

Summer 6-1-2014

In the Weeds with Thomas: *Morse, in loco parentis*, Corporal Punishment, and the Narrowest View of Student Speech Rights

William C. Nevin

Follow this and additional works at: <https://digitalcommons.law.byu.edu/elj>

 Part of the [Education Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

William C. Nevin, *In the Weeds with Thomas: Morse, in loco parentis, Corporal Punishment, and the Narrowest View of Student Speech Rights*, 2014 BYU Educ. & L.J. 249 (2014).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2014/iss2/5>

.

IN THE WEEDS WITH THOMAS: *MORSE, IN LOCO PARENTIS*, CORPORAL PUNISHMENT, AND THE NARROWEST VIEW OF STUDENT SPEECH RIGHTS

*William C. Nevin**

I. INTRODUCTION

In writing for the English Court of the Exchequer in the case of *Winterbottom v. Wright*,¹ Baron Robert Rolfe codified into English law a maxim almost as old as the law itself. “Hard cases, it has been frequently observed,” Rolfe wrote, “are apt to introduce bad law.”² In *Winterbottom*, Rolfe and his fellow judges denied recovery to a plaintiff in a particularly troubling case of negligence,³ but Rolfe’s statement—that difficult cases with troubling facts often result in bad law—was a universal one. As long as there have been judges, they have been forced to contend with all too sympathetic plaintiffs desperate for relief where the law can grant none. Giving into human nature and bending to suit these plaintiffs, according to Rolfe, results in bad law, either from the bench or the legislature.⁴

* Lecturer, journalism and speech at the University of West Alabama. B.A., 2007, Communication, University of Alabama; J.D., 2010, University of Alabama School of Law; Ph.D. candidate, 2014, Communication and Information Sciences, University of Alabama. The author would like to thank the editors of this journal for their insights, suggestions, and professionalism in the process of preparing this article for publication.

¹ *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch. of Pleas) 406; 10 M. & W. 109, 116.

² *Id.* at 116 (Rolfe, J., concurring).

³ *Id.* *Winterbottom*, the plaintiff, was hired by the postmaster to deliver mail. Wright, the defendant, was responsible for the maintenance of the mail coach driven by *Winterbottom*. After the coach collapsed, *Winterbottom* sued, claiming that Wright had breached his duty of care. Rolfe and his fellow judges denied relief and found English law allowed for either a duty of care in contract or tort—not both. The resulting precedent left consumers who were injured by defective products no redress for much of the nineteenth century.

⁴ See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 905 (2006) (noting that, much like case law, legislation “made in the wake of a highly salient disaster, or made in the wake of legislative hearings featuring sympathetic victims” is subject to “a distorted view of the nature of those controversies and the proper resolution of them.”).

Yet there is another type of “hard case”—one where the plaintiff is so unlikable, so flawed that even with the law on his side, judges are tempted to stretch rulings simply to avoid siding with such an unfortunate individual.⁵ In this vein of hard cases, there have been few more difficult in the recent history of the Supreme Court than *Morse v. Frederick*.⁶

In *Morse*, the Court was confronted by the thoroughly unsympathetic Joseph Frederick,⁷ an eighteen-year-old high school senior who decided to perpetrate a silly prank with his friends so that they might get on television as the Olympic torch relay passed through their town.⁸ However, their stunt, hoisting a banner that read “BONG HiTS 4 JESUS,” was promptly disrupted by their high school principal, Deborah Morse.⁹

The question before the Court in *Morse* can be phrased simply enough as an inquiry into whether the First Amendment protected a banner that was blasphemous, facially absurd, and a possible endorsement of illegal drugs.¹⁰ The majority answered in the negative, finding the pro-drug message was simply too much to bear.¹¹ The majority’s conclusion was lamentable enough for those in favor of student speech rights, but Justice Clarence Thomas went even further in his concurring opinion. For a while the majority at least tried to narrow the impact of its decision,¹² Justice Thomas opined that the landmark student speech case *Tinker v. Des Moines Independent Community School District*¹³ was “without

⁵ See generally David J. Salvin, *The Wrongful Termination Roller Coaster*, 39 ORANGE COUNTY LAWYER 16, 17 (1997) (describing a wrongful termination lawsuit where the plaintiffs, indicted on multiple felony charges, were “very unlikeable” and resulted in a court that “appeared motivated to find for the defendants.”).

⁶ *Morse v. Frederick*, 551 U.S. 393 (2007).

⁷ Frederick’s maturity and the value (or lack thereof) in his speech is reminiscent of plaintiff Matthew Fraser’s pun-laden, sexually tinged speech before a student assembly at the heart of *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court found the plaintiff’s speech to be “plainly offensive” and unprotected in a school setting. *Id.* at 683.

⁸ *Frederick v. Morse*, 439 F.3d 1114, 1115–16 (9th Cir. 2006).

⁹ *Id.* at 1115. For a full discussion of the facts, see Part Ia, *infra*.

¹⁰ *Morse v. Frederick*, 551 U.S. at 400.

¹¹ *Id.* at 403.

¹² See *infra* Parts I, II.

¹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

basis in the Constitution.”¹⁴

Justice Thomas’s argument to sack *Tinker* was based primarily on his view that student speech rights are not supported by the earliest practices in American public schools. In his fundamentally originalist¹⁵ concurrence, Justice Thomas employs a wide range of historical sources to come to the conclusion that nineteenth-century public schools did not recognize First Amendment rights for students.¹⁶ In short, as Justice Thomas wrote, “[T]eachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”¹⁷ This “order,” as evidenced by the historical support Justice Thomas gathers for his position, was enforced by severe, often brutal forms of corporal punishment that the justice all too easily excuses.¹⁸ Justice Thomas grounds his claim with the legal doctrine of *in loco parentis*, a principle from English common law by which parents delegate authority over their children to the state for the purposes of education.¹⁹ However, a cursory glance to other documents from the period finds at least scattered opposition to corporal punishment and *carte blanche* authority for school personnel to discipline children, a contrast to the monolithic position the Justice portrays.²⁰ Ultimately, his conflation of free speech rights with the ability of turn-of-the-century schoolmasters to savagely punish the children in their care is at best a *non sequitur*. Justice Thomas may be alone among his fellow justices on the Court in his stance that children have no rights under the First Amendment, but it is still a shocking position to those at least nominally supportive of free

¹⁴ 551 U.S. at 410 (Thomas, J., concurring).

¹⁵ See *infra* Part IIc, for a full exploration of Justice Thomas’ use of originalism in his *Morse* concurrence.

¹⁶ 551 U.S. at 412.

¹⁷ *Id.*

¹⁸ As Thomas writes, “the idea of treating children as though it were still the 19th century would find little support today.” *Id.* While he is presumably referring to corporal punishment, he is unclear at best.

¹⁹ *Id.* at 413.

²⁰ See *infra* notes 204–214, 219–221, 232, and accompanying text (explaining that a historical inquiry, far from the cohesive narrative Justice Thomas presents, into the relevant period of the mid-nineteenth century reveals a liberalization in attitudes toward children and building opposition regarding the application of corporal punishment in public schools).

expression.

In relying on principles of originalism for his concurring opinion in *Morse*, Justice Thomas exposes a fundamental weakness with this interpretive method in that the outcome is driven largely by a subjective historical inquiry. Part II examines the three mainstream opinions from *Morse* that, more or less, would leave the *Tinker* standard for deciding student speech cases intact.²¹ Part III takes up an examination of Justice Thomas' concurring opinion, looking at his use of originalism and his embrace of the *in loco parentis* doctrine before then examining some of the historical material the Justice uses to support his assertions. Part III will contrast the historical resources and cases cited by Justice Thomas with others from the period that show an evolving attitude toward children and a moderation of public schools. Finally, the paper will conclude in Part IV with final thoughts on the impact of Justice Thomas' opinion and originalism as applied *Morse*.

II. EIGHT JUSTICES AND *MORSE V. FREDERICK*

A. *The Majority Opinion*

Chief Justice John Roberts began the majority opinion²² by labeling the viewing of the Olympic torch relay as a “school-sanctioned and school-supervised event” and framing *Morse*'s interpretation of the banner as a pro-drug message as a reasonable one—certainly a harbinger of unfortunate things to come for *Frederick*.²³ Chief Justice Roberts then laid out the familiar student speech touchstones, moving from *Tinker*²⁴ to

²¹ See Kenneth W. Starr, *Bong Hits And The Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 14–15 (2008) (“The Justices also came together, more substantively, on the continuing vitality of *Tinker*. Eight of the nine Justices would embrace the *Tinker* framework, and thus stare decisis values carried the day. Only Justice Thomas would have scuttled the entire enterprise and begun anew.”).

²² The majority opinion of the Court, written by Chief Justice Roberts, was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Thomas, again, offered his concurrence, which will be the focus of this paper. Justice Alito wrote a concurring opinion joined by Justice Kennedy. Justice Breyer concurred in the judgment and dissented in part. Justice Stevens, joined by Justices Souter and Ginsburg, dissented.

