AGING OUT OF *IN LOCO PARENTIS*: TOWARDS RECLAIMING CONSTITUTIONAL RIGHTS FOR ADULT STUDENTS IN PUBLIC SCHOOLS

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I. INTRODUCTION

It is no secret—children eventually grow up. While most view the transition from childhood to adulthood as the result of years of growing, learning, and experiencing the joys and occasional sorrows of life, the law typically recognizes the transition not as a developmental process, but instead, as a moment in time.[1] That moment when a child legally enters into the adult world and is vested with the full complement of rights and responsibilities[2] is often unceremonious in the eyes of the individual. But, regardless of one's appreciation for the transition, it marks the investiture of significant responsibilities—many of which may be unwelcome[3]—upon the individual. For some individuals, the transition

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1. *See* Keely A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging out of Foster Care*, 79 TEMP. L. REV. 557, 559 (2006) ("For most young people in the United States, turning eighteen means becoming an 'adult' under the law but not necessarily in the eyes of one's parents.").

2. In most jurisdictions, it is not completely true that upon reaching the age of majority a newly christened adult immediately obtains all rights and privileges associated with that status. *See, e.g.*, *id.* at 601 (discussing that all fifty states forbid the sale of alcohol to minors under the age of twenty-one, even if the legal age of majority in the state is lower than twenty-one).

3. *See* Neil Shah, *More Young Adults Live with Parents*, THE WALL STREET JOURNAL (Aug. 27, 2013), http://www.wsj.com/articles/SB10001424127887324906304579039313087064716 (discussing the difficulty that young adults are having managing adult responsibilities like careers and homeownership).

into adulthood happens during their enrollment in public school.[4] Facially, that reality may not seem to pose a problem, but a more thorough analysis points to important constitutional questions that need to be addressed.

While in attendance at public school, children are governed by school policies that often limit their constitutional freedoms.[5] The authority of the public schools to exercise such control over students is often attributed to the legal doctrine of *in loco parentis*, which allows parents to delegate parental authority over their own children to the school.[6] But adult students[7] do not fit neatly into this doctrine, principally because, as adults, their parents no longer have any authority over them that can be delegated. Nevertheless, no alternative to *in loco parentis* exists to rationalize a public school's authority to restrict the constitutional freedoms of adult students. Indeed, courts have historically just assumed that adult students can be controlled under the umbrella of *in loco parentis*.[8] American courts have not seriously considered this fundamentally flawed application of the doctrine, and now that the presence of adult students in the nation's public schools is on the rise,[9] it is high time to find the proper balance between providing adult students with their constitutionally protected rights and restricting those rights in circumstances where the public schools have a legitimate need to do so.

Part II of this Note traces the evolution of the *in loco parentis* doctrine in American education from early colonial times through modern Supreme Court interpretations and discusses some of the criticisms of the

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4. For the purposes of this Note, "public school" will include any elementary or secondary public schools created or authorized by state legislatures.

5. *See* Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 977 (2010) (discussing the potential restrictions on students' First Amendment right to free speech and Fourth Amendment right to be free from unreasonable searches and seizures).

6. *See* State v. Pendergrass, 19 N.C. 365, 365 (1837) ("The authority of the teacher is regarded as a delegation of parental authority . . . .").

7. For the purposes of this Note, "adult student" will be representative of those students who have reached the legal age of majority or have been declared emancipated minors within their jurisdictions, but who are still enrolled as students in the public schools of the state.

8. *See* Sheehan v. Sturges, 2 A. 841, 843 (Conn. 1885); State v. Mizner, 45 Iowa 248, 251–52 (1876); Stevens v. Fassett, 27 Me. 266, 273 (1847).

9. According to the *Digest of Education Statistics*, the percentage of the eighteen- and nineteen-year-old population in America that was enrolled in public schools has increased from 10.5% in 1970 to 19.1% in 2009. *See* United States Department of Education Institute of Educational Sciences, *Digest of Education Statistics: Table 7: Percentage of the Population 3 to 34 Years Old Enrolled in School, by Age Group: Selected Years, 1940 Through 2010*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS (July 2011), https://nces.ed.gov/programs/digest/d11/ tables/dt11_007.asp.

doctrine as generally applied to education. Part III explains the traditional applications of *in loco parentis* to adult students both in public schools and in a college setting. Part IV discusses the implications for governing adult students under *in loco parentis* by analyzing the legal problems that would result under both the traditional and modern interpretations of the doctrine. Also included in Part IV is a review of practical concerns and suggestions for moving away from *in loco parentis*. Finally, Part V offers the conclusion that either statutory enactments or a judicial shift to a reasonableness standard would be more appropriate tools to rationalize a public school's authority to restrict the constitutional protections of adult students.

II. THE RISE, FALL, AND RESURGENCE OF *IN LOCO PARENTIS*

Like many legal doctrines, *in loco parentis* has had an unstable tenure in educational law. Although its origin is in early English common law,[10] the adoption of *in loco parentis* in American legal traditions has hardly been consistent with its English roots. Nor has consistency been the hallmark of *in loco parentis* jurisprudence across American jurisdictions.[11] The ebbs and flows of *in loco parentis* have brought the doctrine from the eases of expansive influence back to the shores of almost certain death.[12] But recent precedent seems to be breathing life back into the doctrine, albeit in a different light.[13] Though critiques of *in loco parentis* abound, an understanding of both the philosophical support for and the evolution of the doctrine are necessary to appreciate the complications presented by the presence of public school students who are legal adults and yet presumably under the doctrine's purview while in school.

A. Origins

Translated into English, *in loco parentis* means "in the place of a parent."[14] It is a common law doctrine widely used[15] to represent the

10. Alan F. Edwards, *In Loco Parentis: Alive and Kicking, Dead and Buried, or Rising Phoenix?, in* ERIC COLLECTION OF ASSOCIATION FOR THE STUDY OF HIGHER EDUCATION CONFERENCE PAPERS 4 (Nov. 12, 1994), *available at* http://files.eric.ed.gov/fulltext/ED375720.pdf. The doctrine of *in loco parentis* in an educational context may even be traceable to the ancient *Code of Hammurabi*. *Id.*

11. *See generally* Stuart, *supra* note 5, at 970–83.

12. *Id.* at 977–80.

13. *Id.* at 980–83.

14. BLACK'S LAW DICTIONARY 858 (9th ed. 2009).

posture of a person who takes on "all or some of the responsibilities of a parent."[16] In the context of educational supervision over students, the origin of *in loco parentis* is almost always traced back to William Blackstone's *Commentaries*:[17]

> [The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[18]

Earlier in the same section of his commentaries, Blackstone explains that the father has the affirmative duty to protect his children.[19] Thus, under a fair reading of Blackstone, parents were expected to serve the dual role of both a protective agent as well as an administrative agent, vested with the power to rebuke and correct their children in order to command obedience.[20] While Blackstone undoubtedly carved out the possibility for a father to delegate part of his parental authority to the school, much of the concern among legal and educational professionals has been focused on the question of how much of that authority is permissibly delegated to the school.

Traditionally, American courts have been slow to find that the parental duty of protection is transferred to a school under *in loco*

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15. For a list demonstrating the breadth of federal statutes that explicitly employ the Latin name of the doctrine, see Stuart, *supra* note 5, at 973 n.19.

16. BLACK'S LAW DICTIONARY, *supra* note 14, at 858.

17. *See, e.g.*, John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 714 (2013); Stuart, *supra* note 5, at 974.

18. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765). The author has taken the liberty to adjust Blackstone's old-English to reflect modern spelling norms.

19. *Id.*

20. This view of the dual nature of parental responsibility was carried across the Atlantic and found a home in American legal traditions. *See* Leslie J. Harris, D. Dennis Waldrop & Lori Rathbun Waldrop, *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689, 692–97 (1990). One of the salient rationales for that dual nature is that parents needed the authority to take action towards a child in order to effectively carry out their duty to care for the child. *Id.* at 698–99 n.38. The parent-child relationship was thus a type of contractual understanding wherein the parent agreed to care for and protect the child and the child agreed to dutifully obey the parent and accept rebuke if he went astray. *Id.* at 697–99.

parentis.[21] However, the other side of the parental duty coin—discipline—has historically been included in the *in loco parentis* transfer of responsibility to schools.[22] In fact, until about the mid-1980s, *in loco parentis* was primarily used as a shield against liability for acts of corporal punishment instituted by teachers in public schools.[23] More recently, however, *in loco parentis* has transitioned to a new role in education law—one that facilitates the weakening of recently created constitutional protections for individual students.[24] Ironically, this transition has rested principally on the premise, not too long ago rejected, that schools have a duty to protect students while standing *in loco*

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21. Stuart, *supra* note 5, at 974; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) ("While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect, we have acknowledged that for many purposes school authorities ac[t] *in loco parentis*.") (alteration in original) (citations and internal quotation marks omitted); Rumel, *supra* note 17, at 717 (calling a school's duty to protect students under *in loco parentis* one of "secondary nature").

22. Stuart, *supra* note 5, at 974. The bedrock American case that applied the principle of *in loco parentis*, although without the use of the Latin name of the doctrine, established that:

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

State v. Pendergrass, 19 N.C. 365, 365–66 (1837).

23. Stuart, *supra* note 5, at 976–77. Currently, thirty-one states have statutorily or judicially abolished corporal punishment. *State Laws*, GUNDERSEN NAT'L CHILD PROTECTION TRAINING CENTER, http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-and-the-law/state-laws (last visited Nov. 14, 2014). Those states still permitting corporal punishment utilize the justification that teachers stand in the place of a parent and thus are properly positioned to carry out a disciplinary function. *See, e.g.*, McReynolds v. State, 901 N.E.2d 1149, 1153 (Ind. Ct. App. 2009) (holding that only custodians standing *in loco parentis* have the right to exercise reasonable corporal punishment measures).

The Supreme Court has upheld the constitutionality of corporal punishment in schools based upon *in loco parentis*, but has left implementation of the doctrine to the discretion of state legislatures. Ingraham v. Wright, 430 U.S. 651, 671, 682 (1977) ("[W]hen public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable . . . . [Corporal punishment] is authorized and limited by the common law.").

24. Stuart, *supra* note 5, at 977.

parentis.[25] Though the *in loco parentis* doctrine is misapplied in this context,[26] a long line of Supreme Court decisions shows a conflicted Court struggling to use it to legitimize the role of public schools as guardians of student safety in the context of an increasingly dangerous and changing educational environment.

