup>204</sup> albeit in a critical way, that did not "impede[] the teacher's proper performance of his daily duties in the classroom or . . . interfere[] with the regular operation of the

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<sup>197</sup> See *supra* text accompanying notes 48–50.

<sup>198</sup> See Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 65–66 (2008) (noting that "the *Tinker* decision also has loomed in the background as courts have dealt with teachers claiming independent speech rights. . . . [and] courts have used [post-*Tinker* precedent] . . . to exert substantial control over the in-class speech of teachers.").

<sup>199</sup> See 391 U.S. 563 (1968).

<sup>200</sup> See *id.* at 566.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 568.

<sup>203</sup> *Id.* at 572.

<sup>204</sup> *Id.* at 574. In 1983, in *Connick v. Myers*, the Supreme Court emphasized the essential nature of *Pickering*'s evaluation of speech "on matters of public importance," expressly finding that the inquiry of whether "speech [is] a matter of public concern" is a threshold question before analyzing the constitutionality of the reasons for a public employee's discharge based on such speech. 461 U.S. 138, 143, 146 (1983).

schools generally.”<sup>205</sup> *Pickering* is the high-water mark for rights recognitive jurisprudential treatment of teacher speech<sup>206</sup> and is ostensibly a vehicle for a reconstructionist perspective as it reflects a view of “progressivist self-criticism, which seeks to consolidate and further the achievements of its parent by a widespread idealization of the goals of education and of the relation of the school to society.”<sup>207</sup>

However, courts have not uniformly applied the pure *Pickering* balancing test to First Amendment challenges brought by educators.<sup>208</sup> After *Tinker*, which came down a year after *Pickering* was decided, some lower courts have instead treated cases of teacher speech under a rubric that expressly follows the student speech decision and its progeny’s control framework.<sup>209</sup> Like the student speech and privacy cases, the vast majority of these courts first cite to the *Tinker* dicta in the context that “teachers retain their First Amendment right to free speech in school.”<sup>210</sup> Then, in short order, these courts adopt a reproductionist approach that emphasizes the maintenance of control and order in the schools,<sup>211</sup> resulting in speech rights restrictive holdings for these teacher lawsuits.<sup>212</sup>

This line of cases premises the crux of its rationale on the grafting of student speech cases onto teacher speech cases,<sup>213</sup> despite the Supreme

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<sup>205</sup> *Pickering*, 391 U.S. at 572–73.

<sup>206</sup> See Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 66 (characterizing *Pickering* as “a particularized application of the deeply rooted First Amendment rule against any governmental effort to compel ideological conformity”).

<sup>207</sup> Richard D. Mosier, *The Philosophy of Reconstructionism*, 1 *EDUC. THEORY* 47, 47 (1951).

<sup>208</sup> A minority of circuits claim to employ the pure *Pickering-Connick* approach to teacher speech cases. See *infra* text accompanying notes 237–243.

<sup>209</sup> See, e.g., *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719, 724 (8th Cir. 1998) (utilizing *Tinker*, *Fraser*, and *Kuhlmeier* to hold in a rights-restrictive way on a teacher’s First Amendment claim).

<sup>210</sup> *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993).

<sup>211</sup> See *id.* (providing in the sentence after the recitation of the *Tinker* dicta that “it is well-settled that public schools may limit classroom speech to promote educational goals”).

<sup>212</sup> *Id.* at 453–54 (equating a teacher’s classroom with the student newspaper in *Kuhlmeier*, finding that schools may limit teachers’ speech in that setting, and finding a biology teacher who was terminated for in-class discussion of abortion was not entitled to a trial on the issue of whether she was entitled to notice regarding prohibited conduct from the school committee on procedural grounds).

<sup>213</sup> See, e.g., *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991) (“A school’s interests in regulating classroom speech . . . are implicated regardless of whether that speech comes from a teacher or student.”); *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990)



Court's distinct delineations between the speech rights of adults and the diminished speech rights of students.<sup>214</sup> This faulty premise, with its reliance on the *Tinker* student control discourse framework as a predicate for right restrictive holdings, has resulted in a more severe circumscription of teacher rights.<sup>215</sup> Indeed, the imposition of this control framework on teacher First Amendment claims has resulted in dictating the parameters of every action of the teacher within the schoolhouse gate, exposing the current transparency of the *Tinker* dicta.<sup>216</sup>

The predominant thrust of this type of judicial approach is a co-optation of the *Kuhlmeier* standard onto teacher expressive activities.<sup>217</sup> It has been used in this way to restrict planned curricular speech in classrooms,<sup>218</sup> off-hand commentary on school rumors in the classroom,<sup>219</sup> and the silent demonstration of political support on any area of school property.<sup>220</sup> The judicial approach of this last trend is a particularly instructive example of the extensive application of the *Kuhlmeier* standard to teacher speech.<sup>221</sup> In *Weingarten v. Board of Education*, a 2010 case that came out of the

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(finding “no reason . . . to draw a distinction between teachers and students where classroom expression is concerned”).

<sup>214</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (“It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”).

<sup>215</sup> See Hutchens, *supra* note 198, at 66–67 (“[*Kuhlmeier*] has often served as a basis for substantially restricting teachers’ First Amendment rights in the classroom.”).

<sup>216</sup> See Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1629 (2012) (“The application of [*Kuhlmeier*] . . . to teacher speech threatens to strip teachers of First Amendment protection for any speech they might direct toward their students, whether inside or outside the classroom.”).

<sup>217</sup> *E.g.*, *Kirby v. Yonkers Sch. Dist.*, 767 F. Supp. 2d 452, 460–61 (S.D.N.Y. 2011) (employing *Kuhlmeier* to hold that an icebreaker on the male reproductive anatomy presented by a teacher was not protected speech, as the school district curriculum did not provide for icebreakers in the teaching of this subject).

<sup>218</sup> *E.g.*, *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719, 724 (8th Cir. 1998) (determining that, under *Kuhlmeier*, an English teacher’s First Amendment rights were not violated by a school terminating her contract for permitting students to use profanity in their written classwork).

<sup>219</sup> *E.g.*, *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 778–79 (10th Cir. 1991) (utilizing *Kuhlmeier* to uphold the constitutionality of the suspension of a teacher for making an off-hand comment about a school rumor to students in a discussion about the decline in school quality).

<sup>220</sup> *E.g.*, *Weingarten v. Bd. of Educ.*, 680 F. Supp. 2d 595, 602 (S.D.N.Y. 2010).

<sup>221</sup> *See id.*

Southern District of New York, the court used this standard to declare constitutional a regulation that barred teachers from wearing campaign buttons in any Board of Education building, not just in their classrooms.<sup>222</sup> The court found that it should give deference to the school district's view that the opinions conveyed by teacher-worn political buttons might reasonably be perceived to bear the schools' endorsement or otherwise interfere with the accomplishment of the schools' public role,<sup>223</sup> thereby providing a reproductionist rationale to cabin the core political speech rights of educators as soon as they crossed the threshold of the schoolhouse gate.

This continued judicial application of *Kuhlmeier* to teacher First Amendment cases, typically after a gloss to *Tinker*, is problematic, because its justification of educator control over school-sponsored student expression is not at play in teacher speech cases.<sup>224</sup> Also, by placing this standard on teachers' expressive activities, these courts are equating the speech rights of adult professionals with children.<sup>225</sup> This equation does not afford proper First Amendment protection for teachers, and it infantilizes teachers both in law and policy.<sup>226</sup> Further, the use of *Kuhlmeier* as the standard for teacher speech cases by courts or as a yardstick in crafting regulations by school districts will result in fewer speech rights for teachers than for their students.<sup>227</sup> When thinking about the scope of *Kuhlmeier*, it

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<sup>222</sup> *Id.* at 597.

<sup>223</sup> *Id.* at 600–01.

<sup>224</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (The Court framed the issue as one that “concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”).

<sup>225</sup> See *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991) (finding “no reason to distinguish between the classroom discussion of students and teachers in applying” *Kuhlmeier* in a rights restrictive way to a teacher’s First Amendment claim).