²³ *Morse*, 551 U.S. at 396.

²⁴ *Tinker*, 393 U.S. 503 (1969).

*Bethel School District No. 403 v. Fraser*²⁵ and *Hazelwood School District v. Kuhlmeier*,²⁶ before concluding, “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”²⁷

The facts of the case, as Chief Justice Roberts presented them, are relatively straightforward. As the Olympic torch relay passed through Juneau, Alaska, Juneau-Douglas High School Principal Deborah Morse allowed staff members and students to leave class to observe the torch as it passed the school.²⁸ Students waited for the relay on both sides of the street—one side on school grounds, the other outside of school property.²⁹ Frederick was “late to school that day,” as Chief Justice Roberts writes,³⁰ but the Ninth Circuit’s opinion made it clear he was never actually on school grounds.³¹ When Frederick did make it to the relay, he stood across the street from the school, where “rambunctious” students were “throwing plastic cola bottles and snowballs and scuffling with their classmates.”³² As the torch passed, Frederick and his friends erected a fourteen-foot banner that read, “BONG HiTS 4 JESUS”³³ in order to attract attention from the television cameras covering the relay.³⁴ Morse then crossed the street to demand the students take down the banner, and all but Frederick complied.³⁵ Frederick was subsequently suspended for eight days under a school board policy prohibiting “public expression that . . . advocated the use of substances that are

²⁵ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

²⁷ *Morse*, 551 U.S. at 397.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006). According to the circuit court, Frederick’s truancy was apparently the result of a snowed-in driveway.

³² *Morse*, 551 U.S. at 397. Chief Justice Roberts ultimately concluded that Frederick was effectively a student and therefore subject to school discipline. *Id.* at 401. Therefore, it seems strange that the majority would point out the “rambunctious” nature of the other students at the torch relay if indeed it was a situation where teachers and other administrators were free to enforce school discipline. In anything, the behavior of the other students suggests that this was not a school activity and that Frederick’s argument to that point should not have been so easily dismissed. *See id.*

³³ *Id.*

³⁴ *Id.* at 401.

³⁵ *Id.* at 398.

illegal to minors.”³⁶

After dismissing Frederick’s argument that the Court’s school speech jurisprudence should not apply,³⁷ Chief Justice Roberts then turned to the “cryptic” message on Frederick’s banner.³⁸ He posits there are at least two interpretations for the words: either a command to take drugs or a celebration of illegal drug use. Ultimately, Chief Justice Roberts concluded that for the purposes of the majority’s analysis, there is no substantive difference between the two.³⁹ Chief Justice Roberts basically cast aside both Frederick’s argument that the phrase was a meaningless word salad and the dissents’ view that it represented an attempt to advance debate on drug policy as he concluded that the banner was reasonably viewed as promoting illegal drug use.⁴⁰

With this determination of what was at least a reasonable interpretation of a somewhat unclear banner,⁴¹ the issue for the majority shifted from free expression and student speech rights in the abstract to specifically whether school officials can “restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”⁴² In answering in the affirmative, Chief Justice Roberts once again returned to the Court’s student speech jurisprudence. The Chief Justice focused on what he found to be two central points from *Fraser*: (1) students in a public school have a more limited right to free expression as compared to adults and (2) that the “material and substantial disruption” standard established in

³⁶ *Morse*, 551 U.S. at 398 (citing App. Pet. Cert. 53a). Morse originally suspended Frederick for ten days, but the student’s punishment was reduced to time served (eight days) by the Juneau School District superintendent.

³⁷ *Id.* at 400–01. Frederick argued that since he was not on school property and he had technically not attended school that day, then he should not be subject to school discipline. Quoting Morse’s petition for certiorari, Chief Justice Roberts rejected the argument, writing, “Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.’” *Id.* at 401 (citation omitted).

³⁸ *Id.* at 401.

³⁹ *Id.* at 402.

⁴⁰ *Id.* at 402–03.

⁴¹ *See Morse*, 551 U.S. at 402 (noting that there were “at least” two interpretations of the banner: an “imperative” to use illegal drugs and a celebration of drug use). *See also id.* (“Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.”).

⁴² *Id.* at 403.

Tinker is not the only frame for analysis where student speech is concerned.⁴³ Indeed, Chief Justice Roberts emphasized that *Tinker* “is not the only basis for restricting student speech,”⁴⁴ as he laid out the seriousness of the drug problem in American schools:

The problem remains serious today. About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. Nearly one in four 12th graders has used an illicit drug in the past month. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps “the single most important factor leading schoolchildren to take drugs,” and that students are more likely to use drugs when the norms in school appear to tolerate such behavior.⁴⁵

He noted that, while *Tinker* prohibited the squelching of expression due to a mere fear of disturbance, the danger with this banner is “more serious and palpable” with “[t]he particular concern to prevent student drug abuse . . . extend[ing] well beyond an abstract desire to avoid controversy.”⁴⁶ The specter of illegal drugs and the possible harmful consequences from Frederick’s banner became the ultimate deciding issue for Chief Justice Roberts and the majority.

In closing, Chief Justice Roberts offered some hints as to how the majority opinion should be properly interpreted. First, he wrote that Frederick’s banner did not merit censorship due to its perceived offensiveness, like in *Fraser*; rather, because of its “promotion of illegal drug use.”⁴⁷ Chief Justice Roberts points out, “much political and religious speech might be perceived as offensive to some.” Considering this, it appears the majority leaves room for possibly offensive political and religious student speech to receive protection under the *Tinker*

⁴³ *Id.* at 404–05.

⁴⁴ *Id.* at 406.

⁴⁵ *Id.* at 407–08 (citations omitted).

⁴⁶ *Id.* at 408–09.

⁴⁷ *Morse*, 551 U.S. at 409.

standard.⁴⁸

Chief Justice Roberts then argued that the majority opinion and the dissent authored by Justice John Paul Stevens were not entirely dissimilar. They differed, he noted, only on the question of whether the banner promoted illegal drugs.⁴⁹ Chief Justice Roberts wrote, “[t]he dissent’s contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.”⁵⁰

Authorities are mixed concerning the ultimate consequences the majority opinion in *Morse* will have on student speech rights.⁵¹ Some argue that Chief Justice Roberts created an entirely new standard for examining student speech by basing a school’s authority on its obligation to protect students.⁵² This new standard could be both “amorphous” and troubling, as at least one writer contends, due to the Court’s interpretation of “BONG HiTS 4 JESUS” as a direct call to try illegal drugs—suggesting that school administrators are likely to aggressively interpret student speech as harmful.⁵³ However, due to Chief Justice Roberts’s careful attempts to narrow the majority opinion, Professor Mark W. Cordes believes that *Morse* does not significantly erode student speech rights.⁵⁴ As Cordes writes,

What *Morse* once again makes clear, and what the Court has stated in its previous decisions, is that the free speech rights

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Compare Francisco M. Negron, Jr., *The Unwitting Move Towards A “New” Student Welfare Standard In Student Speech After Morse v. Frederick*, 58 AM. U.L. REV. 1221, 1224 (2009). (“Where *Tinker*, *Hazelwood School District v. Kuhlmeier*, and *Fraser* spoke to a school’s ability to regulate student expression with regard to disruption, curricular control, and offensive language, in *Morse*, the Court premised its rule on none of these bases specifically, but rather it articulated the school’s interest as one that involves its ability to safeguard or protect student well-being.”) and Charles Chulack, *The First Amendment Does Not Require Schools to Tolerate Student Expression That Contributes to the Dangers of Illegal Drug Use: Morse v. Frederick*, 46 DUQ. L. REV. 521, 536 (2008) with Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL OF RTS. J. 657, 660 (2009) (“[A] close reading of *Morse* suggests that viewpoint restrictions on core speech will certainly be subject to the *Tinker* standard, in which schools can prohibit speech only when it poses a very real threat to substantially interfere with school operations or would infringe on the rights of other students.”).

⁵² Negron, *supra* note 51, at 1224.

⁵³ Chulack, *supra* note 51, at 536.

⁵⁴ See Cordes, *supra* note 51, at 660, 679.

of high school students must be analyzed in light of the special characteristics and purpose of public high schools. This is neither remarkable nor disconcerting. Schools don't exist to facilitate free speech, but rather to educate students, and students' free speech interests must be tailored to a school's unique environment. . . . [A] close reading of *Morse* suggests that viewpoint restrictions on core speech will certainly be subject to the *Tinker* standard, in which schools can prohibit speech only when it poses a very real threat to substantially interfere with school operations or would infringe on the rights of other students.⁵⁵

Ultimately, Chief Justice Roberts wrote an opinion that is both narrow and almost entirely predicated upon the fact that Frederick's banner contained a reference to illegal drugs. However, other members of the Court took issue with both the Chief Justice's conclusion and its scope.