B. Evolution of In Loco Parentis

The transformation of *in loco parentis* from protector of a public school's authority to institute corporal punishment to a doctrine that endorses a school's duty to exercise protective care over its students has largely been crafted by the United States Supreme Court. The Supreme Court's decisions leading to the creation of a protective duty for schools standing *in loco parentis* have been the product of cases where constitutional questions arose under provisions in the Bill of Rights. The Court's most influential decisions impacting *in loco parentis* are analyzed chronologically below.

1. Tinker v. Des Moines Independent Community School District (1969)[27]

The Court's first major break with the traditional view of *in loco parentis* in education occurred in *Tinker*.[28] There, the Court was faced with the question of whether a public school could create and enforce a policy forbidding students from wearing black armbands as a sign of protest against the government's involvement in the Vietnam War.[29] The enforcement of the policy was deemed to be a violation of the students' First Amendment right to free speech because the wearing of armbands was found to be neither a substantial disruption nor a material interference with school activities.[30] In effect, the ruling unraveled any support for the *in loco parentis* doctrine in schools insofar as free speech

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25. *Id.* at 994.

26. *See infra* Part II.C for a discussion of the doctrine's misapplication.

27. 393 U.S. 503 (1969).

28. From the early colonial era up until this time, American courts regularly upheld the view that schools, deriving their authority from *in loco parentis*, were to be governed locally and authority to act was vested in the school officials, whose actions—even on constitutional issues—were outside the reach of courts. *See* Morse v. Frederick, 551 U.S. 393, 410–16 (2007) (Thomas, J., concurring); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 53 (1996).

29. *Tinker*, 393 U.S. at 504–05.

30. *Id.* at 514.

is involved because it granted students the full protection of the First Amendment while in school, except in the limited cases of substantial disruption or material interference.[31] The Court would eventually revisit this standard, but only after considering *in loco parentis* in other educational capacities.

2. Ingraham v. Wright (1977)[32]

In *Ingraham*, the Court considered whether corporal punishment of students enrolled in the public schools in Florida was constitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause.[33] Without using the Latin name of *in loco parentis*, the Court acknowledged that the traditional source of the authority granted to teachers was parental delegation.[34] However, it then proceeded to explain that the traditional view has been replaced with one more "consonant with compulsory attendance laws,"[35] namely that corporal punishment is permissible when a state-run school needs to act to preserve a proper education for the child or the "maintenance of group discipline."[36]

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31. These exceptions to the grant of constitutional protection afforded to students would eventually be accompanied by other exceptions that the Court would carve out. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (published speech likely to carry imprimatur of school); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (lewd speech). Almost forty years later, Justice Thomas criticized the *Tinker* holding for the very reason that it created a standard which was subject to *ad hoc* modification in subsequent cases. *See Frederick*, 551 U.S. at 417–19 (Thomas, J., dissenting) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators.").

32. 430 U.S. 651 (1977).

33. *Id.* at 653.

34. *Id.* at 662.

35. *Id.*

36. *Id.* The Court's rationale here is not entirely inconsistent with Blackstone's notion of *in loco parentis*. To the extent that the school's right to discipline a student is based upon the need to preserve a proper education for the student, the state is "answer[ing] the purposes for which [it] is employed," and thus serves the same end as Blackstone's decree, although it derives its authority from within rather than from a parent. 1 BLACKSTONE, *supra* note 18, at 441 However, the Court's introduction of a state's right to use corporal punishment to maintain group discipline is an entirely new legal concept. *See* Stuart, *supra* note 5, at 977. Ironically, this premise will eventually be used as the foundation for the modern *in loco parentis* doctrine, even though it has nothing to do with standing in the place of a parent. *Id.*; *see also infra* Part II.C.

3. New Jersey v. T.L.O. (1985)[37]

The traditional view of *in loco parentis* as a doctrine applicable to public schooling began to erode in *T.L.O.* There, the Court considered whether, upon suspicion of drug use, a principal's search of a female student's purse violated the Fourth Amendment protection against unreasonable searches and seizures.[38] The State of New Jersey argued that, because school employees stand *in loco parentis* over students and exercise parental authority—not state authority—to conduct searches, they are not subject to the restrictions of the Fourth Amendment.[39] The Court declined to accept that rationale and explicitly found that school employees were state actors who could not be shielded from constitutional inquiry under the guise of *in loco parentis*.[40] In addition to piercing the heart of the traditional *in loco parentis* doctrine, the Court went on to prescribe an alternative tool to determine whether school employee actions were violative of the Fourth Amendment.[41] The new Court-commissioned standard was a reasonableness test that balanced the student's legitimate expectation of privacy and the school's equally legitimate need to maintain an orderly educational environment in which learning can take place.[42]

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37. 469 U.S. 325 (1985).

38. *Id.* at 332. The fourteen-year-old female student was observed smoking in the school's lavatory, a violation of school policy. *Id.* at 328. The principal commenced a search of the student's purse, which uncovered not only cigarettes, but also evidence that the student was engaged in the dealing of marijuana. *Id.*

39. *Id.* at 336.

40. *Id.* This holding was consistent with the Court's decisions in earlier cases that school officials are subject to the restrictions that state actors are subject to under the First Amendment, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969), and the Due Process Clause of the Fourteenth Amendment, Goss v. Lopez, 419 U.S. 565, 574 (1975).

In the minds of many educational and legal scholars, the *T.L.O.* decision signaled the inevitable end of the *in loco parentis* doctrine. Stuart, *supra* note 5, at 977–78. Not only did the Court hold that public school employees could not be protected from Fourth Amendment inquiry under *in loco parentis*, but it questioned whether the doctrine of *in loco parentis* makes sense in an age where states have authority over students not because of a voluntary grant of power from parents but instead from compulsory school attendance statutes. *T.L.O.*, 469 U.S. at 336 (citing *Ingraham*, 430 U.S. at 662).

41. *T.L.O.*, 469 U.S. at 341–42.

42. *Id.* at 340–43.

4. Bethel School District No. 403 v. Fraser (1986)[43]

Less than eighteen months after deciding *T.L.O.*, the Court considered in *Fraser* whether the First Amendment prevented a school district from imposing disciplinary sanctions on a student for giving an inappropriate speech at a student assembly.[44] In deciding that the school had not run afoul of the First Amendment when it sanctioned the student, the Court explained that there is an obvious concern "on the part of parents, and school authorities acting *in loco parentis,* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."[45] In the eyes of the Court, the need to preserve the school's basic educational mission outweighed any expectation of free speech that the student had.[46] This decision helped to solidify the prospect of moving to a balancing standard, as espoused in *T.L.O.*, and further confirmed that the death of *in loco parentis* as a constitutional shield in educational law was imminent.[47]

5. Hazelwood School District v. Kuhlmeier (1988)[48]

Not long after the *Fraser* Court introduced another exception to *Tinker*'s grant of First Amendment protections to student speech in school, the Court was asked to consider another student speech issue in *Kuhlmeier*. There, members of a high school journalism class sued the school principal for editing content out of a student-produced school

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43. 478 U.S. 675 (1986).

44. *Id.* at 677–78. The student giving the speech used lewd language consisting of an elaborate, graphic, and explicit sexual metaphor. *Id.*

45. *Id.* at 684.

46. *Id.* at 685.

47. Of note in *Fraser* is that even the dissenting Justices believed that a proper First Amendment analysis necessarily resulted in the determination that a public school has a right, though not a limitless one, to regulate some forms of student speech. *Id.* at 690 (Marshall, J., dissenting) ("I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission."); *id.* at 691 (Stevens, J., dissenting) ("For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission."); *see also id.* at 689 (Brennan, J., concurring in judgment) ("It is true . . . that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities."). Although the Justices did not agree on the factual basis for the holding in *Fraser*, the consensus was that there are indeed some limitations on a student's expectation of free speech rights at school, and importantly, that the authority of the school to impose those limitations was not based on the doctrine of *in loco parentis*.

48. 484 U.S. 260 (1988).

newspaper before sending it to print.[49] The Court declined to classify the case as being governed by *Tinker* and instead treated *Kuhlmeier* as a case principally about whether the school was required to endorse student expression of speech rather than whether the school could punish student expression in school.[50] Ultimately, the Court explained that the school was permitted to censor the publication of student speech because schools have editorial control over school-sponsored expression as long as the editorial control is reasonably related to a pedagogical goal.[51] Although the *Kuhlmeier* Court tried to distance itself from the *Tinker* decision, the practical impact of the holding was to carve out another exception to public school students' expectation of full First Amendment protections. Thus, in addition to the "substantial disruption" or "material interference" exceptions provided for in *Tinker*,[52] and the "lewd speech" exception espoused by *Fraser*,[53] schools would now be able to censor student speech in publications carrying the imprimatur of the school.

6. Vernonia School District 47J v. Acton (1995)[54]

Despite what seemed to be an imminent death for the doctrine of *in loco parentis* in public schooling, the Court revived the doctrine in *Vernonia* and gave it preeminence in the consideration of constitutional questions arising out of public education.[55] The *Vernonia* Court considered whether a random urinalysis drug testing policy that applied only to students participating in extracurricular athletics at a public school violated their Fourth Amendment right to be free from unreasonable searches.[56] Writing for the Court, Justice Scalia explained that the drug testing policy was constitutionally permissible, chiefly because the school was furthering the important government responsibility of protecting the children over whom it was the guardian and tutor.[57] In making this determination, the Court's opinion seemed to

49. *Id.* at 262. The principal decided to cut two pages of articles from the newspaper because two of the articles contained sensitive material about pregnancy and divorce that potentially violated standards of anonymity and fairness required by the journalism curriculum of which the publication was a product. *Id.* at 274–75.

50. *Id.* at 272–73.

51. *Id.* at 273.

52. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

53. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

54. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

55. *Id.* at 665.

56. *Id.* at 648.