<sup>226</sup> Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 1002 (2003) (“Equating teachers’ free speech rights with those of students similarly undercuts the professional nature of the teachers’ position. If Americans want their teachers to exercise discretion in the classroom, then these teachers must be given greater than the bare minimum of First Amendment protection.”).

<sup>227</sup> Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV.

only implicates a limited amount of student speech—just student speech in school-sponsored expressive activities, like the school newspaper at issue in the case.<sup>228</sup> When thinking about how courts and administrators have used *Kuhlmeier* for teacher speech cases, the scope is remarkably overbroad, as these entities have equated “school-sponsored expressive activities” for teachers to be any type of speech on school grounds that involves an interaction between a teacher and a student.<sup>229</sup> It is this realization that exposes the infiltration of *Tinker*’s control discourse into almost every aspect of a teacher’s employment.<sup>230</sup>

Not all courts expressly employ student speech cases when evaluating teacher speech. One circuit has utilized a purely control-centric rationale when looking at in-class teacher speech: the Third Circuit premised its holding that all in-class conduct of teachers is not protected under the First Amendment<sup>231</sup> on a rationale “that the teacher is acting as the educational institution’s proxy during his or her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students.”<sup>232</sup> Although an outlier, this unique approach encapsulates the reproductionist ideology that underlies the current treatment of public school teachers by school boards and courts.

In evaluating teacher speech claims, most courts use an elaboration of the Supreme Court’s public employee speech doctrine analysis, utilizing

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717, 740–41 (2009) (“If a teacher decides to post one of her own pictures on the classroom wall to serve some educational purpose, she receives no First Amendment protection in doing so. If she decides to post, or not to post, certain student work on the classroom wall, *Hazelwood* authorizes courts to determine whether her decisions serve a legitimate pedagogical concern. Here again students get more protection than their teachers in the school environment itself.”).

<sup>228</sup> *Kuhlmeier*, 484 U.S. at 271 (defining the parameters of the student speech under consideration).

<sup>229</sup> See, e.g., *Weingarten v. Bd. of Educ.*, 680 F. Supp. 2d 595, 601–02 (S.D.N.Y. 2010) (upholding a regulation that barred teachers from wearing any “political paraphernalia in schools”).

<sup>230</sup> Wohl, *supra* note 29, at 1298–99 (stating that *Kuhlmeier* “contradicts and interferes with the underlying mission of the school itself by eliminating the balance between administrators, teachers, students, and parents in favor of the safety net of complete control in the name of pedagogical concerns”).

<sup>231</sup> *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1174, 1176 (3d Cir. 1990) (finding that a teacher’s First Amendment rights were not violated by retaliation against her pedagogical use of “Learnball, a classroom management technique” that incorporated student democratic and rulemaking processes and incentive reward systems).

<sup>232</sup> *Borden v. Sch. Dist.*, 523 F.3d 153, 172 (3d Cir. 2008).

various combinations of *Pickering*, *Connick*, and *Garcetti*.<sup>233</sup> Despite these seemingly variant approaches, these decisions are quite uniform as they reject any type of reconstructionist perspective for public schools and focus on the same central theme as student speech cases (or teacher speech cases that co-opt student speech rationales): control.<sup>234</sup> Essentially, these courts' rationales align with the control discourse framework as they either premise their holdings on the idea that school board control over the curriculum is paramount to teachers' constitutional rights,<sup>235</sup> or they employ the incredibly restrictive general governmental employee speech analysis test onto teachers without acknowledging the unique nature of the educational profession.<sup>236</sup>

A minority of circuit courts purport to apply the *Pickering-Connick* balancing approach to teacher speech cases, but in doing so, the results replicate the control discourse.<sup>237</sup> In *Lee v. York County School Division*, the Fourth Circuit asserted the use of the "*Pickering-Connick* balancing standard" to find that a teacher's "classroom postings do not constitute speech concerning a public matter, because they were of a curricular nature."<sup>238</sup> Despite an earlier en banc Fourth Circuit decision, *Boring v. Buncombe County Board of Education*, that determined that *Pickering-Connick* should apply to teacher speech cases, rather than *Kuhlmeier*,<sup>239</sup> the *Lee* decision also utilized *Kuhlmeier* as the basis for its rationale.<sup>240</sup> The *Lee*

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<sup>233</sup> JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-Garcetti Jurisprudence*, 63 U. MIAMI L. REV. 761, 761–62 (2009) (discussing the lack of uniformity in the evaluation of teacher speech cases and the significant impact of *Garcetti* on the analysis in these types of cases).

<sup>234</sup> See *infra* text accompanying notes 237–297.

<sup>235</sup> See Papandrea, *supra* note 216, at 1618 ("In cases arising prior to *Garcetti*, some courts held that a school has a right to control not just the content of teachers' lessons but also the pedagogical methods they use.").

<sup>236</sup> See *supra* text accompanying note 195.

<sup>237</sup> The Third Circuit applied this approach in a case where it found that a high school football coach's silent acts of participation in student-led prayer were not protected by the First Amendment as they were not matters of public concern under *Connick* and subsequently acknowledged that the governing *Pickering* balancing test was not necessary. See *Borden*, 523 F.3d at 168–70.

<sup>238</sup> 484 F.3d 687, 694 (4th Cir. 2007).

<sup>239</sup> 136 F.3d 364, 371 n.2 (4th Cir. 1998) (en banc) ("This is not a case concerning pupil speech, as in *Hazelwood*, either classroom or otherwise. This case concerns itself exclusively with employee speech, as does *Connick*, whether or not a public high school teacher has a First Amendment right to insist on a part of the curriculum of the school.").

<sup>240</sup> *Lee*, 484 F.3d at 695–96.

court, like the other courts that explicitly used *Kuhlmeier* in evaluating teacher First Amendment claims, falsely couched the circumscription of adult teacher rights with those of the student rights in *Kuhlmeier* by claiming that “the enhanced right of a school board to regulate the speech of its teachers in classroom settings is supported by the Supreme Court’s explicit recognition that First Amendment free speech rights in a *school environment* are not ‘automatically coextensive with the rights of adults in other settings.’”<sup>241</sup> The vast expansion by the *Lee* court of the Supreme Court’s statement that “the First Amendment rights of *students* in the public schools ‘are not automatically coextensive with the rights of adults in other settings’” is of especial significance.<sup>242</sup> By first acknowledging the *Tinker* dicta and then utilizing a highly restrictive rationale in construing teacher speech rights, this type of “pure” *Pickering-Connick* judicial ideology typifies the underlying reproductionist tenets that compose the *Tinker* control discourse.<sup>243</sup>

Rather than using just the *Pickering-Connick* approach in evaluating teacher speech cases, the majority of courts now utilize *Garcetti v. Ceballos* as a way to constrict teacher First Amendment rights.<sup>244</sup> This majority application should not be surprising, as its focus on control<sup>245</sup> fits within the judicial framework of cabinining all rights within the schoolhouse setting.<sup>246</sup> The 2006 *Garcetti* decision, authored by Justice Kennedy, provided that speech made by government employees pursuant to their official job duties

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<sup>241</sup> *Id.* at 695 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)) (emphasis added).

<sup>242</sup> *Kuhlmeier*, 484 U.S. at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)) (emphasis added).

<sup>243</sup> See *Borden v. Sch. Dist.*, 523 F.3d 153, 168 n.8 (3d Cir. 2008) (reciting the *Tinker* dicta prior to its rights-restrictive holding); *Lee*, 484 F.3d at 693 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (“[I]t is important to first acknowledge that schoolteachers do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ Nevertheless, certain limitations are placed on the free speech rights of schoolteachers, such as *Lee*, due to the nature of their employment by government-operated schools.” (citations omitted)).

<sup>244</sup> See *infra* text accompanying notes 261–297.

<sup>245</sup> *Garcetti*, 547 U.S. at 418 (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”).