B. *Justice Alito's Concurring Opinion*

On its face, the concurring opinion by Justice Samuel Alito appears to be an effort to narrow the majority's holding while explaining some of Justice Alito's beliefs regarding student speech rights. Justice Alito, joined by Justice Anthony Kennedy, began his opinion by stating his belief that the majority's decision "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."⁵⁶ He further stated that the opinion "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."⁵⁷ Furthermore, according to Justice Alito, this prohibition on the regulation of student speech would be extended to cover expression on the "war on drugs" or "legalizing marijuana for medicinal uses."⁵⁸

In discussing student speech jurisprudence, Justice Alito both began with the assertion that *Tinker* was rightly decided and that administrators are not due unquestioned deference when making decisions regarding student speech.⁵⁹ He

⁵⁵ *Id.* at 660.

⁵⁶ *Morse*, 551 U.S. at 422 (Alito, J., concurring).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

concluded, however, that *Bethel* and *Hazelwood* allow for the censorship of speech outside of the rigorous “substantial disruption” standard,⁶⁰ but he again cautioned that he joined the majority opinion only on the understanding that the decision does not call for any further regulation of student speech due to the “special characteristics” of public schools.⁶¹ Justice Alito also refuted the argument that the First Amendment allows school administrators to censor any speech that disrupts a school’s “educational mission,” writing

[t]he “educational mission” of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups. . . . The “educational mission” argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.⁶²

Justice Alito next rejected a key assertion from Justice Thomas’ concurrence—namely that school administrators act *in loco parentis* in regard to student discipline.⁶³ “It is a dangerous fiction,” Justice Alito wrote, “to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities.”⁶⁴ Parents, he argued, have no real choice in whether to send their children to public schools, and they have little chance to control what happens in the school setting—thereby making the *in loco parentis* argument inappropriate.⁶⁵

However, if Justice Alito’s intention was to narrow the scope of the majority’s decision, he unnecessarily got in his own way⁶⁶ when he stated that any alteration of the “usual free

⁶⁰ *Id.* at 422–23.

⁶¹ *Id.* at 423.

⁶² *Morse*, 551 U.S. at 423.

⁶³ *Id.* at 424.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 9 (2008).

speech rules”⁶⁷ in public schools must arise from a special circumstance in the school setting. In *Morse*, he wrote the circumstance was “the threat to the physical safety of students.”⁶⁸ From there, Justice Alito expounded on the potential dangers of school attendance, arguing that students face dangers they might otherwise avoid in attending schools. Parents, he continued, cannot provide guidance and protection in the school setting, and students may be sharing close quarters with other students who would physically harm them.⁶⁹ “Experience shows,” as Justice Alito concludes, “that schools can be special places of danger.”⁷⁰

Even though Justice Alito took great pains to say he joined the majority only because Frederick’s banner did not include any form of political speech regarding “the wisdom of the war on drugs or of legalizing marijuana for medicinal use,”⁷¹ lower courts have interpreted his lone paragraph on “special characteristics” and school safety to allow for the censorship of violent and homophobic student speech.⁷² According to Professor Clay Calvert, “if Justice Samuel Alito hoped his concurring opinion in *Morse v. Frederick* would be interpreted narrowly by lower courts, he might not have written so much.”⁷³

Thus even if his intention had been to craft a narrowing lens through which to view the majority opinion, Justice Alito’s concurrence has been distorted by some courts to permit more—not less—censorship of student expression predicated on the notion of student safety. “[E]ven as the concurrence attempted to contain the Court’s decision to illegal drug messaging,” Francisco M. Negron argues, “it validated the existence of a new standard premised on student welfare.”⁷⁴ However, according to Professor Mark W. Cordes, when Justice

⁶⁷ 551 U.S. at 424 (Alito, J., concurring).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 422 (quoting *id.* at 445 (Stevens, J., dissenting)).

⁷² Calvert, *supra* note 66, at 9. Court decisions employing this broad, perhaps unintended, interpretation of Justice Alito’s opinion include *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007), *Boim v. Fulton Cnty Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007), and *Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072 (2008).

⁷³ *Id.* at 9.

⁷⁴ Negron, *supra* note 51, at 1227.

Alito's concurrence is read in its entirety it only "painted a picture in which permissible restrictions on student speech are the exceptions, not the rule."⁷⁵

C. Justice Breyer's Opinion

In his opinion, Justice Stephen Breyer stated he would simply decide the issue of qualified immunity in favor of Morse and avoid ruling on the merits of Frederick's expression, thereby dodging the tricky First Amendment issue.⁷⁶ Even though Justice Breyer was the only member of the Court to devote serious attention to the matter, the issue of immunity for Morse garnered an "unstated" unanimity from a fractured Court, according to Kenneth Starr.⁷⁷ Even the dissenters agreed the principal should not be held liable for pulling down the "BONG HiTS 4 JESUS" banner.⁷⁸

Justice Breyer first surveyed the majority opinion and found it to be based on viewpoint restrictions, thereby "rais[ing] a host of serious concerns."⁷⁹ He then pondered whether the Court's decision could be used to justify the censorship regarding the underage consumption of alcohol, the medicinal use of marijuana, or even "deprecating commentary about an antidrug film shown in school."⁸⁰ Yet, even with the faults he found in the majority opinion, Justice Breyer wrote that the dissent, if adopted, "would risk significant interference with reasonable school efforts to maintain discipline."⁸¹ He rhetorically asks, "[w]hat is a principal to do when a student unfurls a 14-foot banner (carrying an irrelevant or inappropriate message) during a school-related event in an effort to capture the attention of television cameras? Nothing?"⁸²

Thus, the answer for Justice Breyer becomes the qualified

⁷⁵ Cordes, *supra* note 51, at 674.

⁷⁶ 551 U.S. at 425 (Breyer, J., concurring in part and dissenting in part).

⁷⁷ Starr, *supra* note 21, at 14.

⁷⁸ *Id.* (noting that the majority had little reason to reach the immunity question once the substance of the case was decided for *Morse*. Starr had a familiarity with the case unlike most—he represented Morse in oral arguments before the Court.).

⁷⁹ *Morse*, 551 U.S. at 426.

⁸⁰ *Id.*

⁸¹ *Id.* at 427.

⁸² *Id.*

immunity defense, which requires courts to find for government employees unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.”⁸³ Morse is entitled to qualified immunity, Justice Breyer argued, because she “did not clearly violate the law” when she took down Frederick’s banner, and her belief in the constitutionality of her action was reasonable given the “complex and often difficult to apply” state of student speech jurisprudence.⁸⁴ With the qualified immunity question potentially answered, it leaves only the issue of whether Frederick could obtain injunctive relief as to his suspension—an issue clouded by facts that suggest his discipline was related, in part, to conduct aside from the banner.⁸⁵

Stuck between a First Amendment rock and a school discipline hard place, Justice Breyer made his home in the middle.⁸⁶ He avoided, as he saw it, “a decision on the underlying First Amendment issue [that] is both difficult and unusually portentous.”⁸⁷

D. Justice Stevens’s Dissent

Justice Stevens, joined by Justices David Souter and Ruth Bader Ginsburg, began his dissent by pointing out Frederick’s banner was erected as a means to gain television exposure.⁸⁸ Since it was a simple ploy to gain the attention of television cameras and not the promotion of illegal drug use, Justice Stevens argued, Principal Morse would have acted to take down the banner even if it said “Glaciers Melt!”⁸⁹ Justice Stevens wrote that he was “willing to assume” that discouraging the use of drugs is a “valid and terribly important interest” and that the “pressing need to deter drug use”

⁸³ *Id.* at 429 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

⁸⁴ *Id.* at 429–30.

⁸⁵ *Morse*, 551 U.S. at 433. Justice Breyer cites Frederick’s “disregard of a school official’s instruction, his failure to report to the principal’s office on time, his ‘defiant [and] disruptive behavior,’ and the ‘belligerent attitude’ he displayed when he finally reported” as possible reasons for disciplining him.

⁸⁶ *Id.* at 427–28.

⁸⁷ *Id.*

⁸⁸ *Id.* at 433–34 (Stevens, J., dissenting).

⁸⁹ *Id.* at 434.

supports the school district's policy prohibiting the advocacy of illegal substances.⁹⁰ However, as he saw it, Frederick's banner "was never meant to persuade anyone to do anything," and therefore the student should not have been punished simply for a view that the school found to be inappropriate.⁹¹

Justice Stevens then discussed *Tinker* through the lens of *Brandenburg v. Ohio*, arguing that the majority opinion "trivializes" the landmark student speech cases by upholding viewpoint discrimination and that the banner falls well short of *Brandenburg's* standard of "incitement to imminent lawless action."⁹² As Justice Stevens concluded, "[e]ncouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship."⁹³

Justice Stevens, though, soon weakened in his resolve, stating that "some targeted viewpoint discrimination" in a school setting might be justified, as well as speculating that the imminence requirement of *Brandenburg* might need to be relaxed at schools.⁹⁴ Even after he conceded those arguments to the majority, Justice Stevens still argued that school officials must show how Frederick's banner interrupted the school's educational mission or how it prompted students to try illegal drugs.⁹⁵ "But instead of demanding that the school make such a showing," Justice Stevens wrote, "the Court punts."⁹⁶

Ultimately, Justice Stevens' dissent turns on the interpretation of the banner, much as Chief Justice Roberts characterized his argument.⁹⁷ As Justice Stevens argues,

[t]o the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use—in other words, that it can most reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of

⁹⁰ *Id.*

⁹¹ *Morse*, 551 U.S. at 434–35.