57. *Id.* at 665. Justice Scalia also offered other rationales for the reasonableness of the policy, although he subordinated them to the allusion of *in loco parentis*. *Id.* The first alternative rationale included the fact that students who "volunteer" to "go out" for a team

directly contradict *T.L.O.* by saying that "teachers and administrators . . . stand *in loco parentis* over the children entrusted to them."[58] But it then proceeded to explain that *T.L.O.* should be read not to limit *in loco parentis*.[59]

Instead, the opinion asserted, *T.L.O.* stands for the proposition that, although the authority of the school is no longer derived from parental delegation, the nature of the power that a school has over a student is both "custodial and tutelary."[60] The effect of the Court's holding was that the authority afforded by the custodial and tutelary role of the school would permit a "degree of supervision and control [over students] that could not be exercised over free adults."[61]

7. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls (2002)[62]

The Court again took up the issue of student drug testing in *Earls*.[63] This time, the broader question before the Court was whether a urinalysis drug test that applied to students participating in non-athletic extracurricular activities violated the Fourth Amendment.[64] In upholding the constitutionality of the drug testing policy, the Court reaffirmed the essential aspect of the holding in *Vernonia*: that the school was permitted to require extracurricular participants to submit to a drug test because it had a custodial duty to protect the "safety and health" of the children

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willfully subject themselves to lowered expectations of privacy, including the communal undress that occurs in locker rooms and higher degrees of regulation than the general student population experiences. *Id.* at 657. Additionally, the opinion discounted the intrusiveness of the search conducted under the policy because neither the method of collection of the urine specimens nor the information obtained as a result of the analysis compromised privacy in any significant way. *Id.* at 658–60. Finally, the opinion explained that the nature and immediacy of the governmental concern—the student drug problem in the district—counseled in favor of the appropriateness of the search. *Id.* at 660–64.

58. *Id.* at 654.

59. *Id.* at 655.

60. *Vernonia*, 515 U.S. at 655.

61. *Id.*

62. 536 U.S. 822 (2002).

63. *Id.* at 825.

64. *Id.* This is unlike the Court in *Vernonia*, which was only presented with a student drug test that was applied to students in extracurricular athletics. 515 U.S. at 648; *id.* at 666 (Ginsburg, J., concurring) ("I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.").

under its care.[65] The preservation of the *Vernonia* holding by the *Earls* Court was a tacit approval of the expanded, modern *in loco parentis* doctrine,[66] which holds that schools, when standing in the place of the parent, are charged with a protective and custodial duty.[67]

8. Morse v. Frederick (2007)[68]

Transitioning back to First Amendment free speech considerations, the *Frederick* Court assessed whether a principal at a public high school was permitted to sanction a public high school student who displayed a sign at a school-sanctioned event that read: "BONG HiTS 4 JESUS."[69]

Drawing upon the holdings in *Tinker*, *Fraser*, and *Kuhlmeier*, the Court reemphasized that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings,"[70] and that the "special characteristics of the school environment"[71] allowed schools to take steps to protect those committed to their care from speech that encouraged illegal drug use.[72] The Court found the actions of the principal[73] to accord with the First Amendment protections afforded to students in a public school.[74]

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65. *Earls*, 536 U.S. at 838. Notably, the majority opinion did not specifically refer to the "tutelary" responsibilities of the school, but instead focused on the other half of the *Vernonia* rationale: custodial responsibilities. *See, e.g.*, *id.* at 830 ("maintain[ ] discipline, health, and safety"); *id.* ("secur[e] order in the school environment"); *id.* at 836 ("prevent and deter the substantial harm of childhood drug use").

66. Unlike in *Vernonia*, the Court in *Earls* did not use the term *in loco parentis* to explain its holding. However, both Justice Breyer's concurrence and Justice Ginsburg's strong dissent asserted that the proper foundation for the *Vernonia-Earls* line of reasoning is the doctrine of *in loco parentis*. *Id.* at 840 (Breyer, J., concurring) ("The law itself recognizes these responsibilities with the phrase *in loco parentis* . . . ."); *id.* at 844 (Ginsburg, J., dissenting) (same).

67. *Id.* at 834; *see also id.* at 840 (Breyer, J., concurring) ("Today's public expects its schools not simply to teach the fundamentals, but to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services, all in a school environment that is safe and encourages learning.") (internal quotation marks omitted).

68. 551 U.S. 393 (2007).

69. *Id.* at 397.

70. *Id.* at 396–97 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

71. *Id.* at 397 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

72. *Id.*

73. The principal not only confiscated the sign from the student, but also suspended the student for ten days. *Id.* at 398. The Superintendent supported the principal's actions but reduced the suspension to eight days. *Id.*

74. *Frederick*, 551 U.S. at 410. Practically, the *Frederick* opinion served as an additional expansion of the *in loco parentis* power of public schools under the modern, protective-duty flavor of the doctrine. *Id.* at 406 (quoting Vernonia Sch. Dist. 47J v. Acton,

515 U.S. 646, 656 (1995)) (explicitly referring to the "custodial and tutelary" responsibilities that schools have become presumed to have over the students in the modern take on the doctrine). Not only would schools be permitted to limit student speech if it substantially disrupted the work and discipline of the school, *see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969), or if it contained lewd language, *see Fraser*, 478 U.S. at 685, or if it could be perceived to carry the imprimatur of the school, *see Kuhlmeier*, 484 U.S. at 271, but now schools would also be permitted to limit student speech if it appeared to promote illegal drug use, *Frederick*, 551 U.S. at 408. Although the Court only introduced a single additional category of permissible student speech regulation, *Frederick* opened up the likelihood for further expansion of the *in loco parentis* doctrine to other areas of speech regulation where student protection could potentially be at issue. *See id.* at 418 (Thomas, J., concurring) (explaining that litigation would be the tool used to determine the bounds of future student speech limitations); *see also id.* at 446 (Stevens, J., dissenting) (expressing doubt that the restriction of student speech would be limited to illegal drugs).

Perhaps one of the more interesting aspects of *Frederick* is that, while it unquestionably expands the authority of public schools to limit the speech expression of students, and does so by relying on judicial interpretations of *in loco parentis*, *see Vernonia*, 515 U.S. at 656 (discussing "custodial and tutelary" responsibilities), the Justices clearly displayed internal inconsistencies in their exposition of the doctrine. Justice Thomas spent the majority of his concurrence explaining that he disagreed with the Court's approach to constitutional questions involving student speech and that he believed the proper approach would be to resort to the traditional doctrine of *in loco parentis*. *See generally Frederick*, 551 U.S. at 410–22 (Thomas, J., concurring). In support of his view, Justice Thomas reviewed the historical development of *in loco parentis* in schools and concluded that students were never afforded any constitutional rights under the doctrine. *Id.* at 418–19 (Thomas, J., concurring). Accordingly, he opined that the appropriate rationale for finding the principal's actions to be permissible is that students have no expectation of free speech while in school because schools are limited in their ability to control student speech "in almost no way." *Id.* at 416 (Thomas, J., concurring). Despite his view that the question should have been resolved under the traditional rather than the modern *in loco parentis* doctrine, Justice Thomas concurred because the majority opinion had the effect of eroding the *Tinker* standard, which he viewed to lack a constitutional basis. *Id.* at 422 (Thomas, J., concurring).

Additionally, Justice Alito penned a concurrence in which he stated outright that schools "do not stand in the shoes of the students' parents." *Id.* at 424 (Alito, J., concurring). Justice Alito did not simply dismiss *in loco parentis* in passing, but continued to explain:

> It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.

Id. (Alito, J., concurring). Justice Kennedy joined Justice Alito's pronouncement in the concurrence. *Id.* at 422.

Despite expressing views to the contrary, Justices Thomas, Alito, and Kennedy concurred with the opinion, which relied upon the modern *in loco parentis* doctrine as expressed in earlier decisions.

9. Safford Unified School District No. 1 v. Redding (2009)[75]

Most recently, in *Safford*, the Court returned to the question of the constitutionality of student searches in school. There, a thirteen-year-old girl was strip-searched in an effort to find prescription strength and over-the-counter pain medications that she was alleged to possess in violation of the school drug policy.[76] The Court concluded that the search did violate the girl's Fourth Amendment right to be free from unreasonable searches because the search was excessively intrusive in light of the age and sex of the student, and the nature of the infraction.[77] Strict adherence to the reasonableness standard espoused in *T.L.O.* eventually won the day in *Safford* without an explicit mention of, or allusion to, *in loco parentis*. However, Justice Thomas seized the opportunity in a secondary opinion to explain the pressing need to return to the traditional notion of *in loco parentis*.[78]

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75. 557 U.S. 364 (2009).

76. *Id.* at 368–69, 371.

77. *Id.* at 375 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

78. *Id.* at 398 (Thomas, J., concurring in the judgment in part and dissenting in part) ("[T]he most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*."). Much of Justice Thomas's position on this issue is premised on the fact that, in his view, anything less than the traditional version of *in loco parentis* requires the Court to impose upon the administration of local schools without any expertise in the management thereof. *See, e.g.*, *id.* at 393 (Thomas J., concurring in the judgment in part and dissenting in part) ("Judges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment."); *id.* at 382–83 (noting that the majority opinion permits the Court to make a "deep intrusion into the administration of public schools").

Justice Thomas was hardly alone in his concern that the Court may be slipping into an administrative role that oversteps its authority and expertise. *See, e.g.*, *id.* at 377 (majority opinion) (concluding that courts must give a high degree of deference to educators' professional judgments); *Frederick*, 551 U.S. at 428 (Breyer, J., concurring in the judgment in part and dissenting in part) ("[N]o one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office."); *Tinker*, 393 U.S. at 507 ("[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."); *Tinker*, 393 U.S. at 515–16 (Black, J., dissenting) ("[The *Tinker* holding] ushers in what I deem to be an entirely new era in which power to control pupils by the elected officials of state supported public schools in the United States is in ultimate effect transferred to the Supreme Court.").

C. Current Status of the In Loco Parentis Doctrine and Associated Criticisms

When the Supreme Court opinions are stripped to their essence and the dust finally settles, the doctrine of *in loco parentis* survives in the modern educational context. Its meaning now, however, is far different than what Blackstone envisioned. The doctrine now serves principally as a rationalization for two distinctly different educational issues: (1) the permissibility of corporal punishment in schools, and (2) the weakening of the recently created constitutional rights afforded to students in schools.[79]

In corporal punishment cases, *in loco parentis* continues to provide protection for school officials who physically punish students.[80] However, the modern doctrine expands upon the traditional premise that the school can discipline under the authority of the parents, and now includes the understanding that the school can corporally punish individual students as part of the "maintenance of group discipline."[81] The same expansive shift in the Court's interpretation of *in loco parentis* can be found in the modern application of the doctrine to other constitutional questions in schools. While traditional *in loco parentis* shielded schools from constitutional inquiries by courts,[82] modern Supreme Court

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79. Stuart, *supra* note 5, at 977.