<sup>246</sup> See *Hutchens*, *supra* note 198, at 72 (“Evaluating teachers’ in-class speech using *Garcetti* would erase even this modest level of First Amendment protection [afforded by the application of *Kuhlmeier* to teacher speech cases].”).

is not protected under the First Amendment, even if it relates to a matter of public concern.<sup>247</sup> The decision did not involve a public school teacher; it involved a deputy district attorney who was disciplined for writing a memo regarding a case against the wishes of his supervisor.<sup>248</sup> The Court held that the speech was unprotected, because “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>249</sup> In doing so, the Court provided that the restriction of speech in this way “simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>250</sup>

Throughout *Garcetti*, the Court alluded to the unique nature of teaching within the panoply of public employees.<sup>251</sup> In support of its claimed proposition “that public employees do not surrender all their First Amendment rights by reason of their employment,” the Court cited to *Pickering*.<sup>252</sup> It further framed *Pickering* as an important example of the societal necessity of safeguarding constitutional rights of public employees:

The Court’s employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to “limi[t] teachers’ opportunities to contribute to public debate.” It also noted that teachers are “the members of a community most likely to have informed and definite opinions” about school expenditures. The Court’s approach acknowledged the necessity for informed, vibrant dialogue in a democratic

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<sup>247</sup> *Garcetti*, 547 U.S. at 421.

<sup>248</sup> *Id.* at 421–22.

<sup>249</sup> *Id.* at 421.

<sup>250</sup> *Id.* at 422.

<sup>251</sup> *Id.* at 417–19.

<sup>252</sup> *Id.* at 417.

society. It suggested, in addition, that widespread costs may arise when dialogue is repressed.<sup>253</sup>

The Court continued to use its past teacher speech cases of *Pickering* and *Givhan v. Western Line Consolidated School District*,<sup>254</sup> in which the Court found that a teacher's private expressions of concerns about the school's actions in light of a desegregation order to her principal could be subject to First Amendment protection,<sup>255</sup> to support its propositions that some employee expression made at work and some "expressions related to the speaker's job" may be protected speech.<sup>256</sup> Finally, in a coda to a section of its decision and with reference to Justice Souter's dissent,<sup>257</sup> the Court noted that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."<sup>258</sup> Consequently, the Court provided a caveat that it "need not, and for that reason [did] not, decide whether the analysis we conduct[ed] [in *Garcetti*] would apply in the same manner to a case involving speech related to scholarship or teaching."<sup>259</sup>

Despite this express caveat<sup>260</sup> and its acknowledgment that teachers as public employees may have First Amendment protection for speech "made

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<sup>253</sup> *Id.* at 419 (citations omitted) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968)).

<sup>254</sup> 439 U.S. 410 (1979).

<sup>255</sup> *Id.* at 415–16.

<sup>256</sup> *Garcetti*, 547 U.S. at 421.

<sup>257</sup> Justice Souter was deeply concerned about the impact of the *Garcetti* holding on "First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Id.* at 438 (Souter, J., dissenting).

<sup>258</sup> *Id.* at 425.

<sup>259</sup> *Id.*

<sup>260</sup> Most courts have determined that this dicta only applies to college and university professors, rather than K–12 public school teachers. *See, e.g., Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 343–44 (6th Cir. 2010) (finding that the *Garcetti* caveat does not apply to high school teachers as "the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school."). *But see Demers v. Austin*, No. 11-35558, 2014 WL 306321, at \*1 (9th Cir. Jan. 29, 2014) (holding that "*Garcetti* does not apply to 'speech related to scholarship or teaching.' Rather, such speech is governed by *Pickering*" (citations omitted)). Although *Demers* evaluated the speech of a public university professor and despite earlier Ninth Circuit case law applying *Garcetti* to teacher speech, the Ninth Circuit's discussion in *Demers* did not appear to

at work . . . related to the speaker's job,"<sup>261</sup> *Garcetti* has been used to constrict teacher speech both inside and outside of the classroom.<sup>262</sup> Both the Sixth and Seventh Circuits have applied *Garcetti* in cases that have held that the First Amendment does not provide protection for teachers' in-class, curricular speech.<sup>263</sup> In *Evans-Marshall v. Board of Education*, the Sixth Circuit first cited to the *Tinker* dicta for teachers<sup>264</sup> and then found in a right-restrictive way by affirming summary judgment for a school board on a teacher's claim that her First Amendment right was infringed upon by the school's retaliation against her selection of books and methods of instruction for use in her classroom.<sup>265</sup> Part of the teacher's actions included an assignment to her ninth-grade English class to report on and lead an in-class debate on a book from "the American Library Association[']s . . . '100 Most Frequently Challenged Books.'"<sup>266</sup> Another part of the teacher's speech included teaching an optional book purchased by the school board.<sup>267</sup> To support its holding, the court determined that the teacher's speech satisfied both the "*Connick* 'matter of public concern' requirement [and] the *Pickering* 'balancing' requirement."<sup>268</sup> However, the court found that the teacher's speech rights had not been violated as her speech was made pursuant to her official job duties and was, therefore, not protected via application of *Garcetti*.<sup>269</sup> The court emphasized that the insight that "the government, just like a private employer, retains 'control over what the

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foreclose its application to K–12 school teachers. *See id.* at \*6 ("But teaching and academic writing are at the core of the official duties of teachers and professors.").

<sup>261</sup> *Garcetti*, 547 U.S. at 420–21.

<sup>262</sup> *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 12–13 n.44 (2009) (noting the different approaches regarding *Garcetti*'s application to K–12 public school teachers).

<sup>263</sup> *Evans-Marshall*, 624 F.3d at 334 (applying *Garcetti* to find that "the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made 'pursuant to' their official duties"); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479–80 (7th Cir. 2007) (applying *Garcetti* to hold that the First Amendment does not entitle primary and secondary teachers when conducting the education of captive audiences to cover topics or advocate viewpoints that depart from the curriculum adopted by the school system).

<sup>264</sup> *Evans-Marshall*, 624 F.3d at 340.

<sup>265</sup> *See id.* at 344.

<sup>266</sup> *Id.* at 335.

<sup>267</sup> *Id.* at 339.

<sup>268</sup> *Id.* at 338.

<sup>269</sup> *Id.* at 340.



employer itself has commissioned or created': the employee's job. . . . has particular resonance in the context of public education."<sup>270</sup> Given the use of control as the core theme of *Garcetti* and as the overall framework of student speech and privacy cases, the Sixth Circuit's application of this general public employee speech doctrine illustrates how easy it is for courts to enforce reproductionist rationales against teachers.<sup>271</sup>

The Seventh Circuit has also determined that *Garcetti* forecloses any type of First Amendment protection for teachers' in-class, curricular speech, as such speech is part of a teacher's "official duties."<sup>272</sup> In *Mayer v. Monroe County Community School Corp.*, the Seventh Circuit affirmed a grant of summary judgment in favor of a school board where a teacher alleged that her First Amendment rights were violated.<sup>273</sup> In this case, a school district did not renew a teacher's contract because in a "current-events session in her class . . . she answered a pupil's question about whether she participated in political demonstrations by saying that, when she passed a demonstration against this nation's military operations in Iraq and saw a placard saying 'Honk for Peace,' she honked her car's horn to show support for the demonstrators."<sup>274</sup> In its decision, the court reaffirmed the "rule that employers are entitled to control speech" of teachers.<sup>275</sup> Despite an acknowledgement that "[m]ajority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination [and] elected school boards are tempted to support majority positions about religious or patriotic subjects especially," the court determined that "teachers hire out their own speech and must provide the service for which employers are willing to pay."<sup>276</sup> The Seventh Circuit was plain in its embrace of the control doctrine for public school teachers, stating that "the school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."<sup>277</sup> Although

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<sup>270</sup> *Id.* at 342 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006)).

<sup>271</sup> See Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 55 (2008) ("[T]he scope of academic freedom in elementary and secondary education has not been changed by *Garcetti*: it remains quite limited.").

<sup>272</sup> *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007).