⁹² *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 at 449).

⁹³ *Id.* at 438.

⁹⁴ *Id.* at 439.

⁹⁵ *Id.* at 439–41.

⁹⁶ *Id.* at 441.

⁹⁷ *See Morse*, 551 U.S. at 409.

that.⁹⁸

While admitting, “some high school students . . . are dumb,” Justice Stevens nevertheless concluded that Frederick’s banner could not prompt other students to try drugs.⁹⁹ Even if the banner is framed as pro-drug advocacy, Justice Stevens argued, the message was “at best subtle and ambiguous,” and it should be framed in a way to benefit Frederick, the speaker, and not any audience.¹⁰⁰ Justice Stevens also found that the majority’s “ham-handed, categorical approach” might lead to the censorship of speech regarding the legalization of drugs in addition to the use of alcohol by minors.¹⁰¹

Justice Stevens concluded by observing how American attitudes slowly shifted against both the Vietnam War and Prohibition.¹⁰² Similarly, as Justice Stevens argued, the debate on whether it “would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely” is an important national issue served by even “inarticulately” phrased speech.¹⁰³ In such a political debate, it is the minority viewpoint that “most demands the protection of the First Amendment” in Justice Stevens’ view.¹⁰⁴

While Justice Stevens’ dissent is at times blistering in its assessment of the majority opinion, there is much agreement to be found. As Professor Cordes suggests, Justice Stevens hints at a belief that *Tinker* should be interpreted as allowing viewpoint discrimination only where student speech would pose a clear and present danger to the school, putting the dissent in line with Justice Alito’s concurrence.¹⁰⁵ Justice Stevens and the other dissenters also agreed that Morse should not have been personally liable for her actions in silencing Frederick.¹⁰⁶ Still, Justice Stevens “particularly lamented the abandonment of the prohibition on viewpoint discrimination in schools and the requirement of a showing of actual disruption to justify

⁹⁸ *Id.* at 444 (emphasis in original).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 444–45.

¹⁰¹ *Id.* at 445–46.

¹⁰² *Id.* at 447.

¹⁰³ *Morse*, 551 U.S. at 447–48.

¹⁰⁴ *Id.* at 448.

¹⁰⁵ Cordes, *supra* note 51, at 675.

¹⁰⁶ *Morse*, 551 U.S. at 434.

punishing student speech” as Dean Erwin Chemerinsky wrote, thereby conclusively setting the dissent apart from Chief Justice Roberts and the majority.¹⁰⁷

The contrast between Justice Stevens’ dissent and Justice Thomas’ concurrence could not be sharper.

III. JUSTICE CLARENCE THOMAS STANDS ALONE

A. Introduction

Justice Thomas began his concurring opinion by focusing on *Morse*, but it soon turned to an indictment of *Tinker* and student speech rights. He opened the opinion simply enough in stating a public school may indeed prohibit speech it deems as advocating illegal drug use.¹⁰⁸ His next statement, however, serves as a complete break from his colleagues on the Court as Thomas declares the reasoning for his opinion: “I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.* is without basis in the Constitution.”¹⁰⁹ From there, Justice Thomas uses a litany of educational history texts, state court cases from the mid-nineteenth century, and appeals to the doctrine of *in loco parentis* to support his view that “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”¹¹⁰

While his distance from the rest of the Court might render his opinion otherwise meaningless,¹¹¹ Justice Thomas’ concurrence is a fascinating look at how originalism, or the doctrine of attempting to interpret the Constitution as the Framers or framing generation understood it,¹¹² is applied—or perhaps misapplied—to a modern day problem.

¹⁰⁷ Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 727–28 (2011).

¹⁰⁸ *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

¹⁰⁹ *Id.* (citation omitted).

¹¹⁰ *Id.* at 410–11.

¹¹¹ Cordes, *supra* note 51, at 673 (“Though the Thomas concurrence is quite substantive in nature, his position is so far removed from where the rest of the Court is at on the issue of student speech that for all practical purposes his lonely voice is meaningless.”).

¹¹² See generally Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177 (1987).

B. Originalism and Justice Thomas

While originalism as a means of constitutional interpretation is nearly as old as the republic itself—indeed members of the Framing generation argued “the words’ of the text were to be interpreted based on ‘the general sense of the whole nation at the time the Constitution was formed’”¹¹³—the modern start for originalism began in the late 1970s and early 1980s.¹¹⁴ Originalism, as advocated by prominent figures such as Judge Robert Bork and Attorney General Edwin Meese, was positioned as a counter to the Supreme Court’s abortion decisions and other expansive opinions dating back to the Warren Court;¹¹⁵ rather than reading rights into the Constitution via the “penumbras” and “emanations” in cases such as *Griswold v. Connecticut*,¹¹⁶ jurists employing originalism as a means of interpretation would apply the “rules of the written [C]onstitution in the sense in which those rules were understood by the people who enacted them.”¹¹⁷ Thus the originalist is tasked with divining the original intention of those who drafted whatever law is before him or her, a mission that often requires the use of secondary texts.¹¹⁸ When interpreting the Constitution, possible secondary texts as to the

¹¹³ *Id.* at 1199.

¹¹⁴ Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM. L. & POL’Y 385, 388 (2012).

¹¹⁵ See, e.g., *id.*; J.D. Drodny, *Originalist Justification and the Methodology and Unenumerated Rights*, 199 L. Rev. M.S.U.-D.C.L. 809 (1999) (citing Bork as a prominent advocate of originalism).

¹¹⁶ 381 U.S. 479, 484 (1965). In writing for the Court, Justice William O. Douglas found a personal right to contraception through the implied constitutional right to privacy. *Id.* at 479.

¹¹⁷ Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988).

¹¹⁸ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (defining originalism as “the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters”); Ronald Turner, Was Separate but Equal Constitutional?: Borkian Originalism and Brown, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 248 (1995) (citing Justice Scalia’s observation that originalism “requires the consideration of an enormous mass of material, including the records of the ratifying debates of all the states when the issue is one of interpreting the Constitution and amendments thereto.”). See also Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U.L. 1, 10 (2009) (defining the most ideologically strenuous version of originalism as the belief that “whatever may be put forth as the proper focus of interpretive inquiry (framers’ intent, ratifiers’ understanding, or public meaning), that object should be the sole interpretive target or touchstone”).

original meaning held by the Framers include notes from the Philadelphia debates and *The Federalist*.¹¹⁹

However, reliance on the relatively sparse evidence surrounding the debate and ratification of the Constitution resulted in critiques that the originalism approach resulted in rendering most legal inquiries indeterminate due to the lack of answers in the secondary text.¹²⁰ Furthermore, where there was historical evidence, it was often contradictory, as the Framers often disagreed amongst themselves.¹²¹ An additional problem, and perhaps the most devastating one with the approach, was that it afforded the most weight and intellectual importance to those drafting the Constitution instead of the ratifiers—those with the actual power to give the new governing documenting binding authority were thus an afterthought.¹²²

As a response to these critiques, originalism underwent something of a rebirth, returning as an interpretive tool focused on the views of those who ratified the Constitution at state conventions.¹²³ This “original understanding originalism” soon ran into problems of its own, as Dean Larry Kramer observed:

The indeterminacy argument became stronger, because indeterminacy of intent was magnified by the expansion of the number of individuals whose intent was to be considered. It was not now a small group of fifty-five in Philadelphia whose intent was to be considered, but rather a vast body including every individual who voted on the Constitution. Originalists found themselves trying to recover the understanding of an exceedingly large group of people, a task made even more difficult because different issues were discussed from state to state. There were issues discussed in

¹¹⁹ Clinton, *supra* note 112, at 1214.

¹²⁰ Larry Kramer, *Two (More) Problems With Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 909 (2008).

¹²¹ Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The “New Originalism,” Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL'Y 329, 332 (2012).