80. Blackstone suggested that "correction" was appropriate and lawful when carried out by a teacher against a student who was under the teacher's instruction. 1 BLACKSTONE, *supra* note 18, at 441. In fact, early courts employed a liberal reading of *correction*, and provided teachers a defense to charges of assault and battery as long as the punishment was not carried out with malicious intent and it did not permanently injure the student. *See* State v. Pendergrass, 19 N.C. 365, 365 (1837). Modern courts in jurisdictions where corporal punishment is still permitted have generally used a reasonableness test to determine if a particular punishment is appropriate. *See* Ingraham v. Wright, 430 U.S. 651, 662 (1977). When the amount of force used is deemed excessive or unreasonable, modern courts will generally attach criminal or civil liability to the acts. *Id.* at 661.

81. *Ingraham*, 430 U.S. at 662. It is not entirely clear what practical impact this phrase has on a school official's right to discipline a student. It is hard to imagine that a school would subject an individual student to physical punishment on the basis of maintaining group discipline. Perhaps one can envision, for example, a food fight taking place in a cafeteria, after which a large group of students is corralled and paddled, without proof that they were complicities in the event, for the sake of deterring similar future group conduct. But this seems unlikely given the *Ingraham* Court's caution that "the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment." *Id.* at 676. Unlikely as the result may be, the Court's expansion of the *in loco parentis* power under the group discipline theory is a stepping stone to the general expansion of *in loco parentis* authority which grants schools the power to act on behalf of parents who would traditionally not have been within the grant of parental prerogative. *See* Stuart, *supra* note 5, at 977.

82. *See Frederick*, 551 U.S. at 410–12 (Thomas, J., concurring).

jurisprudence has established that constitutional inquiries into public school actions against students are not only appropriate,[83] but also that an *in loco parentis*-derived-duty[84] rests upon school officials to protect the student population.[85] At times, however, this duty necessitates relaxing constitutional safeguards for individual students in order to preserve the safety of *other* members of the student body.[86]

The doctrine of *in loco parentis* has been widely criticized as being both outdated and ineffective. The chief criticism of the doctrine is founded on the fact that American public schools are state-run institutions at which attendance has been made compulsory by statute.[87] Though the Court has acknowledged that parents do not really choose to send their children to public school,[88] it continues to cling to *in loco parentis* to support its decisions.[89]

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83. *See Tinker*, 393 U.S. at 506 (holding that students do not shed their constitutional rights at the schoolhouse gate).

84. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986); *see also Frederick*, 551 U.S. at 408–09 (discussing need to protect students). Although the *Frederick* Court avoided using language that is directly recognizable as typical of *in loco parentis*, it was only masking the doctrine in vague language that does not practically change the Court's stance. *See* Stuart, *supra* note 5, at 995–96.

85. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 834 (2002); *Fraser*, 478 U.S. at 684.

86. *See infra* text accompanying note 96.

87. Stuart, *supra* note 5, at 971. All fifty states and the United States territories of American Samoa, Puerto Rico, and the Virgin Islands now have compulsory attendance statutes. *See* Melodye Bush, *Compulsory School Age Requirements*, EDUC. COMMISSION OF THE STATES, http://www.ncsl.org/documents/educ/ECSCompulsoryAge.pdf (last updated June 2010).

88. *See Frederick*, 551 U.S. at 424 (Alito, J., concurring); Ingraham v. Wright, 430 U.S. 651, 660 (1977).

89. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995); *Fraser*, 478 U.S. at 684. The tendency of the Court to keep asserting *in loco parentis* despite its own admission that the very foundation of the doctrine seems to have been eroded is consonant with the circuit courts of appeal, many of which have explicitly considered the interplay between compulsory attendance and *in loco parentis* and have held that the two can coexist. *See* Patel v. Kent Sch. Dist., 648 F.3d 965, 973–74 (9th Cir. 2011) (collecting cases and discussing impact on custodial responsibilities). Justice Thomas has also doubted whether compulsory school attendance statutes undermine the parental delegation of authority to schools under *in loco parentis*. *Frederick*, 551 U.S. at 420 (Thomas, J., concurring) ("If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.").

In so doing, the Court has effectively endorsed a government-sanctioned takeover of parental rights.[90] Now schools enjoy their *in loco parentis*-derived immunity not because they are standing in the place of parents who have delegated authority, but because schools are parent-like institutions that would benefit from the immunity granted to parents for violations of their children's constitutional rights.[91]

Not only does *in loco parentis* get attacked for having a shaky foundation in the parental delegation of rights, but it also gets attacked for the inconsistencies that the modern doctrine creates with respect to the newly formed duty of a school to protect the children under its care. The inconsistencies are twofold. First, the affirmative duty of the school to protect the children under its care does not have an analogue in the parent-child relationship.[92] Parents generally do not have a duty to protect their children,[93] and thus it is hard to rationalize why a school can assume such a duty under the authority of *in loco parentis*.[94] The second problem with the modern doctrine is that it broadens the reach of the school—which is supposedly standing in the place of a parent—beyond the bounds of parental authority.[95] Although common sense dictates that parents only have authority over their own children, the modern *in loco parentis* doctrine permits schools to take action on a single student in order to protect the safety of *other* students.[96] While the

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90. Tony LaCroix, Note, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 272 (2008).

91. *Id.* at 271.

92. *See* Stuart, *supra* note 5, at 985–86 (explaining that American jurisdictions have been slow to recognize parents' affirmative duty to protect and care for their children).

93. *See id.* at 985. In many jurisdictions, parents can be held criminally liable for the extremes of child abuse and neglect, but civil liability rarely attaches to lesser "breaches" of the protective role. *See id.*

94. Even when operating under the assumption that parents today are still voluntarily delegating their parental authority to the public schools, this duty cannot logically be tied to the fact that the school stands in the place of the parent when a parent has no such duty. Perhaps this is why virtually every American court has held school officials to a duty of supervision rather than protection. *See id.* at 994 (explaining that a duty to supervise is institutional, unlike a duty to protect, which is personal in nature).

95. *Id.*

96. *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 834–35 (2002) (holding suspicion-less drug testing of group of students was permitted to promote safety of student population generally); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684–85 (1986) (permitting the sanctioning of an individual student to prevent "captive" student body from harm due to exposure to lewd language); Ingraham v. Wright, 430 U.S. 651, 662 (1977) (holding that corporal punishment was permitted for the maintenance of group discipline).

Professor Stuart explains the absurdity of this premise by proposing the analogue to this practice in a non-educational context: a mother who claims authority to search her

school may be promoting an important government interest by punishing a student, quelling student speech, or searching a student to protect the safety of the student body as a whole, it cannot reasonably claim that its authority for such acts stems from an assumption of authority from a parent.[97]

A final critique of the doctrine is that, on a practical level, *in loco parentis* has been shown to be useless and uninfluential. As an obvious matter, litigation of cases that involve students suing their school is almost universally brought by the parents of the students, who necessarily disagree with the actions of the school.[98] The fact that courts now regularly entertain suits brought by students against schools lends support to the doctrine's weak relevance. Additionally, research suggests that school officials are rarely taught about *in loco parentis*, and most think it has no relevance to their daily work with children.[99]

Since the doctrine is outdated, ineffective, irrelevant to those who it was intended to serve, and has been relegated to academic discussion plagued by the confusion of inconsistent application and meaning, it is understandable why some call for its death.[100] *In loco parentis* survives, perhaps, merely as a matter of convenience for the courts.[101] By resorting to *in loco parentis*, the courts can avoid having to interfere with the decisions of local school administrators.[102]

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son's friends as a precaution to protect the safety of her own son. Stuart, *supra* note 5, at 994.

97. Stuart, *supra* note 5, at 994.

98. *Id.* This situation is paradoxical: parents do not agree that the school has acted properly or within the bounds of its authority—authority that was presumably granted by the parents under *in loco parentis*. *Id.*

99. *Id.* at 983–84. There is, however, at least some evidence that school administrators and school boards of education pay attention to Supreme Court jurisprudence in cases that involve *in loco parentis*. *See* Morse v. Frederick, 551 U.S. 393, 399 (2007) (acknowledging that both the superintendent and board of education relied upon the Supreme Court's opinion in *Fraser* to uphold principal's decision to suspend).

100. *See generally* Stuart, *supra* note 5; *see also* LaCroix, *supra* note 90, at 272–73 ("[W]hile *in loco parentis* is not a dead letter, it is a model for schools that has proper application only in the minds of Supreme Court Justices.").

101. *See* Stuart, *supra* note 5, at 983–84.

102. *See id.* The Supreme Court has expressed this sentiment on multiple occasions. For example, in *Epperson v. Arkansas*, the Court stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems . . . .

393 U.S. 97, 104 (1968); *see also* 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

III. COMPLICATING *IN LOCO PARENTIS* WITH ADULT STUDENTS

Aside from the criticisms discussed earlier in this Note, an additional practical consideration of *in loco parentis* in the context of public schools warrants consideration: how do adult students fit into the doctrinal scheme? This question has largely been passed over by scholars and it has been given minimal treatment by courts.[103] However, the presence of adult students in the public schools of the nation complicates the application of modern *in loco parentis* even further, and could potentially tip the scales in favor of the doctrine's final demise.

A. Adult Students and the Authority of the American College

An effective starting point for the analysis of *in loco parentis* as applied to adult students is the college[104] setting. The evolution of *in loco parentis* in the American college has been somewhat analogous to the evolution of the doctrine in state-run public schools, where early application of the doctrine was universal but has since been reined in. In the context of higher education, *in loco parentis* used to rule the day, granting the college administration almost unlimited authority to govern the actions of the students enrolled at the college.[105] But in contrast to the doctrine's application in public school settings, the power vested in the college by *in loco parentis* was largely based on the need to not only

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comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

Despite the criticisms lobbed at the Court for its deference to school administrators, the practice of affirming the decisions made by those with particularized expertise in their fields extends beyond the educational context. *See, e.g.*, United States v. Hartwell, 436 F.3d 174, 179 n.9 (3d Cir. 2006) (quoting Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990)) ("[The Court does not mean] to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed . . . . [T]he choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources . . . ."), *cert. denied*, 549 U.S. 945 (2006).