<sup>273</sup> *Id.* at 478, 480.

<sup>274</sup> *Id.* at 478.

<sup>275</sup> *Id.* at 480.

<sup>276</sup> *Id.* at 479.

<sup>277</sup> *Id.*

the Seventh Circuit does not explicitly cite the *Tinker* dicta or other student speech cases in this decision, it need not do so. The predicate control discourse established as the predominant theme for student First Amendment cases allows for a straightforward application by courts of *Garcetti*'s control doctrine to cabin teacher speech in the classroom.<sup>278</sup>

In addition to finding no First Amendment protection for in-class, teacher curricular speech, circuit courts have extended *Garcetti* to apply to teacher speech outside of the classroom (and even off of school grounds).<sup>279</sup> In a 2007 decision, *Brammer-Hoelter v. Twin Peaks Charter Academy*, the Tenth Circuit determined that charter school teachers' off-campus speech regarding student behavior, the school's curriculum and pedagogy, and school spending on classroom materials was made pursuant to the teachers' official duties under *Garcetti* and was, therefore, not subject to First Amendment protection.<sup>280</sup> The court in this case significantly expanded the definition of "official duties" for teachers, providing that "[a]n employee's official job description is not dispositive [of this definition], however, because speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform."<sup>281</sup> The Tenth Circuit mirrored the Fifth Circuit's expansion of this definition in *Williams v. Dallas Independent School District*, in which the Fifth Circuit applied *Garcetti* to find that a high school athletic director's speech was not subject to First Amendment protection given that it was made in the course of performing his job duties, although that speech was not a required component of his employment.<sup>282</sup>

The Second Circuit has also utilized *Garcetti* to expand the definition of teachers' "official duties" and to limit protection for teachers' out-of-class speech.<sup>283</sup> In *Weintraub v. Board of Education*, the Second Circuit found that a teacher's "filing a formal grievance with his union that challenged the school assistant principal's decision not to discipline a student who had

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<sup>278</sup> See Papandrea, *supra* note 216, at 1627 ("*Garcetti*'s bright-line rule eliminating First Amendment protection for speech made in the course of job duties means that courts no longer have to rely on *Hazelwood* to give schools robust authority to control the speech of their teachers in the classroom.>").

<sup>279</sup> See, e.g., *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202–03 (10th Cir. 2007).

<sup>280</sup> *Id.* at 1204.

<sup>281</sup> *Id.* at 1203.

<sup>282</sup> 480 F.3d 689, 693–94 (5th Cir. 2007).

<sup>283</sup> See *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 208 (2d Cir. 2010).

thrown books at [the teacher] during class . . . was in furtherance of one of his core duties as a public school teacher, maintaining class discipline, and had no relevant analogue to citizen speech.”<sup>284</sup> Consequently, the court found that this speech was made pursuant to official duties and was not protected speech under *Garcetti*.<sup>285</sup> Citing *Brammer-Hoelter* and *Williams*, the court substantially extended the definition of a teacher’s official duties, providing that the speech was made “‘pursuant to’ his official duties because it was ‘part-and-parcel of his concerns’ about his ability to ‘properly execute his duties’ as a public school teacher—namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning.”<sup>286</sup> The breadth of extension of the *Garcetti* decision in these types of cases highlights the courts’ willingness to allow schools to exercise expansive control over teachers and staff.<sup>287</sup>

The Ninth Circuit dramatically expanded the reach of the control framework to teacher speech even beyond existing case law in the 2011 *Johnson v. Poway Unified School District* case.<sup>288</sup> Here, the court applied *Garcetti* to discount a high school teacher’s speech rights to display non-curricular banners in his classroom that quoted official and historical texts that contain a reference to God or a Creator.<sup>289</sup> As with most teacher speech cases, the court acknowledged the *Tinker* dicta<sup>290</sup> and provided that “*Pickering* and *Tinker* are not mutually exclusive concepts” in support of its application of a *Garcetti-Pickering* analysis.<sup>291</sup> Because the court found that the teacher “spoke as an employee, not as a citizen,” it deemed the speech

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<sup>284</sup> *Id.* at 198.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 203 (internal citations omitted) (citing *Brammer-Hoelter*, 492 F.3d at 1204; *Williams*, 480 F.3d at 694).

<sup>287</sup> See Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 WASH. & LEE L. REV. 1103, 1113–14 (citing to *Brammer-Hoelter* and *Williams* to support the proposition that “the term ‘pursuant to’ captures speech . . . which might be contrary to one’s official duties, but whose content is based on information gained *through* one’s official duties”).

<sup>288</sup> See 658 F.3d 954, 958–59 (9th Cir. 2011); Recent Case, *First Amendment—Free Speech in Schools—Ninth Circuit Holds That Teacher Speech in School-Related Settings Is Necessarily Government Speech*.—*Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), 125 HARV. L. REV. 1868, 1872 (2012) (“The breadth of *Johnson*’s holding effectively denies First Amendment rights to teachers speaking with students in school-related settings.”).

<sup>289</sup> *Johnson*, 658 F.3d at 958, 975.

<sup>290</sup> *Id.* at 962.

<sup>291</sup> *Id.*

to be unprotected speech via *Garcetti*.<sup>292</sup> In doing so, the court drew a wide cordon around the definition of official duty speech for teachers.<sup>293</sup> It “include[d] speaking to [a teacher’s] class in [the] classroom during class hours,”<sup>294</sup> but it also noted that:

[T]eachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction. Rather, because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.<sup>295</sup>

The court widened the *Garcetti* definition of official duties for teachers even further by “emphasiz[ing] that teachers may still speak as government employees if fewer than all three conditions are met.”<sup>296</sup> The application of the reproductionist model is clear in this decision, as the court plainly embraced this approach: “All the speech of which [the teacher] complains belongs to the government, and the government has the right to ‘speak for itself.’”<sup>297</sup> This complete adoption of the control discourse in a case that links *Tinker* with the application of a *Garcetti-Pickering* test illustrates how entrenched the student speech control framework has become in courts’ treatments of teacher First Amendment claims.

Overall, most courts evaluating teacher speech cases have used *Garcetti* to dramatically expand the scope of teachers’ official duties and to deem an incredibly broad amount of speech that takes place both on and off school property as unprotected as a result of this expansion.<sup>298</sup> This majority

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<sup>292</sup> *Id.* at 964.

<sup>293</sup> *See id.* at 967–68.

<sup>294</sup> *Id.* at 967.

<sup>295</sup> *Id.* at 967–68 (citations omitted).

<sup>296</sup> *Id.* at 968 n.15.

<sup>297</sup> *Id.* at 975 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

<sup>298</sup> *See* Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1108 (2008) (“Although post-*Garcetti* litigation is still in its nascent stages, it appears that much of the litigation will focus on a practical assessment of what the public employee’s official duties are, with employers seeking broad definitions and employees more narrow ones.”).

approach of utilizing *Garcetti* in teacher First Amendment cases further restricts the bounds of educators' speech rights and reinforces the expansive sense of control over teachers inside and increasingly outside public schools.<sup>299</sup> Indeed, the aim of control is articulated here with even more resolution as *Garcetti* has been used to prohibit or allow sanctions on a substantial amount of teacher conduct that would be protected by a more rights-recognitive perspective.<sup>300</sup> This change demonstrates the grip of control that the state and school boards are now able to exercise over teachers and the victory of the reproductionist strand in education.

Although the circuit courts take a variety of approaches in evaluating teacher speech cases, they are not split in the adoption of the *Tinker* control discourse as a foundation for constricting the speech of educators in public schools.<sup>301</sup> *Garcetti* is arguably a preferable standard over *Kuhlmeier* for teacher First Amendment cases, as it treats teachers like other adults, rather than like children.<sup>302</sup> Although this aspect of *Garcetti* does not infantilize teachers, it is still not an appropriate standard because of the special circumstances of teachers as compared to other public employees,<sup>303</sup> due to the nature of the teaching profession.<sup>304</sup> Ironically, this difference was

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<sup>299</sup> See Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1281 (2008) (providing that "bad management practices now seem to trump the First Amendment [through the application of *Garcetti* to teacher speech cases]. Such practices have school boards discharging teachers and administrators for speaking out—truthfully—on matters of fiscal mismanagement, student discipline, and similar school district problems").