¹²² Kramer, *supra* note 120, at 909. As Dean Larry Kramer so astutely noted, prioritizing the intent of the drafters of the Constitution instead of those who ratified it “is like giving authority to a speech writer for the President. It is like giving authoritative weight to the intent of the lobbyists who drafted a bill for Congress, as opposed to the Congress that actually adopted it.” *Id.*

¹²³ *Id.*

Pennsylvania that just did not come up in Virginia and vice versa.¹²⁴

This reinvention of originalism also encountered another obstacle in the ratification debates as the debates in the various states were concerned with whether the Constitution itself as a whole should be adopted, not the interpretation of individual parts of the document.¹²⁵ Thus, originalism was rebranded once more, this time as “public meaning originalism,” the form of originalist interpretation that is most prevalent today.¹²⁶ Public meaning originalism focuses on attempting to discern how the average, reasonable person would have understood the language of the Constitution when it was enacted.¹²⁷ This average person for the purposes of public meaning originalism is one “with the understanding of a hypothetical reasonable observer, skilled in contemporary grammar and syntax and fully informed about all pertinent history.”¹²⁸

This assumption of a reasonable individual in the time of adoption is not without its own problems, as Dean Kramer argues: “Any interpretation of original public meaning is a wholly fictitious construct—a construct made possible only because the person presenting it has not learned much about how the Founding generation actually thought matters should be handled.”¹²⁹

Originalism as an ideological doctrine is also scrutinized for both its close ties to political conservatism (given its intellectual origins) and continued support from Justices Scalia and Thomas, two notably conservative members of the Supreme Court.¹³⁰ However, as Professor Keith E. Whittington

¹²⁴ *Id.* at 9–10 (footnote omitted).

¹²⁵ Bunker, *supra* note 121, at 332.

¹²⁶ Kramer, *supra* note 120, at 910.

¹²⁷ Bunker, *supra* note 121, at 337–39.

¹²⁸ Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations For Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 8–9 (2011).

¹²⁹ Kramer, *supra* note 122, at 913.

¹³⁰ Silver & Kozlowski, *supra* note 114, at 388. *See also* Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 LAW & CONTEMP. PROB. 53, 54 (2004) (noting that, in contrast to more liberal justices such as Thurgood Marshall and William Brennan, “[t]oday. . .there are Justices, such as Antonin Scalia and Clarence Thomas, who are further to the right than Rehnquist and perhaps any other Justices in U.S. history.”).

observed, the issue is “not whether the public associates originalism with conservatives or conservative politics, but whether originalism is a rationalization for conservatism.”¹³¹ These lingering doubts as to the ideological ties between conservatism and originalism are only exacerbated when the Justices are inconsistent in their use of the interpretive tool, thereby raising the specter of ideologically-influenced decision making.¹³²

Justice Thomas specifically has been accused of using “originalism where it provides support for a politically conservative result” while otherwise ignoring the doctrine.¹³³ Yet supporters laud for the Justice for “his refusal to conform to [opponents’] notions of orthodoxy.”¹³⁴ These same supporters, scholars and jurists who admire Justice Thomas’ use of originalism and his willingness to spurn precedent¹³⁵ see the Justice as adhering to a personal philosophy that combines originalism and natural law, the idea that there is a moralistic source of law other than our codified statutes.¹³⁶ In essence, natural law is a “higher” or “unwritten” law that supersedes the written law.¹³⁷ As Professor Douglas W. Kmiec lays out the relevance of natural law, it begins with the Framers drafting a Constitution that “was to be informed by natural law embodied in the Declaration [of Independence].”¹³⁸ Those that ratified both the Constitution and the Fourteenth Amendment had “no

¹³¹ Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 29–30 (2011) (“[O]riginalism is a principled theory of constitutional interpretation and not merely a rationalization for conservatism. The association of conservative politics with originalism is not accidental, however, and conservatives are generally more likely than liberals to find originalism a normatively attractive approach to constitutional interpretation.”).

¹³² Fallon, *supra* note 128, at 16.

¹³³ Doug Kendall & Jim Ryan, *Originalist Sins: The Faux Originalism of Justice Clarence Thomas*, SLATE (Aug. 1, 2007, 5:16 PM), <http://www.slate.com/id/2171508>.

¹³⁴ John S. Baker, Jr., *A Tribute to Justice Clarence Thomas: Natural Law and Justice Thomas*, 12 REGENT U.L. REV. 471, 472 (1999).

¹³⁵ *Id.* at 509–10 (concluding “As between a decision that does not adhere to the Constitution and the Constitution itself, for Justice Thomas, it is clear which controls. That obviously does not mean voting to reverse every or even many decisions with which he may disagree. But for Justice Thomas, when judges go very far astray from the Constitution, their decisions should be overturned regardless of *stare decisis*. That follows from his view that judges should get the answer right.”).

¹³⁶ Douglas W. Kmiec, *Natural Law Originalism for the Twenty-First Century—A Principle of Judicial Restraint, Not Invention*, 40 SUFFOLK U. L. REV. 383, 385 (2007).

¹³⁷ Baker, *supra* note 134, at 472.

¹³⁸ Kmiec, *supra* note 136, at 399.

intention” of displacing this foundation of natural law, Professor Kmiec writes.¹³⁹ Thus, to Professor Kmiec, this gives rise to “natural law originalism,” a doctrine that guides the interpretation of the Constitution by “inform[ing] the meaning of the more grandly phrased constitutional provisions” by encouraging justices to not supply their own substantive meanings where they would contradict natural law principles.¹⁴⁰

“Justice Thomas is a traditional natural law thinker and a textualist,” argues Professor John S. Baker, citing insights the Justice gave into his philosophy before his confirmation.¹⁴¹ As to the scope of natural law’s influence on Justice Thomas, Professor Kmiec writes that while natural law thinking has been largely absent in Justice Thomas’ work on the Court, the silence on this moralistic position has not been complete; instead, as properly understood, Thomas has used natural law originalism as a way to rein in judicial excess.¹⁴² Furthermore, as Professor Baker states, Justice Thomas’ opinions “reflect an understanding of the role of the judge and the principle of *stare decisis* based on natural law, rather than positivistic principles.”¹⁴³ This natural law originalism, as practiced by Justice Thomas, “debunks legal realism—the notion that law is merely will or what the judges say it is—and in so doing, it helps elevate the ideal of the rule of law over the inferior substitute of the rule of men,” according to Professor Kmiec.¹⁴⁴

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 400–401. Professor Kmiec outlines seven principles of natural law originalism: “(1) that the human person has a created reality; (2) that while the understanding of human nature may be disputed, that nature exists independent of what we may believe about it; (3) that as a foundational premise for forming a government, we are created equal in our political status to govern, even as we obviously differ in physical or intellectual aspects; (4) that natural law, not the government, is the source of inalienable rights; (5) that natural law guides personal behavior and is interwoven with the common law and the statutes which often codify or “restate” common-law principles; (6) that natural law is often stated at too high a level of generality to supply specific answers, but as a background principle, it can be highly relevant to legislative policy deliberation and choice; and (7) that while the same level of generality precludes natural law from being the singular basis for adjudicative outcome, it informs the meaning of the more grandly phrased constitutional provisions and should incline the Court against supplying its own substantive meaning where doing so would contradict the above.”

¹⁴¹ Baker, *supra* note 134, at 502.

¹⁴² Kmiec, *supra* note 136, at 411.

¹⁴³ Baker, *supra* note 134, at 507.

¹⁴⁴ Kmiec, *supra* note 136, at 415.

Whatever may be the source for Justice Thomas' originalism, it has generally not been received well in the area of free expression by other members of the Court, according to Professors Derigan Silver and Dan V. Kozlowski.¹⁴⁵ After undertaking an empirical review of all free expression opinions using originalism from Justices Brennan, Scalia, and Thomas, Silver and Kozlowski concluded that while Justice Thomas has authored five majority opinions addressing free expression during his time on the bench, none of his originalist opinions garnered the support of a majority of his colleagues.¹⁴⁶ Furthermore, seventy percent of his originalist opinions were much like his opinion in *Morse* in that they were unable to garner support from other members of the Court¹⁴⁷—surely a sign of his “iconoclastic approach to constitutional issues,” as Dean Starr wrote in reference to Justice Thomas' concurring opinion in *Morse*.¹⁴⁸

Outside of the Court, scholars and other critics have found Justice Thomas' originalism opinions in the area of free expression to be inconsistent or applied in favor of conservative policy preferences.¹⁴⁹ In comparing Justice Thomas' opinions in *Morse* and *44 Liquormart v. Rhode Island*,¹⁵⁰ Professors Matthew D. Bunker and Clay Calvert found key distinctions—namely the breadth of originalism and historical investigation (*Morse* represented a “massive deployment of originalism,” while *44 Liquormart* used a “cursory, if not passing” appeal to the doctrine) and Justice Thomas' use of paternalism.¹⁵¹ Writing for the online magazine *Slate*, commentators Doug Kendall and Jim Ryan examined two cases from the 2007 term, *Morse* and *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁵² and Justice Thomas' concurring opinions in

¹⁴⁵ Silver & Kozlowski, *supra* note 114, at 418.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Starr, *supra* note 21, at 4.

¹⁴⁹ See generally Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U.L. REV. 321 (2010); Kendall & Ryan, *supra* note 133.

¹⁵⁰ 517 U.S. 484 (1996).