103. The most thorough recent treatment of the question was in a concurring opinion by Justice Thomas in *Frederick*, which even then was relegated to a footnote. 551 U.S. at 413 n.3 (Thomas, J., concurring) (asserting that under traditional *in loco parentis* adult students who willfully subject themselves to the authority of a school were subject to the same restrictions as minor students).

104. For the purposes of this Note, "college" will encompass a broad range of post-secondary institutions, including those institutions that are traditionally known both as colleges and as universities.

105. *See* Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) (holding that colleges can make any rule or regulation for the student body as long as it is not unlawful or against policy).

supervise student conduct, but also to ensure the welfare of the students.[106] The duty to ensure the welfare of the students was based largely on the unique aspect of the educational relationship between the students and the college,[107] and the doctrine of *in loco parentis* found application despite the fact that most members of the student body were legal adults.[108] Like its analogue in the public schools of the nation, *in loco parentis* in the college setting began to take on a different face in the mid-1900s. The confluence of a variety of factors, including the reduction in the legal age of majority,[109] the increased number of adult students,[110] the large number of students seeking degrees, and the diversity of the student body, drove courts to reevaluate the effectiveness of *in loco parentis* as a controlling doctrine in higher education.[111] The doctrine eroded principally on the basis of the welfare-protective duty that, in the

106. George L. Stewart II, Comment, *Social Host Liability on Campus: Taking the "High" out of Higher Education*, 92 DICK. L. REV. 665, 672 (1988). This paternalism found its footing in the English model of the college as one in which students enrolled in a small family-like community that promoted religious and moral ideals in addition to rigorous study. Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1138–39 (1991). In that setting, strict adherence to the rules and norms of behavior was required, and courts were hesitant to second-guess administrators who used their *in loco parentis* authority to discipline students or promulgate regulations that restricted student freedoms in a manner that the students' parents would have done. *Id.* at 1139, 1144.

107. Jackson, *supra* note 106, at 1139–40; *see also* Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 472–73 (1990) (noting the "special relationship" between students and colleges).

108. *See* Jackson, *supra* note 106, at 1136 n.5. Jackson cites reports which state that as much as two-thirds of Yale's 1826 entering freshman class were sixteen years of age or younger. *Id.* While a sixteen-year-old student would be considered a minor even under modern standards, that statistic suggests that most of the student population would reach the legal age of majority at some point during their enrollment at Yale. *See id.*

109. *See* U.S. CONST. amend. XXVI, §1 (reducing age of majority for voting purposes to eighteen years old); Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("Students—who, by reason of the Twenty-Sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community."). Although the amendment only affected adulthood status for federal purposes, most state legislatures were quick to follow with statutory enactments that created the same adult status within their own states for those who have attained the age of eighteen. *See* Magyar, *supra* note 1, at 601. Interestingly, while the reduction of the legal age of majority in the Twenty-Sixth Amendment helped to undo the controlling influence of *in loco parentis* over adult students at college, it necessarily created a new class of concerns under the doctrine as applied to public schools.

110. Jackson, *supra* note 106, at 1148.

111. Stewart, *supra* note 106, at 672–73; *see also* Bradshaw v. Rawlings, 612 F.2d 135, 140 (3rd Cir. 1979) ("At the risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years.").

eyes of the court, was wrongfully placed upon the college.[112] An oft-cited Ohio case, *Hegel v. Langsam*,[113] explained the rationale behind what would become a major departure from *in loco parentis* in higher education:

> A university is an institution for the advancement of knowledge and learning. It is neither a nursery school, a boarding school nor a prison. No one is required to attend. Persons who meet the required qualifications and who abide by the university's rules and regulations are permitted to attend and must be presumed to have sufficient maturity to conduct their own personal affairs. We know of no requirement of the law and none has been cited to us placing on a university or its employees any duty to regulate the private lives of their students, to control their comings and goings and to supervise their associations.[114]

Other courts followed the *Hegel* court by eliminating the role of the college as the protector of student welfare.[115] But in the absence of *in loco parentis*, courts needed to find another foundation for their decision that colleges could exercise the authority to enforce rules and regulations upon adults without being subject to the duty to protect the safety and welfare of the student. They found that home in contract law.[116]

While contract law seemed, momentarily, to provide a reasonable solution to the problem of governing the college-student relationship, it has not been an adequate tool for dealing with college authority over adult students.[117] Under the contract model, students are viewed as

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112. Stewart, *supra* note 106, at 673.

113. 29 Ohio Misc. 147 (Ct. Com. Pleas, Ham. Co., 1971).

114. *Id.* at 148.

115. *See, e.g.*, *Bradshaw*, 612 F.2d at 138 ("[T]he modern American college is not an insurer of the safety of its students."); Beach v. Univ. of Utah, 726 P.2d 413, 419–20 (Utah 1986) (holding that a university policy may permit administrators to discipline students for infractions without fundamentally changing the student-university relationship in such a way as to imply a custodial relationship that charges the university with the duty of protective care over students). Some courts even went so far as to declare that *in loco parentis* does not apply to the student-college relationship even if the student is a minor. Hartman v. Bethany Coll., 778 F. Supp. 286, 294 (N.D.W. Va. 1991) (declining to acknowledge that a college stands *in loco parentis* to a seventeen-year-old freshman student).

116. *See* Jackson, *supra* note 106, at 1148.

117. *Id.* at 1151–52.

explicitly[118] and impliedly[119] agreeing to the terms of a contract when they accept enrollment at a college. Courts consistently approve of these contracts even though they are one-sided, favoring the college because of a "unique"[120] relationship the college has with the student.[121] In addition to interpreting the contractual agreement in favor of the college, most courts ignore the obvious fact that under strict construction of contract rules, it can hardly be said that students engage in a fair bargain for the contract in the first place.[122] Nevertheless, contract law has become a more pervasive tool in the efforts to transition higher education away from the *in loco parentis* doctrine.[123]

B. Historical Treatment of Adult Students in Public Schools

Traditionally, *in loco parentis* was understood to be a delegation of authority over a child from the parents of the child to the school. It would therefore be reasonable to take the position that once a child passes into legal adulthood, a school's *in loco parentis* power over the child ceases because the parents no longer have the legal authority to delegate responsibility to the school. In fact, courts considering the question of when the *in loco parentis* relationship terminates in other contexts have applied the general rule that, absent voluntary abrogation of the relationship by either party, the *in loco parentis* relationship terminates when a non-disabled child reaches the age of majority.[124] However, courts

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118. *See* Univ. of Miami v. Militana, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966) (holding that college publications offer terms of the contractual agreement between student and college).

119. *See* Carr v. St. John's Univ., 231 N.Y.S.2d 410, 413 (App. Div. 1962) (holding that an implied contract exists between student and college in which the student agrees to college's terms, and the college agrees to provide a degree if the student so adheres to the college's terms).

120. Jackson, *supra* note 106, at 1152.

121. *Id.* at 1148 n.105. In rare cases, a student that was disciplined in bad faith, or in an arbitrary or capricious manner, could find relief through contract law and the college's breach of its responsibility to deal fairly. *See id.* at 1149.

122. *See* Stamatakos, *supra* note 107, at 477 (arguing that students do not engage in a fair arm's length bargain, and thus, may be entering into what could be considered an unconscionable contract).

123. This is especially true with regard to private colleges, which are not state actors for the purposes of constitutional inquiry. *See* Jackson, *supra* note 106, at 1151 n.133.

124. *See, e.g.*, Babb v. Matlock, 9 S.W.3d 508, 510 (Ark. 2000) (beneficiary status); Trieval v. Sabo, No. 94C-12-213-WTQ, 1996 WL 944981, at *6 (Del. Super. Ct. Mar. 13, 1996) (same); Peters v. Costello, 891 A.2d 705, 719–20 (Pa. 2005) (Eakin, J., dissenting) (visitation rights for extended family); Sutliff v. Sutliff, 489 A.2d 764, 775 (Pa. Super. Ct. 1985) (duty to support).

regularly held just the opposite in the context of education in early America.[125]

The rationale of such holdings was that students who were above the legal age of majority attended public school on a voluntary basis, and thus willfully subjected themselves to the governance of the school.[126] This reasoning suggests that an implied contract, not parental delegation, granted the school authority over adult students.[127] For the reasoning to work, it is essential that the adult student contractually agrees—voluntarily and without undue influence—to be controlled by the school.[128] Even though that same appeal to contract law has been understood to represent a clear departure from *in loco parentis* in the context of higher education, it has been viewed as just an ancillary aspect of *in loco parentis* in public schools.[129]

IV. IMPLICATIONS FOR GOVERNANCE OF ADULT STUDENTS IN PUBLIC SCHOOLS

Automatically grafting adult students into the authority granted to public schools under *in loco parentis* is simply inappropriate. Although a compelling argument can be made that adult students could never properly be under *in loco parentis* protection,[130] it is obvious that adult students complicate the modern application of the doctrine even further when viewed in the context of public schooling. Of course, the departure from the application of *in loco parentis* to adult students requires a conscious acknowledgement that adult students should be treated differently than their minor counterparts in a public school setting. However, American courts have not readily endorsed such an acknowledgement.

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125. *See, e.g.*, Sheehan v. Sturges, 2 A. 841, 843 (Conn. 1885) (holding that a person over twenty-one years of age is subject to the same restrictions as minors in the school); State v. Mizner, 45 Iowa 248, 251–52 (1876) (same); Stevens v. Fassett, 27 Me. 266, 278–79 (1847) (same).

126. *Mizner*, 45 Iowa at 252; *Fassett*, 27 Me. at 273.

127. *See* Carr v. St. John's Univ., 231 N.Y.S.2d 410, 413 (App. Div. 1962) (holding that an implied contract exists between a student and the school at which a student voluntarily enrolls). Ironically, by resorting to a contractual understanding of the adult-student-school relationship, courts were in fact reemphasizing the fatal flaw of *in loco parentis* authority over these students because only legal adults can enter into contracts. RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 14 (1981).

128. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177; *cf.* U.C.C. § 2-302 (2012).

129. *See* Morse v. Frederick, 551 U.S. 393, 413 n.3 (2007) (Thomas, J., concurring).

130. *See supra* Part III.A–B.