<sup>300</sup> See Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 309 (2012) ("[M]any [teachers' First Amendment retaliation claims], including claims arising from the identification of potentially serious misconduct or the failure to meet legal obligations to vulnerable students, have been doomed by the application of *Garcetti*. Until *Garcetti* is reconsidered or refined, teachers' efforts to expose school dysfunction will remain a hazardous enterprise few may be bold enough to undertake." (footnotes omitted)).

<sup>301</sup> See Bowman, *supra* note 192, at 256 ("The circuit splits are indeed interesting, if ultimately largely irrelevant to the outcomes of the cases, because, as with the student and parent challenges to curriculum and textbooks, the state somehow almost always wins.").

<sup>302</sup> See *supra* text accompanying notes 247–248.

<sup>303</sup> See Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 943–44 (2011) (providing that *Garcetti* compares "public school teachers [to] district attorneys, or police officers [who] may have the right to talk politics on their own time, but those employees have no right to public employment if they wish to engage in on-duty speech the government does not sanction").

<sup>304</sup> See Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1469 (2006) (providing that teachers' "jobs consist almost entirely of speech").

recognized throughout the *Garcetti* opinion.<sup>305</sup> These distinctions among types of public employment are critical as the Supreme Court has previously stated that teachers hold unique positions to inculcate civic values in students, which should include the ability to dissent from dominant and unpopular views in our democratic political system.<sup>306</sup> However, the teacher speech cases that apply *Garcetti* too broadly are at odds with this idealistic view of teachers, holding instead that teachers are hired mouthpieces of the state that deliver mandated curriculum.<sup>307</sup> This perception carries harm for teachers, students, and society at large.<sup>308</sup>

This potential harm is being perpetrated as a matter of course as a result of the constriction of teachers' First Amendment rights, regardless of the choice of the lower courts' applications, be they based on *Kuhlmeier*, *Garcetti*, or another control-centric rubric. Each of these variants fails to recognize the special position of education and teachers. Public school teachers "through both the presentation of course materials and the example [they] set[] . . . influence the attitudes of students toward government, the political process, and a citizen's social responsibilities[, and] [t]his influence is crucial to the continued good health of a democracy."<sup>309</sup> If teachers are role models, as has been stated by the courts,<sup>310</sup> then it stands to reason that they should be able to model dissent or at least have a modicum of protection to freely express themselves without governmental control in school and continued surveillance of their activities outside of

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<sup>305</sup> See *supra* text accompanying notes 251–259.

<sup>306</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>307</sup> See, e.g., *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) ("Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."); see also *Stuart*, *supra* note 76, at 998 (stating that given that *Garcetti* "devalue[s] the government employee to voicelessness, it is a wonder there is anybody left who would want to teach at all" (footnote omitted)).

<sup>308</sup> See, e.g., Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 583–84 (2008) ("Because public elementary, secondary, and higher education teachers are public employees who are paid to speak, *Garcetti* could be read for the proposition that little if any speech uttered in the classroom by a public school teacher or professor is protected from employer discipline by the First Amendment." (footnote omitted)); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 235 (2008) (providing that the application of *Garcetti* to teacher speech cases could result in the "children in our public schools [being] the ultimate losers because unethical or illegal activities in their school districts may not be brought to light").

<sup>309</sup> *Ambach v. Norwick*, 441 U.S. 68, 79 (1979).

<sup>310</sup> See *id.*

school. Yet, the imposition of the *Tinker* control discourse and its reproductionist rationales on teacher speech cases, whether articulated via the application of student speech cases or standard public employee speech cases, has cabined educators' First Amendment rights in a way that no longer allows for them to do so.

## VI. CONTROLLING TEACHERS' FOURTH AMENDMENT RIGHTS

The constriction of teachers' constitutional rights, like that of students' rights, has extended into the realm of the imposition of suspicionless drug testing upon public school teachers with a claimed justification of the controlled school environment.<sup>311</sup> Only two federal circuit courts have examined the propriety of such drug testing<sup>312</sup> as a condition of employment for traditional public school teachers,<sup>313</sup> and the Supreme Court has never addressed the issue.<sup>314</sup> Both on-point intermediate appellate decisions followed *Acton* but predated *Earls*.<sup>315</sup> This is the only context among judicial evaluation of student and teacher speech and privacy rights where the majority approach is not one of pure reproductionism; however, given the paucity of case law in this area, there is no majority approach.<sup>316</sup> This area is particularly instructive, though, in highlighting how the judicial embrace of the *Tinker* control discourse is determinative in whether courts are willing to cabin teachers' Fourth Amendment rights in this way.

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<sup>311</sup> Andrew McKinley, Comment, *Testing Our Teachers*, 61 EMORY L.J. 1493, 1530 (2012) ("So, too, school boards [in imposing drug tests on teachers] have an interest in controlling the role-model effect of their teachers, curbing the influence of any individual who may contribute to a drug culture.").

<sup>312</sup> *Compare* Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998) (upholding a suspicionless drug testing policy for teachers as constitutional), *with* United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853, 857 (5th Cir. 1998) (ordering a district court to enjoin a school board's imposition of suspicionless drug testing on teachers as being violative of the Fourth Amendment).

<sup>313</sup> In 2012, in an analogue to the traditional teacher drug testing policy cases, the D.C. Circuit found that a suspicionless drug testing policy for all Forest Service Job Corps Center employees who work with students from ages 16 to 24 at residential centers was a violation of the Fourth Amendment. *Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack*, 681 F.3d 483, 486 (D.C. Cir. 2012).

<sup>314</sup> *Id.* at 500. (Kavanaugh, J., dissenting) ("No Supreme Court case has addressed drug testing of public school teachers or other public school employees.").

<sup>315</sup> *See supra* note 312.

<sup>316</sup> *See supra* notes 312–315.

Similar to the majority approach in courts' treatment of teachers' speech rights cases, these courts that embrace the reproductionist ideology for school populations' rights premise their rationales on false equations between teachers and students<sup>317</sup> or on a lack of recognition of the differences between the nature of the teaching profession and other highly regulated forms of government employment.<sup>318</sup> Essentially, even though these cases do not explicitly cite to *Tinker, Tinker* and its progeny's control framework are at the heart of the treatment of teacher Fourth Amendment lawsuits.<sup>319</sup> This is even in spite of the cautionary coda of Justice Scalia in the *Acton* case that warned against:

[T]he assumption that suspicionless drug testing will readily pass constitutional muster in other contexts [as] [t]he most significant element in [the student drug testing] case is . . . that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.<sup>320</sup>

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<sup>317</sup> See, e.g., *Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690, 701 (E.D. Ky. 2004) ("While the Supreme Court has only upheld random testing in the context of student testing, nothing in the language of the cases provides an explicit prohibition against random testing of adults and the Supreme Court has never struck down a testing regime simply because it provided for random tests.").

<sup>318</sup> See, e.g., *Smith Cnty. Educ. Ass'n v. Smith Cnty. Bd. of Educ.*, 781 F. Supp. 2d 604, 616–17 (M.D. Tenn. 2011) (providing that teachers subject to a random suspicionless drug testing policy "occupy 'safety sensitive' positions[,] despite admitting that such a finding was an expansion of the Supreme Court's delineations of such positions including "railroad employees and custom agents who have direct contact with drug traffickers or carry firearms" (citations omitted)). Although *Smith County* ultimately found the random suspicionless drug testing policy for teachers at issue to be unconstitutional, this opinion still represents a control-based, reproductionist approach. See *id.* at 620. The district court found that the "policy [was] constitutionally flawed [only] by its lack of notice of what drugs are the subject of testing and how the policy is to be implemented." *Id.* It emphasized that it did not find "that the random drug testing of Smith County teachers is unconstitutional per se. If the unconstitutional aspects of the 2007 Policy and its implementation are cured, the Court is of the opinion that the random drug testing will comply with the Fourth Amendment." *Id.*

<sup>319</sup> See *id.*

<sup>320</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).