¹⁵¹ Bunker & Calvert, *supra* note 121, at 356–57 (concluding Justice Thomas was “anti-paternalism” in regard to the rights of adults to receive lawful information as to the price of alcoholic beverages and “pro-paternalism” where the rights of students to speak was concerned).

¹⁵² *Morse*, 551 U.S. 701 (2007).

both decisions.¹⁵³ Justice Thomas' opinion in *Morse* relies heavily on originalism, while his concurrence in *Parents Involved*, a case addressing voluntary school integration, is largely lacking in originalism.¹⁵⁴ In comparing the two opinions, Kendall and Ryan found the lack of originalism in *Parents Involved* to be striking:

It may be too much to expect any individual justice to be perfectly consistent from year to year and across a diverse array of cases. But here we have two public-school cases, both involving the rights of students, and both decided within days of each other, with Justice Thomas writing concurring opinions in each case, concurrences that no other justices joined. Don't you think that someone, somewhere, might have asked Thomas: "Um, so you ask what the Framers would have thought about speech in school but not what they would have thought about voluntary integration. Why not?"¹⁵⁵

Given its intellectual origins, ardent supporters and average conclusions, originalism has been—and will continue to be—a source of controversy on the Court. Justice Thomas, while not the only member of the Court to engage in the use of the doctrine, has certainly been a prominent user of originalism. *Morse*, in many ways, represents Justice Thomas' quintessential originalist opinion—one, lone Justice using sources to arrive at a position outside of mainstream jurisprudence.

C. *Originalism on display: Justice Thomas and Morse*

After stating that "the standard set forth in *Tinker v. Des Moines Independent Community School Dist.* is without basis in the Constitution" in his introduction,¹⁵⁶ Justice Thomas organized his concurring opinion into three sections: in Part I, he addressed his view of the history of U.S. public education and what it means for students' free speech rights;¹⁵⁷ in Part II, he examined the Supreme Court's jurisprudence on student speech;¹⁵⁸ and in Part III, he restated his arguments in a

¹⁵³ Kendall & Ryan, *supra* note 133.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Morse*, 551 U.S. at 410 (Thomas, J. concurring).

¹⁵⁷ *Id.* at 410–16.

¹⁵⁸ *Id.* at 416–19.

conclusion.¹⁵⁹

In Part I, and throughout the opinion, Justice Thomas relied on a healthy measure of originalism, and he demonstrated this approach early in the opinion as he wrote, “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”¹⁶⁰ While Justice Thomas was not explicit, he was certainly invoking the “public meaning” version of originalism. Therefore, his entire opinion—and Part I specifically—should be understood as an endeavor to determine what the average person thought of the free speech rights of students at the time of (1) the ratification of the Constitution and Bill of Rights and (2) the adoption of the Fourteenth Amendment in 1868.¹⁶¹

In his introduction to Part I, Justice Thomas wrote, “if students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.”¹⁶² Justice Thomas then devoted his attention to showing how little the speech rights of students were respected in the earliest of public schools. He did this by pointing to the nature of education in the era before moving on to discuss the doctrine of *in loco parentis* and school discipline generally.¹⁶³

However, what Justice Thomas neglected to consider is that the nineteenth century was a time of change, including both modernization and liberalization, for the American system of public education.¹⁶⁴ While his conclusions as to the unenlightened state of schools could be accurate as to the earliest colonial schools, by the middle of the century—and definitely by the time the Fourteenth Amendment was adopted—reforms were taking hold across the country that would challenge the assumptions Justice Thomas made about

¹⁵⁹ *Id.* at 419–21.

¹⁶⁰ *Id.* at 410–11.

¹⁶¹ See generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (explaining argument that, to be applied to the states, the amendments contained in the Bill of Rights should be interpreted by examining their public meaning at the time the Fourteenth Amendment was adopted).

¹⁶² *Morse*, 551 U.S. at 411.

¹⁶³ *Id.* at 411–12.

¹⁶⁴ See *infra* notes 173–186 and accompanying text.

the history of public education.

Justice Thomas painted a dire portrait of student speech rights in the earliest American schools, as he argued

[d]uring the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand . . . Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled ‘a core of common values’ in students and taught them self-control.¹⁶⁵

Teachers, as Justice Thomas concluded, ruled with harsh discipline. Students were punished for behavior deviating from school norms of respect and proper etiquette.¹⁶⁶

For the colonial era and the earliest part of the nineteenth century, perhaps this portrait is appropriately bleak as schoolmasters and others in authority often took the position that “[t]he child’s original nature was considered to be evil,” according to education scholar Herbert Falk.¹⁶⁷ Thus children, as Falk wrote, were subject to instructional and disciplinary methods designed to curb this inherent evilness as “[r]epression and coercion were the methods of control used by both school and society. [Teachers’] failure to accomplish the ends sought was interpreted not as the inadequacy of the methods themselves, but rather as an indication of inadequate application.”¹⁶⁸

Thus, a perpetuating system was created in which the Colonial-era schools often sought to repress the natural tendencies of the child by applying more and more discipline usually in the form of “the rod”—meaning brutal corporal punishment.¹⁶⁹ These schools were distinctly unmodern, choosing to obtain conformity “through rituals of repression and even occasionally of terror.”¹⁷⁰

This would mesh well with Justice Thomas’ argument had the state of public schools remained static through both the

¹⁶⁵ 551 U.S. at 411.

¹⁶⁶ *Id.* at 412.

¹⁶⁷ Herbert Arnold Falk, CORPORAL PUNISHMENT 48 (1941).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Barbara Finkelstein, *Dollars and Dreams: Classrooms as Fictitious Message Systems*, 1790–1930, 31.

adoption of the Constitution and the ratification of the Fourteenth Amendment in 1868. Yet the middle of the nineteenth century was far from static as the era saw innovations in education as a broad coalition of civic leaders reconceptualized the function of the public school.¹⁷¹ According to education scholar Barbara Finkelstein, it was these civic leaders and visionaries such as Horace Mann and others that truly created what contemporary Americans would consider public schools.¹⁷² She concluded, “[a]fter 1850, students in rural schools no longer sat on benches around the periphery of the schoolroom Grades supplemented whips, report cards supplemented spelling exhibitions, and rewards of merit took the form of dollar bills with the symbols of banking and national progress”¹⁷³

As early as 1833, reform advocates were promoting the importance of play in a child’s development and the crucial role of at least the mother in a child’s intellectual growth—both ideas generally considered as modern innovations in education.¹⁷⁴ Antebellum reformers experimented with different methods of punishment, including what would now be labeled as “cognitive structuring” and “empathy arousing” techniques.¹⁷⁵ These same reformers also began the shift from teachers as harsh disciplinarians to warm, loving authority figures.¹⁷⁶

As attitudes toward children shifted, so too did public sentiment regarding corporal punishment. England recorded the first public campaign against child corporal punishment in

¹⁷¹ *Id.* at 472 (“[P]hysicians, public school advocates, middling and high-born women, labor leaders, and ministers . . . developed a conscious awareness of the influence of home, church, and neighborhood on the cultivation of moral and civic sensibility.”).

¹⁷² *Id.* at 472–73.

¹⁷³ *Id.* at 477.

¹⁷⁴ Caroline Winterer, *Avoiding a “Hothouse System of Education”: Nineteenth-Century Early Childhood Education from the Infant Schools to the Kindergartens*, 32 *HIST. OF EDUC. Q.* 289, 300 (1992).

¹⁷⁵ Myra C. Glenn, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT* 138 (1984) (defining “cognitive structuring” as “the use of reason and suasion to convince a child of his wrongdoing and point out to him the harmful consequences of his actions for others” and “empathy arousing” as techniques that “cultivate a child’s identification with and sympathy for authority figures.”).

¹⁷⁶ *See Id.*

1669.¹⁷⁷ Even before the Civil War, public opinion began to see punitive teachers as cruel and tyrannical.¹⁷⁸ The 1840s saw an appreciable decline in the use of corporal punishment as teachers began to shy away from its liberal use¹⁷⁹ and apply it only in cases of last resort.¹⁸⁰ In one example, after a regulation requiring Boston schools to record instances of corporal punishment was enacted, the practice declined by twenty-five percent, with some five hundred schools reporting zero whippings in 1846.¹⁸¹ After the Civil War, New Jersey became the first state to ban the practice in schools in 1867¹⁸²—the year before the Fourteenth Amendment was ratified.

While an originalist would perhaps cease the historical inquiry with 1868 and the ratification of the Fourteenth Amendment, it is important to consider the direction of public opinion at the time and how the national consensus was changing,¹⁸³ and that can only be seen by looking at strides made shortly after the Fourteenth Amendment's ratification. As the nation advanced from the post-war period to the mid-1880s, corporal punishment tended to become less frequent and was subject to more limitations such as documentation requirements, the elimination of corporal punishment for girls, and the implicit understanding that it was a last resort for punishing students.¹⁸⁴ By 1884, while the practice was still legal in most areas, its frequent use was "fully understood" as "a sure indication of weakness in a teacher" in at least one school system.¹⁸⁵ When the School Committee of Boston took up

¹⁷⁷ C.B. Freeman, *The Children's Petition of 1669 and Its Sequel*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 41, 41 (Irwin A. Hyman & James H. Wise eds., 1979).