A. Differential Treatment of Adult and Minor Students

Questions arising out of the differential treatment of adults and minors in the context of government-sanctioned public schooling are rare, but some guidance is available. In an interestingly postured and recent case, *Paschal v. State*,[131] the Arkansas Supreme Court considered the constitutionality of a statute that forbade teachers in public schools from engaging in sexual contact with a student enrolled in the school who is younger than twenty-one years old.[132] A teacher appealed a conviction of sexual assault for having consensual sexual relations with an eighteen-year-old student on the ground that the statute violated his fundamental right to privacy.[133] The State argued that it had a need to provide a "special learning environment" that protects all students, regardless of their age, from the sexual advances of the teachers who occupy a position of authority over the students.[134] The court was not persuaded and, in a nod to the necessity of differential treatment of adult students, found that the statute, as applied, criminalized consensual sexual relations between consenting adults in violation of the teacher's fundamental right to privacy.[135] *Paschal* differs from the traditional constitutional inquiry cases in education because a non-student's rights were before the court rather than a student's rights. But in reaching its decision, the court's explicit acknowledgement that the State has proper but separate interests in protecting adults and minor students, despite the presence of both types of students in the same educational environment, is instructive.[136]

However, at least one federal statutory provision suggests the opposite approach. The Family Educational Rights and Privacy Act ("FERPA")[137] is a federal law that sets out the requirements for maintaining the privacy of parent and student educational records.[138]

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131. 388 S.W.3d 429 (Ark. 2012).

132. *Id.* at 434 (quoting ARK. CODE ANN. § 5-14-125(a)(6) (2009)).

133. *Id.* at 431, 434 n.4. The age of majority in Arkansas at the time of the conviction was eighteen years old, and the court acknowledged the student's adult status. *Id.* at 434 n.4 (quoting § 9-25-101(a)).

134. *Id.* at 436.

135. *Id.* at 437.

136. *Id.* In fact, the court determined that the statute here was unconstitutional, not because there was no state interest in protecting adult students from sexual advances made by teachers, but instead because the indiscriminate application of the statute to all students was not the least restrictive way to accomplish that goal. *Id.*

137. 20 U.S.C.A. § 1232g (West 2013).

138. *Id.*; 34 C.F.R. § 99.2 (2009). FERPA regulations are binding upon all public and private educational institutions to which funds are made available under any program administered by the Secretary of Education. 34 C.F.R. § 99.1 (2000).

These regulations are important to the consideration of differential treatment of students in public schools based upon age because the privacy rights afforded to a student under FERPA are transferred from the custody of the parents to the student when the student attains the age of eighteen.[139] This transfer of custodial rights seems to suggest that students who become legal adults while in public school would acquire exclusive rights to control their educational records, and thus would be treated differently than their minor peers. Necessarily, parents would be forever barred from seeing those records without first obtaining the consent of the students.[140] However, exceptions have been carved out of the federal regulations that permit educational institutions to disclose an adult student's educational records to the student's parents if the student is classified as a dependent of the parent for tax purposes[141] or the disclosure is necessary because of an emergency situation.[142] Both of these exceptions imply an administrative intent to recognize that, in some circumstances where the adult student is either unwilling or unable to rise to level of responsibility expected of a competent adult, it is appropriate to refrain from vesting the student with the full complement of rights associated with adulthood.[143]

Few courts have squarely considered the status of adult students under the authority of *in loco parentis* in schools, but some have waded into the discussion,[144] although without settling on a consensus.[145] Instead, discourse about *in loco parentis* seems to be carried out under

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139. 20 U.S.C.A. § 1232g(d) (West 2013). The statute provides for the transition of authority from parents to student to occur either at the student's attainment of the age of eighteen or upon the student's attendance at a postsecondary institution. *Id.*

140. *Id.*

141. 34 C.F.R. § 99.31(a)(8) (2014).

142. *Id.* § 99.31(a)(10).

143. FERPA also provides for a postsecondary institution to release records of an adult student's violation of any law or institutional rule governing the possession or use of controlled substances. *Id.* § 99.31(a)(15). This provision is obviously inapplicable to adult students enrolled in local public schools, but it further demonstrates intent to recognize that situations exist in which the age of legal adulthood is perhaps not the best benchmark to use in deciding what rights a young adult is entitled to. *Cf.* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

144. Most of the judicial discussion of this topic has been relegated to footnotes and dicta. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 413 n.3 (2007) (Thomas, J., concurring); Hartman v. Bethany Coll., 778 F. Supp. 286, 294 (N.D.W. Va. 1991); Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 661 (Ct. App. 1984).

145. *Compare Hartman*, 778 F. Supp. at 294 (holding that it is "not inconceivable" that a state legislature might extend *in loco parentis* to an eighteen-year-old adult student in a public school); *with Gordon*, 208 Cal. Rptr. at 661 (noting the "obvious" difficulty of arguing that *in loco parentis* should apply to an adult student in high school).

the assumption that Justice Breyer made explicit in his concurrence in *Earls*: "[*In loco parentis*] draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students)."[146] But the assumption that adult high school students are, or even should be, grouped together with younger students for the purposes of establishing school authority has serious flaws when viewed from the lens of *in loco parentis* as it has been interpreted and applied both to public school students and adult college students.

B. Traditional In Loco Parentis in the Public Schools: Consent, Compulsory Attendance, and Contract

Important to any consideration of *in loco parentis* is the origination of authority to control students. Under the strictest construction of *in loco parentis*, adult students cannot justifiably be subject to the control of a school because their parents have no custodial rights that can be delegated to the school administration.[147] Justice Thomas's concurrence in *Frederick* outlined the traditional legal step used to avoid that problem: resorting to a hybrid between *in loco parentis* and the adult student's willful enrollment, and thus implied contractual consent, to be governed by the school's authority—regardless of how that authority may be derived.[148] However, the ability to graft adult students into the *in loco parentis* authority of a school on that theory is dependent upon whether the adult students can be said to willfully enroll in the school, a point that is muddied by the network of compulsory school attendance regulations and social realities of the times.

Statutory provisions in every state require students to attend school during a specified period of years based upon the age of the student.[149] Texas is the only state that affirmatively requires attendance for adult students at public schools, and only does so if the student voluntarily enrolls in or attends public school after turning eighteen.[150] While only

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146. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring).

147. *See Gordon*, 208 Cal. Rptr. at 661.

148. *Frederick*, 551 U.S. at 413 n.3 (Thomas, J., concurring) (noting that a student-plaintiff's status as having attained the legal age of majority is "inconsequential" to the consideration of *in loco parentis* authority).

149. *See* Bush, *supra* note 87, at 1–3.

150. TEX. EDUC. CODE ANN. § 25.085(e) (West 2012). Although it would be unlikely that an adult student's parents retained parental rights over the adult student, even if the parents did have those rights, *in loco parentis* would be inapplicable because the "fiction" of parental delegation would be destroyed by the state's compulsory decree. *See Frederick*, 551 U.S. at 422–25 (Alito, J., concurring). However, that does not end the inquiry. Under the

twenty states compel students to remain in school[151] until they reach the age of majority,[152] most states permit attendance at the public schools of the state well into the student's adult years.[153] Therefore, in almost all states, the potential exists for students who have reached the legal age of majority[154] to be legally enrolled in public school.

Under the traditional view of *in loco parentis*, an adult student's voluntary enrollment would have been sufficient to subject him to the

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Texas statute, once the pupil triggers the compulsory provision by enrolling or attending after reaching age eighteen, the pupil is required to complete the course of study offered by the school. EDUC. § 25.085(e). If the pupil is excessively absent without valid excuse, he may be dropped out of the program, but *only* at the discretion of the school. *Id.*

Despite the statutory language that could, in theory, require an adult student in Texas to attend public school, adult students in Texas are practically in the same position as an adult student in any other state's public schools. Adult students in all states except Texas are assumed to be in the public schools because they opted not to exercise their right to leave. In Texas, one could argue that an adult student in the public schools is required to be there on the basis of state compulsion, but that premise disregards the reality that the adult student must have voluntarily enrolled in or attended school *after* reaching the age of majority. *Id.* It is difficult to imagine a court construing this statute as being truly compulsory with regard to such a student.

It appears as though adult students in Texas also have a practical mechanism to be released from the compulsory attendance requirement: they can stop showing up. Even though the statute gives the school sole discretion to drop an adult student with excessive unexcused absences from the program, *id.*, it is foreseeable that a school administration would endorse the disenrollment of an adult student who clearly has no interest in continued attendance rather than utilize valuable school resources to enforce the student's attendance. In essence, the adult student would be enrolled subject to his own will.

Thus, an adult student in a Texas high school is no different than an adult student in any other state's high schools because all adult students are present in the school by choice, rather than based on state compulsion. Because of the complex relationship that necessarily results from an adult student present on school property, a Texas public school would likely be found to have authority over the adult student under a hybrid analysis of traditional *in loco parentis* and contract law.

151. Compulsory attendance statutes generally contain a provision that requires parents to prove a child is attending *a* school, but not necessarily a public school in the state. *See, e.g.*, N.J. STAT. ANN. § 18A:38-25 (West 2013) ("Every parent . . . shall cause [his] child regularly to attend the public schools . . . or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.").

152. Bush, *supra* note 87, at 1; *see also, e.g.*, CAL. EDUC. CODE § 48200 (West 2006) (requiring school attendance until eighteen years old); CAL. FAM. CODE § 6502(a)(2) (West 2013) (setting age of majority at eighteen years old).

153. *See, e.g.*, N.J. STAT. ANN. § 18A:38-4 (no age limit, provided local school board approves); *Id.* § 18A:38-1 (up to age twenty); 24 PA. CONS. STAT. § 13-1301 (2002) (up to age twenty-one); N.J. ADMIN. CODE. § 6A:14-1.1(c) (2006) (up to age twenty-one for qualified disabled students).

154. Emancipated minors who are enrolled in the public schools of the state would be similarly situated to students who have reached the age of majority. *See* Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 661 (Ct. App. 1984).

terms of enrollment and governance at a public school, even though that governance would be outside the parental delegation of rights upon which *in loco parentis* rests.[155] If the adult student was in college, it would be argued that the student's enrollment in the program evinced an implied consent to the terms of a contract offered by the state in providing for his enrollment.[156] But appeals to contract law to rationalize an adult student's subjection to public school authority under modern *in loco parentis* suffer on two fronts.