To be plain, the existence of the reproductionist treatment of students by courts and the state provides the predicate for such constrictive and controlling treatment of teachers by those same entities.<sup>321</sup>

As in the student privacy rights cases, the two circuit courts, the Fifth and Sixth Circuits, that have addressed the federal constitutionality of suspicionless drug testing policies for teachers have employed the “special needs” exception to the Fourth Amendment’s typical requirement for individualized suspicion balancing test.<sup>322</sup> “When such ‘special needs’—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.”<sup>323</sup> Aside from the unanimity in the recognition of the applicability of the special needs framework, these two decisions share little else in common. They diverge at the point of the application of the reproductionist control discourse. One decision does not incorporate this type of school control discourse and arrives at a rights recognitive result for teachers;<sup>324</sup> the other decision embraces such discourse and results in a rights restrictive holding for teachers.<sup>325</sup>

In the 1998 *United Teachers of New Orleans v. Orleans Parish School Board* decision, the Fifth Circuit examined the constitutionality of a suspicionless drug testing policy for teachers<sup>326</sup> that required “employees injured in the course of employment to submit a urine specimen . . . as a

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<sup>321</sup> See Charles J. Russo & David L. Gregory, *Legal and Ethical Issues Surrounding Drug Testing in Schools*, 1999 L. REV. MICH. ST. U. DET. C.L. 611, 643 (1999) (acknowledging the “fast-approaching . . . era of suspicionless testing” and finding that cases such as *Acton* “put us on that slippery slope”).

<sup>322</sup> *Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998) (identifying the special needs analysis as the proper framework for evaluating the teacher suspicionless drug testing policy at issue); *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 856 (5th Cir. 1998) (same).

<sup>323</sup> *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

<sup>324</sup> See *United Teachers*, 142 F.3d at 857 (ordering a district court to enjoin a school board’s imposition of suspicionless drug testing on teachers as being violative of the Fourth Amendment).

<sup>325</sup> See *Knox Cnty. Educ. Ass’n*, 158 F.3d at 384 (upholding a suspicionless drug testing policy for teachers as constitutional).

<sup>326</sup> The court emphasized that the school board policies “require testing of all employees injured in the course of employment without regard to the circumstances, even without any suggestion that a triggering injury was caused by any misstep of the employee to be tested.” *United Teachers*, 142 F.3d at 856.

condition of continued employment.”<sup>327</sup> In weighing the asserted state interest pursuant to the special needs balancing test, the court agreed that “evidence of drug use on the job by teachers could identify a strong state interest [as] [t]eachers are entrusted with this nation’s most precious asset—its children.”<sup>328</sup> In doing so, the court refused, though, to analogize the adult professionals in the classroom to their students, thereby rejecting the reproductionist approach to evaluating these types of Fourth Amendment claims: “We need not lower the privacy expectations of teachers to that of students to observe that the role model function of teachers, coaches, and others to whom we give this responsibility adds heavy weight to the state interest side of the ledger in justifying random testing without individualized suspicion.”<sup>329</sup> This refusal to apply the control discourse to teacher cases is further supported by the Fifth Circuit’s decision to not cite to the *Acton* case throughout the body of the opinion, although the student privacy case had been decided three years earlier.<sup>330</sup> The court proceeded to find that, because the testing policy did “not respond to any identified problem of drug use by teachers,” the state did not provide a sufficient justification for the suspicionless policy.<sup>331</sup> The court found that the policy was largely symbolic and did not fit within the narrow ambit of a special need:

Surely then it is self-evident that we cannot rest upon the rhetoric of the drug wars. As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a “kind of immolation of privacy and human dignity in symbolic opposition to drug use.”<sup>332</sup>

Consequently, the court remanded the case to the lower court “with instructions that defendants are to be enjoined from requiring teachers . . .

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<sup>327</sup> *Id.* at 854.

<sup>328</sup> *Id.* at 856.

<sup>329</sup> *Id.*

<sup>330</sup> *See id.* at 853–57.

<sup>331</sup> *Id.* at 856–57.

<sup>332</sup> *Id.* at 857 (quoting *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting)).

to submit urine specimens for testing in post-injury screening, absent adequate individualized suspicion of wrongful drug use.”<sup>333</sup>

Approximately four months later, the Sixth Circuit issued its own decision on a suspicionless drug testing policy for teachers in *Knox County Education Ass’n v. Knox County Board of Education*.<sup>334</sup> Unlike the Fifth Circuit approach in *United Teachers*, the Sixth Circuit embraced an application of the reproductionist control discourse to teacher privacy rights, framing its decision at the outset as one involving “important constitutional and societal values concerning the environment in which our children are educated.”<sup>335</sup> Here, the court evaluated the constitutionality of a suspicionless drug testing policy for all applicants and employees who transferred or were promoted to teaching positions.<sup>336</sup> Unlike *United Teachers*, the *Knox County* court used the *Acton* decision as a touchstone for its special needs analysis, citing to the student privacy case over ten times.<sup>337</sup> Although the court acknowledged that there was “little, if any, evidence of a pronounced drug . . . problem among Knox County’s teachers,” unlike the “epidemic of abuse” in *Acton*, it later analogized teachers to student athletes in finding that both populations have lesser expectations of privacy given their status as participants in a heavily regulated “‘industry’—public schools.”<sup>338</sup>

In further support of a finding of diminished expectations of privacy for teachers, the court equated teachers with other governmental positions subject to constitutionally permissible suspicionless drug testing,<sup>339</sup> like U.S. Customs Service employees who carry firearms or are involved in the interdiction of illegal drugs.<sup>340</sup> The court further found that teachers occupy safety-sensitive positions like railroad engineers, nuclear power plant workers, oil tanker operators, firefighters, EMTs, police officers, and pipeline operators.<sup>341</sup> In support of this conclusion, the court provided:

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<sup>333</sup> *Id.*

<sup>334</sup> *See* 158 F.3d 361 (6th Cir. 1998).

<sup>335</sup> *Id.* at 363.

<sup>336</sup> *Id.*

<sup>337</sup> *See id.* at 372–84.

<sup>338</sup> *Id.* at 374, 384.

<sup>339</sup> *Id.* at 374 (“Just as the Customs agents in *Von Raab* must be considered in their own unique context, so too must the nature of the work and positions of school teachers and administrators be viewed as unique.”).

<sup>340</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664 (1989).

<sup>341</sup> *Knox Cnty. Educ. Ass’n*, 158 F.3d at 377–78.

Simple common sense and experience with life tells us “that even a momentary lapse of attention can have disastrous consequences,” particularly if that inattention or lapse were to come at an inopportune moment. For example, young children could cause harm to themselves or others while playing at recess, eating lunch in the cafeteria (if for example, they began choking), or simply while horsing around with each other. Children, especially younger children, are active, unpredictable, and in need of constant attention and supervision.<sup>342</sup>

In its final determination of the substantial weight of the state’s interest in enforcing the suspicionless drug testing policy for teachers, the court reiterated the crucial element that teachers play in enforcing the control culture of public schools.<sup>343</sup> In its subsequent minimalization of the individual privacy interest at issue in the case, the court emphasized the nature of the reproductionist perspective in public schools: “when people enter the education profession they do so with the understanding that the profession is heavily regulated as to the conduct expected of people in that field, as well as the responsibilities that they undertake toward students and colleagues in the schools.”<sup>344</sup> Consequently, “teachers should not be surprised if . . . their expectation of privacy . . . might be diminished.”<sup>345</sup> The court provided a final foundation for its ultimate determination that the suspicionless drug testing policy for teachers was not an unconstitutional violation of the Fourth Amendment with a reiteration on the constrictive constitutional environment of public schools under a veneer of veneration for the teaching profession:

That a teacher’s expectation of privacy as to drug use might be diminished is further underscored by the unique role teachers play in the lives of our nation’s children. As we have noted, teachers are not just role models, but mentors, friends, and in some cases, parent-figures that stand in the

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<sup>342</sup> *Id.* at 378 (citations omitted).