¹⁷⁸ Glenn, *supra* note 175, at 33.

¹⁷⁹ *Id.* at 58.

¹⁸⁰ *Id.* at 128.

¹⁸¹ *Id.* at 136–37.

¹⁸² Donald R. Raichle, *The Abolition of Corporal Punishment in New Jersey Schools*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 62, 62 (Irwin A. Hyman & James H. Wise eds., 1979).

¹⁸³ See Gerald V. Bradley, *Essay on the Bill of Rights: The Bill of Rights and Originalism*, 1992 U. ILL. L. REV. 417, 420 (1992) (arguing against "snapshot" originalism because "[t]he Constitution is not a collage of photographs of early national America . . . [t]he Constitution is comprised of principles whose practical import changes with time—as America changes—even as the principles remain the same. Indeed, many constitutional principles, historically recovered, are intrinsically dynamic.").

¹⁸⁴ Falk, *supra* note 167, at 79.

¹⁸⁵ *Id.* at 95 (quoting Quincy, Mass., Annual School Report of the Town of

a measure to completely ban the practice in 1889, it was defeated in part because the use of corporal punishment had already appreciably declined.¹⁸⁶

Considering these facts, Justice Thomas' portrait of the authoritarian landscape of U.S. public education is but half-finished. His historical inquiry as to the schools of the colonial period might indeed be somewhat accurate, but it does not take into account the changing nature of U.S. education during the middle part of the nineteenth century—a key moment in time given the ratification of the Fourteenth Amendment.

With his investigation into the schoolroom complete, Justice Thomas next turned to a key argument: that through *in loco parentis*, courts upheld the rights of school administrators to “discipline students, to enforce rules, and to maintain order.”¹⁸⁷ The doctrine, as described by Blackstone's *Commentaries on the Laws of England*, is a delegation of authority from parent to schoolteacher that allows the instructor to employ “restraint and correction, as may be necessary to answer the purposes for which he is employed.”¹⁸⁸ However, Justice Thomas asserted the acceptance of the doctrine by nineteenth-century scholars and courts without sufficiently considering, once again, the evolution of the education system in the 1800s.¹⁸⁹

However, as many modern legal scholars argue, *in loco parentis* is an anachronism in a discussion of compulsory, state-run education.¹⁹⁰ As Professor Susan Stuart wrote, “[i]n *loco parentis* assumes a voluntary delegation of parental authority and was envisioned during a time of either home-

Quincy, Mass., 1883–84).

¹⁸⁶ *Id.* at 100.

¹⁸⁷ *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring) (footnote omitted).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 441).

¹⁹⁰ See, e.g., Susan Stuart, *In loco parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 971 (2010); Timothy Garrison, *From Parent to Protector: The History of Corporal Punishment in American Schools*, 16 J. CONTEMP. LEGAL ISSUES 115, 117 (2007). See also Richard Howell, Note and Comment, *After Morse v. Frederick: The United States Court of Appeals for the Fifth Circuit Takes Another Step Toward Abrogating the Tinker Standard for Student Speech By Permitting Restrictions on Speech Which Pose a “Special Danger” to the School Environment*, 60 BAYLOR L. REV. 1046, 1049 (2008) (“The common law doctrine of *in loco parentis* was found to be ‘in tension with contemporary reality.’”) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985)).

schooling tutors or small residential, private schools.”¹⁹¹ This foundation, then, places the doctrine more in line with the earlier colonial schools rather than the middle-to-late nineteenth-century schools and the schools of today.¹⁹² As scholar Donald R. Raichle stated, “[a]s the nineteenth century progressed . . . [l]ess and less was the American prepared to surrender *carte blanche* his parental rights to the school no matter what the common law might hold.”¹⁹³ An 1861 letter to the editor published in the (Thomasville, Ga.) Southern Enterprise summed up the position thusly: “Parents send their children to school to be taught, not whipped, buffeted or scolded. They do not pay a teacher for doing these things, and he who does them, commits a breach of the peace, transgresses the law, and subjects himself to prosecution and punishment.”¹⁹⁴

Furthermore, the nature of the doctrine as applied to student speech is troubling, as Professor Todd A. DeMitchell wrote, because “[p]arental rights are not subject to constitutional restraints, but public schools must respect the constitutional rights of students.”¹⁹⁵ Still, Justice Thomas used the term *in loco parentis* a total of fifteen times in his opinion, making it “clearly . . . the lynchpin for his analysis,” according to Professors Matthew D. Bunker and Clay Calvert.¹⁹⁶

For proof that *in loco parentis* was an accepted principle in courts of the period, Justice Thomas cited¹⁹⁷ *State v. Pendergrass*,¹⁹⁸ an 1837 North Carolina case that was the first to adopt the doctrine in the United States.¹⁹⁹ In *Pendergrass*, state authorities brought criminal charges against a teacher who whipped a child “with a switch, so as to cause marks upon

¹⁹¹ Stuart, *supra* note 190, at 971.

¹⁹² See *id.* See also Garrison, *supra* note 190, at 117 (noting that compulsory attendance laws made *in loco parentis* less applicable in the public school setting).

¹⁹³ Raichle, *supra* note 182, at 67.

¹⁹⁴ Letter to the editor, The Southern Enterprise, February 20, 1861.

¹⁹⁵ Todd A. DeMitchell, *The Duty to Protect: Blackstone’s Doctrine of In loco parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L. J. 17, 24.

¹⁹⁶ Bunker & Calvert, *supra* note 121, at 348.

¹⁹⁷ *Morse*, 551 U.S. 393, 413–14 (2007) (Thomas, J., concurring).

¹⁹⁸ *State v. Pendergrass*, 19 N.C. 365 (1837).

¹⁹⁹ Stuart, *supra* note 190, at 975.

her body, which disappeared in a few days.”²⁰⁰ The North Carolina Supreme Court adopted the doctrine of *in loco parentis* to remove criminal liability from the teacher, but it came with a proviso—namely, that courts would continue to review the teacher-child relationship even when discipline was involved.²⁰¹ “If [the teacher] use[s] his authority as a cover for malice, and under pretence [sic] of administering correction, gratify his own bad passions,” the court wrote, “the mask of the judge shall be taken off, and he will stand amenable to justice, as an individual not invested with judicial power.”²⁰²

As Justice Thomas argued that “courts struck down only punishments that were excessively harsh,”²⁰³ he failed to truly consider the extent to which courts of the period were willing to intercede in the disciplinary procedures of schools. When he wrote that *in loco parentis* “limited the ability of schools to set rules and control their classrooms in almost no way,” Justice Thomas swept aside the fact that there was judicial inquiry into how teachers and schools disciplined students.²⁰⁴ The Indiana Supreme Court took this responsibility seriously in 1853 when, despite ruling for a teacher in a corporal punishment case, it wrote

[h]ence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly.²⁰⁵

Coming twenty years after the ratification of the Fourteenth Amendment but still important to understanding the country’s evolving understanding of students, deference to administrators, and school punishment,²⁰⁶ the Indiana Supreme Court was called again to rule on an issue of school

²⁰⁰ 19 N.C. at 365.

²⁰¹ *Id.* at 366–67.

²⁰² *Id.* at 367.

²⁰³ 551 U.S. at 416 (Thomas, J., concurring).

²⁰⁴ *Id.*

²⁰⁵ *Cooper v. McJunkin*, 4 Ind. 290, 292 (1853).

²⁰⁶ *See Bradley*, *supra* note 183. Justice Thomas himself does not limit the case law inquiry to pre-1868 jurisprudence as he cites cases from 1885, 1888, 1890, and 1915 in addition to older, pre-Fourteenth Amendment decisions. *See* 551 U.S. at 414–16 (Thomas, J., concurring).

discipline in *Fertich v. Michener*.²⁰⁷ In *Fertich*, a young girl was late to school only to find her classroom door locked as the local district had a strict policy regarding tardy students.²⁰⁸ The girl decided to walk home, and while exposed to the bitter cold of eighteen degrees below zero, she developed frostbite on her feet.²⁰⁹ The girl's father sued, claiming that the school was responsible for the girl's injury.²¹⁰

The Indiana Supreme Court considered many factors in determining the appropriateness of a rule requiring that school doors be locked to prevent tardy students from entering.²¹¹ "In the enforcement of all rules for the government of a school," the court wrote, "due regard must be had to the health, comfort, age, and mental as well as physical condition of the pupils, and to the circumstances attending each particular emergency."²¹² The court then argued that no rule of general applicability should be enforced where that enforcement "will inflict actual and unnecessary suffering upon a pupil."²¹³ In stating that the practice of locking the doors on especially cold mornings was a violation of this principle, the court concluded, "[a] school regulation must, therefore, be not only reasonable in itself, but its enforcement must also be reasonable in the light of existing circumstances."²¹⁴

Thus, it is against this background of judicial inquiry that Justice Thomas' assertions as to the authority of school officials to rule as they saw fit must be judged. While he argued that courts of the eighteenth and nineteenth century readily accepted the principle of *in loco parentis*,²¹⁵ it is clear that simple acceptance of the principle did not end judicial examination of school rules and school discipline. Rather, courts were willing—albeit reluctantly—to intercede between students and school officials.