First, there is a great imbalance in bargaining power between a state-run school district and a single student.[157] Adult students have very little to offer a state-run public school system in exchange for their right to attend school. They represent the minority of the student population and have the shortest time remaining at the school.[158] Accordingly, there is little incentive for the state to meet them at arm's length and negotiate a fair contractual agreement.[159] Although courts are slow to recognize the unconscionable nature of disproportionate bargaining power in the context of higher education and student-college contractual relationships,[160] the inequity in bargaining power is more pronounced in the case of adult students in public schools. In higher education, students agree to terms that are designed for scholars of their age and educational abilities. Adult students in public schools, however, are presumably consenting to policies and regulations that are designed for students who are much younger and have different pedagogical and developmental needs.[161] Most importantly, adult students in public schools may be deemed to be consenting to the reduced constitutional protections

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155. *See* State v. Mizner, 45 Iowa 248, 251–52 (1876); Stevens v. Fassett, 27 Me. 266, 273 (1847).

156. *See* Carr v. St. John's Univ., 231 N.Y.S.2d 410, 413 (App. Div. 1962).

157. *See* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 184 (2000) (explaining that courts often find the inflexibility of contract law to disadvantage educational institutions which have a need to not be locked into rigidly bargained terms with their students).

158. It is also unlikely that adult students enter the public school system for the first time upon obtaining the age of legal majority. Practically then, these students simply go home from school one day as a minor and return the next as an adult. Such an unceremonious progression from infancy to adulthood, particularly near the end of a high school career, makes it unlikely that a public school would be interested in or capable of negotiating terms of enrollment with adult students.

159. Stamatakos, *supra* note 107, at 477.

160. Beh, *supra* note 157, at 199–200.

161. *See, e.g.*, McCauley v. Univ. of the V.I., 618 F.3d 232, 246–47 (3d Cir. 2010) (noting that public school administrators must be more sensitive to the vulnerabilities of young students than university administrators need to be towards university students).

afforded to minor students[162]—a reality which alone should demand heightened judicial scrutiny in the evaluation of the negotiation and bargaining processes.

The second flaw in the appeal to contract law to rationalize a public school's authority to act on its *in loco parentis*-derived authority over adult students is the fact that an adult student's enrollment in the public school is, in most cases, anything but voluntary.[163] Our society has rightly placed an important emphasis on education. Indeed, education is the "most important function of state and local governments" and the "foundation of good citizenship."[164] If it truly is "doubtful that any child may reasonably be expected to succeed in life" without an education,[165] it is unreasonable to expect a student to drop out of school simply because of the fortuity of an eighteenth birthday that occurs before high school graduation. American society has so inculcated the ideal of a complete education in the minds of youth[166] that it can hardly be said there is not a strong public policy in favor of encouraging adult students to finish their high school programs.[167] Therefore, while an adult student's attendance at a public school may be *voluntary*—in the sense that the adult student is not required to attend—it would be inaccurate to suggest that a student seeking to experience the full provision of the state's educational program was in fact choosing from among equally reasonable alternatives.[168] The strong societal influence to choose continued

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162. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) ("[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally") (citation omitted).

163. The author makes the assumption that adult students remain in public schools primarily in an attempt to finish their high school education. Concession is made, however, that other rationales may exist for adult students to remain in public schools.

164. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

165. *Id.*

166. *See, e.g.*, Kara Rowland, *Obama Addresses School Drop-out Crisis*, WASH. TIMES (Mar. 1, 2010), http://www.washingtontimes.com/news/2010/mar /01/obama-vows-improve-school-dropout-rate/ ("'We know the success of every American will be tied more than ever before to the level of education they receive.'") (quoting President Barack Obama).

167. *See PPN Issue Briefs: Promising Practices for Promoting High School Graduation*, PROMISING PRACTICES NETWORK, http://www.promisingpractices.net/briefs/briefs_highschoolgrad.asp (last visited Jan. 21, 2014).

168. *Cf.* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 845–46 (2002) (Ginsburg, J., dissenting) (arguing that even "voluntary" extracurricular activities in school are not always voluntary in the truest sense of the word); Lee v. Weisman, 505 U.S. 577, 595 (1992) ("Law reaches past formalism . . . . Attendance [at graduation] may not be required by official decree, yet it is apparent that a student is not free to absent herself . . . in any real sense of the term 'voluntary,' for absence would require forfeiture of . . . intangible benefits."). If students are not charged with voluntary action in their pursuit of programs that are merely a part of the educational program at a school, it does not follow

enrollment in public school over the alternative of dropping out should raise serious concerns as to the *voluntary* nature of the consent given by the adult student. To the extent that the consent to the contractual agreement is not a free choice, it further weakens any claim that a fair bargaining process took place or that the formation of the contract was accomplished properly.

C. Modern In Loco Parentis and the Protective-Duty Requirement

As a general rule, adults do not need custodians; they do not need someone to exercise care and control over them to protect them from the dangers of the outside world. But the protective-duty requirement that has been read into modern *in loco parentis* jurisprudence requires a custodial relationship.[169] Without such a relationship, a school has no compelling reason to restrict any student's, let alone an adult student's, constitutional protections in order to protect the student. Of course, modern *in loco parentis* has come to mean something very different than the right of a school to take action on a single student to serve the interests of that particular student. The appealing illusion of *in loco parentis* jurisprudence now is that public schools are trusted to restrict the constitutional freedoms of individual students when necessary to preserve the safety and welfare of *other* members of the student body.[170] This view is, of course, without basis in the meaning of the doctrine. Parents have no authority to limit the constitutional freedoms of other children for the sake of their own child, and thus, schools that exercise this authority are not acting on the basis of an *in loco parentis*-derived power.

Ironically, if schools did have a properly derived parental right under *in loco parentis* to limit a single student's constitutional freedoms in order to protect the safety of other students, the presence of adult students in public schools would be of little concern. In that scenario, a school's authority to take action against any student who is seen as a risk to the welfare of other students would be independent of whether the student has passed an arbitrary age.[171] However, to the extent that

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that adult students should be charged with voluntary action when pursuing the educational program as a whole.

169. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) ("custodial and tutelary").

170. *See id.* at 655.

171. For example, an adult student using language that would be inappropriate for younger students to hear might lead a school administrator to quell the student's freedom of speech in order to protect the rest of the student body. *See* Morse v. Frederick, 551 U.S. 393,

public schools derive that kind of power outside of the grant or assumption of parental authority, they act purely as agents of the state serving in a law enforcement capacity rather than under the authority of *in loco parentis*.[172]

D. Practical Considerations and Suggestions

Among the myriad lawsuits alleging violations of a student's constitutional rights perpetrated by a public school official, cases in which the plaintiff is an adult student are rare.[173] Suits in which the plaintiff-student's adult status has a bearing on the outcome of the case are virtually non-existent. This trend is predictable because adult students only represent a minority of students in public schools, and thus a disproportionately small number of cases are expected. Additionally, adult students are usually among those members of the student body who are closest to commencement, so there is reason to believe fewer will seek relief through legal action.[174] For those who are committed to pursuing their claims, a preliminary injunction[175] against the school may

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397 (2007). The student in *Frederick* whose speech was sanctioned was a legal adult. *Id.* at 413 n.3 (Thomas, J., concurring).

172. Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 661 (Ct. App. 1984).

173. While it is possible that adult students may bring claims against a local public school for causes of action other than constitutional violations, *in loco parentis* has chiefly become a judicial tool to rationalize school intrusion upon students' constitutional rights. Stuart, *supra* note 5, at 977. Accordingly, this Part only considers the implications of *in loco parentis* in the context of constitutional violations alleged by adult students in public schools.

174. A competent lawyer in consult with such a student would surely advise the student that the length of a lawsuit may preclude the student from obtaining any useful relief. *See Table C-5: U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-month Period Ending September 30, 2012*, U.S. COURTS, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C05Sep12.pdf (last visited Mar. 6, 2015) (reporting median length from filing to disposition of civil claims in United States District Courts as 7.8 months).

175. Under Supreme Court precedent, a plaintiff seeking a preliminary injunction in federal court must establish that (1) he is likely to succeed on the merits; (2) he will suffer irreparable harm if the injunction is not granted; (3) the balance of equities tips in favor of granting the injunction; and (4) that the public interest favors granting the injunction. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The purpose of the preliminary injunction has historically been to preserve the relative position of the parties until a trial on the merits can be held. Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1527 (2011).

But realistically, an adult student aggrieved by a school would only need a court to stay any pending disciplinary action for the remainder of the student's enrollment at the

be the best option, but one which could present a daunting challenge to the plaintiff.[176] Of course, the potential for recovery of damages also counsels heavily against adult students pursuing legal action.[177]

But the dearth of case law and the relatively low likelihood of future cases arising[178] should not render the consideration of proper governance of adult students in public school completely irrelevant because nothing less than the constitutional rights of adults are at stake. The presence of adult students is a real phenomenon, and potential exists for legal clashes that will turn on a proper understanding of how adults are to be treated when enrolled in the public schools. Accordingly, the current default to either an outdated understanding of traditional *in loco parentis* and contract principles, or a flawed, modern version of the doctrine, is insufficient to ground the legal discussion.

At least two alternatives for dealing with the proper governance of adult students in the public schools would make more sense than the current appeal to *in loco parentis*. First, state legislatures could make statutory declarations that adult students are to be treated as though they were minors if enrolled in the public schools. Second the doctrine of

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school. If the adult student successfully argued that an injunction was appropriate, the student may potentially decide to drop the suit after graduation, or may be precluded from continuing the suit if the court deems the controversy to then be moot. *See, e.g.*, Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1098 (9th Cir. 2000) ("It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy.").

176. Preliminary injunctions are "extraordinary" and "drastic" remedies which are never awarded as of right. Munaf v. Geren, 553 U.S. 674, 689–90 (2008). The circuit courts of appeal have not been consistent in holding plaintiffs to a particular burden in order to satisfy the standard. S*ee* Bates, *supra* note 175, at 1530–35. However, at least some courts demand the movant to satisfy a demanding burden. *See, e.g.*, Punnett v. Carter, 621 F.2d 578, 582 (3d. Cir. 1980) ("[W]hen the preliminary injunction is directed not merely at preserving the status quo but, as in this case, at providing mandatory relief, the burden on the moving party is particularly heavy.").

177. *See* Anthony Disarro, *When a Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333, 352 (2012) (explaining that injunctions are often the go-to remedies sought by parties who have suffered constitutional violations because damages awards are perceived as too difficult to obtain or too minute to justify a lawsuit).