<sup>343</sup> *Id.* at 379 (“Rather, school personnel perform an essential monitoring role in preventing incidents from occurring in the first place. Teachers and administrators are in a unique position to observe children and learn if they are involved in activities which can lead to harm or injury to themselves or others.”).

<sup>344</sup> *Id.* at 384.

<sup>345</sup> *Id.*

place of absent parents. Teachers leave indelible impressions on the minds of their young students, because they are entrusted with the safe keeping and education of children during their most impressionable and formative years. Therefore, teachers must expect that with this extraordinary responsibility, they will be subject to scrutiny to which other civil servants or professionals might not be subjected, including drug testing.<sup>346</sup>

The juxtaposition between the two circuit courts that have addressed the constitutionality of suspicionless drug testing policies for teachers provides a clear illustration of the result of a reproductionist application of the *Tinker* control discourse to teacher privacy rights cases.<sup>347</sup> Such an application draws dangerous parallels between all of the inhabitants of schools—both adults and children. This equation falsely extrapolates the asserted special needs of the government in the student privacy cases—that of maintaining order (ostensibly control) in schools and deterring drug use among students<sup>348</sup>—onto teachers.<sup>349</sup> However, “[t]eachers . . . are professional adults over whom the school as employer (and *not* as parent) does not maintain a comparable degree of control. . . . The state simply cannot exercise a similar degree of control over adult employees as it does over students.”<sup>350</sup> Under the reproductionist approach, however, teachers are infantilized for the purposes of this constitutional analysis, which devalues the rights of both students and teachers in their appropriate contexts. This

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<sup>346</sup> *Id.*

<sup>347</sup> See *supra* text accompanying notes 324-325.

<sup>348</sup> See Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 398 (2010) (“In *Vernonia School District 47J v. Acton* and *Board of Education v. Earls*, the Court upheld broad, suspicionless drug-testing programs of public school students on the dual grounds that drug abuse poses a substantial public health risk and that the state is uniquely empowered in its role as guardian of schoolchildren to act outside the normal constraints of the Fourth Amendment.”).

<sup>349</sup> See Karin Schmidt, *Suspicionless Drug Urinalysis of Public School Teachers: The Concern for Student Safety Cannot Outweigh Teachers’ Legitimate Privacy Interests*, 34 COLUM. J.L. & SOC. PROBS. 253, 267 (2001) (“[R]easonable comparison cannot be made between free adults employed by the state and children who have been committed to the custody of the state for the school day and who are subject to a great degree of control.”).

<sup>350</sup> *Am. Fed’n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 902 (S.D.W. Va. 2009) (finding that teachers do not “have a reduced privacy interest by virtue of their employment in the public school system that is comparable to the students in *Vernonia* and *Earls*”).

devaluation is at the core of the control discourse in constricting all rights within the schoolhouse gate, despite the *Tinker* dicta.

Further, the application of the control doctrine in the Fourth Amendment context in terms of the analogization of teachers to other highly regulated positions of governmental employment demonstrates an analogue to the application of *Garcetti* to teachers in First Amendment cases.<sup>351</sup> Such parallels stretch the meaning of the jurisprudence in this area,<sup>352</sup> but such parallels are justified by courts using the central ideology of control over students and teachers' constitutional rights. Lumping teachers in with individuals in these industries demonstrates the increasingly high level of control that is being asserted over them and the bodily intrusions they are subject to as a condition of employment.<sup>353</sup> Despite a judicial gloss to the contrary,<sup>354</sup> this rationale for universal testing ignores the special circumstances and unique nature of teachers' employment, with its emphasis on the cultivation of positive civic attitudes of students, when compared to the primary duties of other highly regulated governmental employees, with their foci on the protection of citizens in emergency conditions.<sup>355</sup> It is the special circumstances of teaching and education that have been recognized by the courts that place the ever-restricting environment in proper control and reproductionist context.

The question of the extent of teacher Fourth Amendment rights in the context of the imposition of suspicionless drug testing is by no means resolved.<sup>356</sup> Given that there is no federal circuit case law in this area after

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<sup>351</sup> See *supra* text accompanying notes 339–341.

<sup>352</sup> See *Am. Fed'n of Teachers*, 592 F. Supp. 2d at 903 (finding that the *Knox County Education Association* case was incorrect in determining that teachers occupy safety sensitive positions as “[b]umps and bruises of students tussling in the hallways or on the playground are not special needs”).

<sup>353</sup> See Schmidt, *supra* note 349, at 270 (“Beyond the [*Knox*] court’s gross overstatement of teachers’ diminished privacy interests is a glaring omission in the court’s consideration of the testing scheme’s intrusiveness—the fact that drug urinalysis confuses legal and illegal drug use, and an employee . . . will often be forced to explain . . . intimate details of legitimate drug use and the underlying illness.”).

<sup>354</sup> See *supra* text accompanying note 346.

<sup>355</sup> See *Am. Fed'n of Teachers*, 592 F. Supp. 2d at 902 (“For an employee to occupy a truly safety sensitive position, it is not enough to show that the employee has some interest or role in safety. Rather, the government must demonstrate that the employee’s position is one that in the ordinary course of its job performance carries a concrete risk of massive property damage, personal injury or death.”).

<sup>356</sup> See *supra* text accompanying notes 322–325.

the expansive decisions of *Earls* and *Morse*, with their far-reaching implementations of the control discourse to the public school environment, it stands to reason, though, that future federal court examination and local school board implementation of these types of rights constrictive policies will likely utilize the reproductionist model to further restrict and control the activities of teachers.<sup>357</sup>

## VII. CONCLUSION

The current status of circumscribed constitutional rights within the schoolhouse gate results in a stark picture of continuous governmental control for the future of students and teachers in public education.<sup>358</sup> Students and teachers are facing, and will continue to face, the imposition of a broad range of disciplinary policies that provide very little room for the constitutional exercise of their First and Fourth Amendment rights. Consequently, the argument that *Tinker*'s reconstructionism has loosed the reigns of control within public schools and contributed to the disciplinary decay of education is a hollow one.<sup>359</sup> Instead, the control discourse of the majority opinion in *Tinker* and Justice Black's prophetic dissent, which "disclaim[ed] any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students,"<sup>360</sup> have been realized, rather than the claimed majority's notions of rights expansive dicta.

This extant application of the school control framework by courts and other governmental decisionmakers to curtail students' and teachers'

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<sup>357</sup> See, e.g., Michael A. Sprow, *The High Price of Safety: May Public Schools Institute a Policy of Frisking Students as They Enter the Building?*, 54 BAYLOR L. REV. 133, 134 (2002) ("School boards, even absent public pressure, understandably want to take whatever measures possible to avoid being the next big news story."); McKinley, *supra* note 311, at 1531 ("It would be a perverse result were a court to conclude that these unique responsibilities justified the drug testing of the class meant to be protected, but not the protectors." (footnote omitted)).

<sup>358</sup> See, e.g., Deleuze, *supra* note 1, at 5.

<sup>359</sup> See, e.g., ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 10 (2009) ("[L]urking under all the rhetoric about student rights [in *Tinker*] was a seed that could cause harm.").

<sup>360</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting).

constitutional rights is detrimental to educational outcomes.<sup>361</sup> Additionally, this cabining has broader implications for how society views the rights of young people, the role of public educators, and the nature of dissent and autonomy for groups that have less power than those bodies making rules to which they must conform.<sup>362</sup> Indeed, the pervasive control of the state in the schools has significant consequences for what students learn, what teachers teach, and what the future of our democratic system of governance will look like.<sup>363</sup>

One of the most significant consequences of this control of students and teachers is how America's situses of power view civic democratic commitments and spaces for dissent in the context of public education.<sup>364</sup> As a result of the predominant judicial imposition of the *Tinker* control discourse in its various manifestations in constitutional education cases, students learn that the opportunities to dissent inside (and increasingly outside of) schools from the prevailing majority trends as established by school authorities are limited.<sup>365</sup> Consequently, students are controlled into believing that these forms of rights constriction are normal, especially as the judicial application of the reproductionist control discourse typically follows a reiteration of the *Tinker* dicta that neither "students [n]or teachers shed their constitutional rights . . . at the schoolhouse gate."<sup>366</sup> This lesson

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<sup>361</sup> See, e.g., Brown, *supra* note 300, at 254 ("However, when children and youth seek protection of such expression [of petition and protest], they face particularly formidable obstacles in schools and courts. The hostility to such expressive efforts by the young stems from a misguided unwillingness to see children as citizens and to see schools as invaluable sites of constitutional citizenship practice.").

<sup>362</sup> See, e.g., Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 136 (2003) ("Sadly, many courts and school district attorneys use the phrase 'the *Tinker* standard' in reference to *Tinker*'s narrow exception (discipline may be imposed when a student's speech causes substantial disruption) instead of its broad rule (discipline may not be imposed for most student speech)").

<sup>363</sup> See *Bd. of Educ. v. Earls*, 536 U.S. 822, 855 (2002) (Ginsburg, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) ("Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . The government is nowhere more a teacher than when it runs a public school.")).

<sup>364</sup> See CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 210–11 (2003) ("Organizations and nations are far more likely to prosper if they welcome dissent and promote openness. . . . But democracies, no less than other systems, frequently create the majority tyranny that Mill deplored, simply because social pressures impose burdens on dissenters.").

<sup>365</sup> See Jeremy Waldron, *A Majority in the Lifeboat*, 90 B.U. L. REV. 1043, 1044 (2010) (noting that "majority-decision is not necessarily democratic").

<sup>366</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).



is particularly ironic, given that schools should be laboratories for civic and community life with education about democratic and political engagement.<sup>367</sup> This lesson is also problematically stratifying and carries with it significant societal impacts, given the demographics of public education increasingly serve marginalized populations.<sup>368</sup> As a result, students begin to naturalize the cabining of rights, because that has been their experience in schools. Ultimately, these patterns will have deleterious effects on public reason, democratic governance, and the republic at large as these concepts lose their deeper meaning and individuals lose the civic capital to participate in this manner.<sup>369</sup>

Yet, the constriction of student speech and privacy rights is just one side of the educational equation. Teachers too have become subjects of control by governing authorities.<sup>370</sup> Given that teachers, as adult professionals, have freely decided to pursue educating young people as a career, the governmental standards for teacher rights should differ from those for student rights.<sup>371</sup> However, in some courts, the current judicial enforcement of a reproductionist rationale that dictates the constitutional conduct of teachers simply superimposes the student constitutional rights cases upon teachers.<sup>372</sup> In other courts, the current controlled environment of schools gives rise to an application of the highly controlled doctrines for other types of governmental employees.<sup>373</sup> Yet, such judicial application misses the

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<sup>367</sup> *E.g.*, Caplan, *supra* note 362, at 134–35 (characterizing *Tinker* as a perspective of “public schools as laboratories of democracy where students learn that they have freedom of thought, belief, and speech” (footnote omitted)). *See generally* JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916) (discussing the relationship between political engagement and schools).

<sup>368</sup> India Geronimo, *Systemic Failure: The School-To-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. SOC’Y 281, 282 (2011) (identifying “punitive policies that encourage social control over marginalized populations” as one cause for “the isolation of some students into the school-to-prison pipeline”).

<sup>369</sup> *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–66 (1997) (discussing the notions of reasonable pluralism in democracy and the core aspects of public reason).

<sup>370</sup> Donald F. Uerling, *Academic Freedom in K–12 Education*, 79 NEB. L. REV. 956, 974 (2000) (“[S]chool boards and administrators do retain considerable legal power to regulate what teachers do and say in their classrooms.”).

<sup>371</sup> *See* *New Jersey v. T. L. O.*, 469 U.S. 325, 339 (1985) (“[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.”).

<sup>372</sup> *See, e.g., supra* text accompanying notes 337–338.

<sup>373</sup> *See, e.g., supra* text accompanying notes 339–342.

unique nature of teaching and its differences from other types of public employment.<sup>374</sup> As a result, teachers' rights are often less protected than students.<sup>375</sup> When teachers have their First and Fourth Amendment rights cabined in this way by governmental control, students notice.<sup>376</sup> This inequity negatively impacts the pedagogical dynamics of an educational environment.<sup>377</sup>

In sum, students and teachers suffer when their First and Fourth Amendment rights are not respected.<sup>378</sup> The harms, however, are not exclusive to those individuals who spend their days in public schools. The harm extends to the broader civic and social communities in which these schools reside,<sup>379</sup> which ultimately tend to impose these deleterious restraints.<sup>380</sup> Yet, despite these harms, the nature of the *Tinker* and post-*Tinker* educational decisions continue to showcase that the notion of control

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<sup>374</sup> See, e.g., *Demers v. Austin*, No. 11-35558, 2014 WL 306321, at \*7 (9th Cir. Jan. 29, 2014) (concluding that “Garcetti does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor” in an opinion that appears to extend the scope of the *Garcetti* coda to K–12 teachers, in addition to university professors).

<sup>375</sup> See *supra* text accompanying notes 348–350.

<sup>376</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“[S]chools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.”).

<sup>377</sup> See Michael J. Sandel, *Justice: What’s the Right Thing to Do?*, 91 B.U. L. REV. 1303, 1310 (2011) (“To achieve a just society, we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that inevitably arise.”).

<sup>378</sup> See *supra* text accompanying notes 376–377.

<sup>379</sup> See, e.g., Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 348 (2011) (“The single-minded focus on punishment in the criminal and juvenile justice systems has impacted how schools handle certain student behaviors, with devastating consequences. Today, these two systems—the education and justice systems—have developed a ‘symbiotic relationship,’ effectively working together to lock out large numbers of youth of color from societal opportunity and advantage.” (footnote omitted)).

<sup>380</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1745 (2007) (“For too long, the United States has sacrificed the education of low-income, urban, and minority students, as well as the overall quality of American education, on the altar of local control.”).

is a pervasive and central force in education that furthers social reproduction.<sup>381</sup>

This governmental emphasis on control has the potential to be used more positively and effectively. If the veneers of *Tinker* were stripped away from the rhetorical flourishes of education law cases,<sup>382</sup> then the educational establishment could function more honestly and possibly work more efficiently. A candid acknowledgement that schools are highly controlled environments could be used to direct educational reforms with a more vigorous purpose.<sup>383</sup> In particular, educational restrictions could be channeled from the existing realm of punitive punishments to a focus on controlling the educational environment towards creativity and innovation.<sup>384</sup> This could reinvest a positive sense of control into public schools, and it could be a means to involve all stakeholders in the debate on the best means of educational reform. It is this type of unencumbered delib-

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<sup>381</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”); *Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002) (“Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”); *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring) (“The school district bears responsibility for the speech, and for First Amendment purposes it therefore is the speaker and it therefore has the right to retain control of the speech—or, more precisely, to retain control over what is being taught in the classroom.”); *Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 379 (6th Cir. 1998) (“[T]eachers’ legitimate expectation of privacy is diminished by their participation in a heavily regulated industry and by the nature of their job . . .”).

<sup>382</sup> See Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 52 (“For most of this century, then, the case law on whether value inculcation is appropriate in public schools has been a collection of platitudes, contradictions, and unfulfilled promises.”).

<sup>383</sup> See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 485 (1960) (quoting *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952)) (“A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.”).

<sup>384</sup> See *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (“[L]ocal control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs . . .”).

erative democratic dialogue and acknowledgement of legitimate privacy interests, even within controlled environments, that should be the best lessons of our public educational system.<sup>385</sup>

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<sup>385</sup> See *Barnette*, 319 U.S. at 637 (“That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).