178. It remains possible that until school districts learn to effectively navigate the constitutional minefield of student technology use in the schools, litigation based on alleged violations of constitutional protections may increase and change this phenomenon. *See generally* Joseph O. Oluwole & William Visotsky, *The Faces of Student Cell Phone Regulations and the Implications of Three Clauses of the Federal Constitution*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 51, 51–53 (2012). With an increase in litigation generally, one would expect that the likelihood of an adult student being the plaintiff in such a suit will also increase.

in loco parentis could be jettisoned and replaced with a simple objective reasonableness standard.

1. Statutory Declarations

Perhaps the simplest way for states to avoid resorting to *in loco parentis* to rationalize control over adult students is for the state legislatures to explain through statutory declarations or definitions that adult students in public schools in the state are to be treated the same as their minor counterparts.[179] By doing this, a state would avoid the necessity of resorting to judicial interpretations of statutes and the chance that a court may attempt to erroneously rationalize authority over adult students based upon *in loco parentis*.[180] Additionally, a local public school would benefit from such pronouncements because members of the public, including adult students, would undoubtedly have been put on notice by the publication of the statute.[181]

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179. At least one state, West Virginia, has a legislature that currently utilizes a statutory declaration:

> 'Student' includes any child, youth or adult who is enrolled in any instructional program or activity conducted under board authorization and within the facilities of or in connection with any program under public school direction: *Provided,* That, in the case of adults, the student-teacher relationship shall terminate when the student leaves the school or other place of instruction or activity.

W. VA. CODE ANN. § 18A-5-1(g)(1) (West 2013) (emphasis in original). Although the West Virginia Legislature has clearly seen fit to include adult students squarely under the authority of the public schools, it apparently did so not to avoid the complications of *in loco parentis* but rather to extend *in loco parentis* to include those students. *See id.* § 18A-5-1(a) ("The teacher shall *stand in the place of the parent(s), guardian(s) or custodian(s)* in exercising authority over the school and has control of all students enrolled in the school from the time they reach the school until they have returned to their respective homes . . . .") (emphasis added). Therefore, in West Virginia, the fact that the statutory definition of "student" includes adult students does not actually help to clarify the proper ground upon which adult students are subject to the governance of a public school.

180. It is well established that the first rule of statutory construction is to seek out the ordinary meaning of the text, unless clearly defined otherwise. *See* Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013). The importance of such statutory definitions with regard to *in loco parentis* and adult students is evidenced by the competing judicial interpretations that have been offered. *See* Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 661 (Ct. App. 1984) (noting the "obvious" difficulty of arguing that *in loco parentis* should apply to an adult student in high school). *But see* Hartman v. Bethany Coll., 778 F. Supp. 286, 294 (N.D.W. Va. 1991) (holding that it is "not inconceivable" that a state legislature might extend *in loco parentis* to an eighteen-year-old adult student in a public school).

181. Ignorance of a statute, even in civil matters, is rarely an excuse for failing to act in accordance with it. *See* Moore v. Brown, 52 U.S. 414, 428 (1850) (Taney, J., dissenting). In the case of statutory declarations, adult students would be put on notice that if they maintained their enrollment in the public schools, they would be subject to the governance

Of course, a statutory pronouncement that equates adult students to minor students in an environment where students are subjected to reduced constitutional protections will likely raise equal protection concerns. To establish a claim that a state statute violates the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment to the Federal Constitution, the statute must either establish a classification for a group of citizens or must have a discriminatory purpose.[182] Once that criterion has been satisfied, the level of judicial "scrutiny" that the law receives is based upon the nature of the claim.[183] In the case of a statutory declaration that adult students are to be treated as minor students, the statute would effectively be creating a "student" classification, under which adult students are treated differently than other adults. That type of classification would implicate the lowest level of judicial scrutiny: rational basis review.[184] Under rational basis review, courts must determine whether the statutory discrimination is rationally related to a legitimate state interest.[185] The Supreme Court has noted that this type of judicial review results in judicial nullification of only the most egregious statutory enactments.[186]

Thus, it is conceivable that an adult student might contest the reduced constitutional protections afforded to him simply because he is a student, while other adults in the school building would presumably enjoy the full complement of constitutional guarantees.[187] But to the

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of the school, on the school's terms. Without such a pronouncement, adult students might assume they are entitled to the full protection of constitutional rights and thus might contest school actions taken against them which are contrary to that full guarantee of constitutional rights.

182. Anna M. Sewell, *Moving Beyond Monkeys: The Expansion and Relocation of the Religious Curriculum Debate*, 114 PENN ST. L. REV. 1067, 1093–94 (2010).

183. *Id.*

184. *See id.*

185. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

186. *See id.* at 84 ("[W]e will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.") (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))).

187. *See* Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 661 (Ct. App. 1984). Equal protection challenges might also lie if a school were to treat adult students differently than similarly situated minor students merely because of an age difference. *Id.* Claims alleging statutory creation of age-based classifications for differential treatment also receive rational basis review. *See* Sewell, *supra* note 182, at 1093–94. In the context of age-based discrimination, the Court has explained that there is a presumption that the statute is rational, and thus the plaintiff bears the burden of rebutting the presumption by showing that the discriminatory statute could not reasonably relate to a legitimate government interest. *Kimel*, 528 U.S. at 84.

extent that any equal protection challenges are raised to combat the statutory scheme, the government would only need to show that the statute is rationally related to a legitimate government purpose[188]—an easily achievable hurdle, especially given the importance that the judiciary has placed on education.[189] Although equal protection challenges will almost always be resolved in favor of local public schools,[190] the statutory declarations that enable such challenges will at least produce the effect of removing adult students from the confusion and misapplication of *in loco parentis*.

In the end, this outcome provides little actual relief to an adult student who is subjected to reduced constitutional freedoms while enrolled in the public schools. On the one hand, under the misapplied modern *in loco parentis* doctrine, the adult student would have no recourse once aggrieved because he would be assumed to have consented to the governance of the school, and the school, if acting within its authority, would act out of its custodial or tutelary responsibilities to the student body. On the other hand, an appeal to equal protection to challenge a statutory construction would invariably lead to a finding that the school's custodial or tutelary responsibilities are rationally related to a legitimate state interest, and thus the adult student would still have no relief. However, despite the unfortunate outcome for the adult student, the transition to a statutory construction at least moves the governance of an adult student in the public schools from the fiction of *in loco parentis* into the realm of legitimate school governance.

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188. *Kimel*, 528 U.S. at 83.

189. The Supreme Court has noted that:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954). Since education is so highly esteemed in this country, it is unlikely that a court would find the education of an adult student to be less of a legitimate state interest than the education of minor students.

190. It should be noted that this is neither the intended purpose nor the ideal outcome envisioned by the premise that adult students should be removed from the grant of *in loco parentis* authority to schools.

2. A Reasonableness Standard

The transition away from *in loco parentis* could most effectively be ushered in by a return to a reasonableness standard like the one first suggested by the Supreme Court in *T.L.O.*[191] Importantly, the Court emphasized that flexibility is the hallmark feature of the reasonableness standard, which was designed to balance both private and governmental interests without unduly burdening either party. Such a reasonableness standard would provide several important outcomes.

First, and most importantly, a reasonableness standard would require use of a totality of the circumstances test[192] that would allow each fact-specific constitutional inquiry to be assessed based upon an objective standard[193] rather than on a logically flawed assumption which automatically subordinates individual student rights to the welfare of the student body as a whole. Second, a reasonableness standard would eliminate the need for the application of *in loco parentis* to adult students in public schools because adult students' constitutional rights would only be restricted when the balancing of governmental interests against the

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191. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985). The reasonableness standard set forth in *T.L.O.* was only established with regard to questions of Fourth Amendment intrusions upon student privacy while in the care of the public schools. *Id.* However, the basic premise of the Court's rationale behind departing from *in loco parentis* and turning to a reasonableness analysis is instructive:

> [The Court has held that] maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship . . . . We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to [Fourth Amendment probable cause standards] . . . . Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search . . . . This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren.

Id. at 339–43. Although this principle was applied only to Fourth Amendment privacy concerns, it could just as easily be applied to other constitutional issues that frequently arise in schools, such as First Amendment free speech claims.

192. *See id.* at 341.

193. Admittedly, a totality of the circumstances standard does not provide clear guideposts to school administrators conducting the daily business of operating a public school. However, even if judicial oversight is required to resolve disputes between adult students and local public schools, a totality of the circumstances test will at least avoid the presumption of *in loco parentis* that adult students' constitutional rights can be restricted to protect the welfare of other students.

constitutional protections for individual adult students tipped in favor of the government. This balancing analysis would have the added benefit of preserving the new protective-duty requirement that the Supreme Court has read into the modern *in loco parentis* doctrine,[194] but would do so on a more legitimate legal basis.

Finally, unlike statutory declarations,[195] a reasonableness standard would actually offer adult students a chance to succeed on the merits of their constitutional claims because it places a higher burden on the local public school to prove the necessity of a constitutional violation than the rational basis review standard applied to equal protection challenges requires.[196] Thus, even though a court deciding a constitutional case between a public school and an adult student would likely always find in favor of the local public school on an equal protection basis, there is at least hope that adult students can prevail against a school under a reasonableness standard.

V. CONCLUSION

Simply put, adult students are real. Although the American ideal of school authority under *in loco parentis* has simply assumed that adult students voluntarily enter into an agreement to be subject to the near limitless, parentally-derived, authority of the school, that assumption is, at best, fatally flawed. Adult students can hardly be said to consent to such agreements and certainly cannot be fit under the umbrella of a public school's *in loco parentis* authority. Because *in loco parentis* has now become a tool to limit the recently minted constitutional protections of students, a new approach is needed to rationalize the control and governance over adult students who are properly enrolled in the public schools of the nation, and thus do not enjoy the full gamut of constitutional protections. Such an approach could be achieved through either statutory declarations in which legislative intent to subject adult students to the same restrictions as minor students is made clear, or through the implementation of a reasonableness standard that balances the competing interests of the adult student's expectation of constitutional protections against the need of the school to carry out a state interest in protecting the safety of students. Ultimately, the transition to a reasonableness standard would be most effective because

194. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 834 (2002).

195. *See supra* Part IV.D.1.

196. *See generally* Sewell, *supra* note 182, at 1093–94 (discussing levels of judicial scrutiny).

it will not only eliminate the need to artificially expand *in loco parentis* rule over adult students, but will also simultaneously create the potential for the preservation of adult students' constitutional rights.