²⁰⁷ *Fertich v. Michener*, 11 N.E. 605, 606 (Ind. 1887).

²⁰⁸ *Id.* at 607–08.

²⁰⁹ *Id.* at 608.

²¹⁰ *Id.* at 606.

²¹¹ *Id.* at 609–11.

²¹² *Id.* at 610.

²¹³ *Fertich*, 11 N.E. at 610 (Ind. 1887).

²¹⁴ *Id.* at 610–11.

²¹⁵ It is worth noting that the first United States decision to adopt the doctrine, *State v. Pendergrass*, does not appear in the law until 1837—some sixty years after the founding of the Republic.

After generally introducing *in loco parentis*, Justice Thomas then cited a number of cases showing how the doctrine was applied to student speech, specifically arguing that the principle permitted the discipline of students for their expression.²¹⁶ The first case Justice Thomas pointed to on this matter was *Lander v. Seaver*.²¹⁷ *Lander* is an 1859 Vermont Supreme Court case in which a student was accused of insulting his teacher after school hours as he was passing the teacher's house.²¹⁸ The child was whipped at school the following day. The child's father later sued, arguing the teacher did not have the right to discipline the child for something occurring outside of the schoolhouse.²¹⁹ The Vermont Supreme Court, however, disagreed and found the boy's punishment to be just.²²⁰ Justice Thomas, quoted the following passage from the court's decision:

[L]anguage used to other scholars to stir up disorder and insubordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools.²²¹

The court's language meshes well with Justice Thomas' narrative, specifically that courts of the period applied *in loco parentis* rigidly and refused to interfere in the disciplinary relationship between administrators and students. However, a much more illuminating and prescient selection lies in the paragraphs above the quote picked by Justice Thomas:

But where the offense has a direct and immediate tendency to injure the school and bring the master's authority into

²¹⁶ *Morse v. Frederick*, 551 U.S. 393, 414–15 (2007) (Thomas, J., concurring).

²¹⁷ *Lander v. Seaver*, 32 Vt. 114 (1859).

²¹⁸ *Id.* at 120.

²¹⁹ *Id.* at 120, 125.

²²⁰ *Id.*

²²¹ *Morse*, 551 U.S. at 414–15 (Thomas, J., concurring) (quoting *Lander*, 32 Vt. at 121).

contempt, as in this case, when done in the presence of other scholars and of the master, and with a design to insult him, we think he has the right to punish the scholar for such acts if he comes again to school.

The misbehavior must not have merely a remote and indirect tendency to injure the school. All improper conduct or language may perhaps have, by influence and example, a remote tendency of that kind. But the tendency of the acts so done out of the teacher's supervision for which he may punish, must be direct and immediate in their bearing upon the welfare of the school, or the authority of the master and the respect due to him. Cases may readily be supposed which lie very near the line, and it will often be difficult to distinguish between the acts which have such an immediate and those which have such a remote tendency. Hence each case must be determined by its peculiar circumstances.²²²

The *Lander* court's "direct and immediate" language calls to mind the "material and substantial" disruption standard that would be set by the Supreme Court in *Tinker* more than one hundred years later.²²³ Furthermore, the *Lander* court cautions that not all potentially disruptive student conduct occurring off-campus would be punishable; rather, as the court argued, each case should be decided on its own merits²²⁴ as opposed to the reluctant stance of the judiciary characterized by Justice Thomas.²²⁵

The *Lander* court would go to limit the application of *in loco parentis*—or at least differentiate it from the authority granted to parents to discipline children:

From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on

²²² *Lander*, 32 Vt. at 120–21.

²²³ *Id.* at 120; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

²²⁴ *Lander*, 32 Vt. at 123–24.

²²⁵ See 551 U.S. at 414 (Thomas, J., concurring) ("Applying *in loco parentis*, the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.).

the alert, and acting rather by instinct than reasoning.

The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise.²²⁶

Justice Thomas authoritatively stated “*in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way”²²⁷ and “courts struck down only punishments that were excessively harsh; they almost never questioned the substantive restrictions on student conduct set by teachers and schools.”²²⁸ However, as demonstrated above, *in loco parentis* was not applied in such strong absolutes. Furthermore, *in loco parentis* was not a guiding principle from the earliest days of the country, like Justice Thomas argued.²²⁹ As the nineteenth century progressed, individuals were far less likely to accept the idea that public school teachers had the right to viciously punish pupils,²³⁰ a critical matter for Justice Thomas’ “public meaning” inquiry into the free speech rights of students.²³¹

In Parts II and III of his concurring opinion, Justice Thomas assailed the Court’s jurisprudence on student speech.²³² Justice Thomas first addressed *Tinker* with obvious distain and argued the case extended student speech rights “well beyond traditional bounds”²³³—before he explained how the Court carved out exceptions from *Fraser*²³⁴ and *Hazelwood*.²³⁵

Justice Thomas then concluded that Chief Justice Roberts’s majority opinion simply created another piecemeal *Tinker* exception, writing “we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of

²²⁶ *Id.* at 122–23.

²²⁷ 551 U.S. at 416 (Thomas, J., concurring).

²²⁸ *Id.*

²²⁹ See *Fertich v. Michener*, 11 N.E. 605, 610–11 (Ind. 1887).

²³⁰ See *supra* notes 203–213, 218–220, 231, and accompanying text.

²³¹ See Raichle *supra* note 182 and accompanying text.

²³² *Morse*, 551 U.S. at 416–22.

²³³ *Id.*

²³⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²³⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); 551 U.S. at 418 (Thomas, J., concurring).

when it operates and when it does not.”²³⁶ As he rather eloquently and accurately summed up the Court’s jurisprudence on student speech, “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not.”²³⁷

Part III illustrated the melding of Justice Thomas’ historical findings with his criticism on the current understanding of student speech rights.²³⁸ “In light of the history of American public education,” Justice Thomas asserted, “it cannot seriously be suggested that the First Amendment ‘freedom of speech’ encompasses a student’s right to speak in public schools.”²³⁹ He also reinforced his notion of the breadth of *in loco parentis* by pointing to an example where a court “refused to find an exception” to the doctrine even where a student concerned with a potential fire hazard criticized school administrators.²⁴⁰ Before concluding his opinion with yet another attack on *Tinker*, he succinctly stated both his core argument and the central, damning issue with his stance and methodology:

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. 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.²⁴¹

Justice Thomas agreed that the current system of U.S. education is inherently and fundamentally different from that found in the late 1700s and early 1800s—only after he devoted

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 419-22.

²³⁹ *Id.* at 419.

²⁴⁰ *Id.* See *Wooster v. Sunderland*, 27 Cal. App. 51, 52, 148 P. 959 (1915).

²⁴¹ *Id.* at 419-20 (citation omitted).

a considerable amount of attention trying to prove that the two are linked via originalism and the public meaning of the First Amendment as applied to schools and student speech.²⁴² By stating such an obvious truth and then so swiftly brushing it aside, Justice Thomas appeared lost in a dogmatic devotion to originalism in applying the rules of the one-room schoolhouse to today's complex school no matter the differences. Furthermore, if Justice Thomas' "treating children" quip²⁴³ referred to the period's practices of corporal punishment, he was simply being callous in glossing over the details of the cruelties dealt. Under various regimes of corporal punishment used in early American schools, children were flogged;²⁴⁴ beaten with canes, rulers, rods, fists and books;²⁴⁵ tied to posts;²⁴⁶ forced to wear burrs strung together;²⁴⁷ lashed for offenses as minor as failing to bow at the entrance of strangers;²⁴⁸ had chips of wood inserted perpendicularly to hold their jaws apart;²⁴⁹ and made to balance on stools for "an hour or so."²⁵⁰

Justice Thomas' opinion, to some extent, is based on the "greater-includes-the-lesser" argument,²⁵¹ meaning that if schools had unquestioned authority to inflict harsh corporal punishment upon students in the eighteenth and nineteenth centuries, then certainly they have the ability today to simply silence student speech. This certainly ignores the vastly different conditions in today's schools, but, more importantly, it in essence celebrates an almost unlimited capacity for cruelty toward the youngest and most vulnerable in society. Thus, at

²⁴² See *id.* at 410–19.

²⁴³ See *id.* at 419 ("To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today."). See also note 245 and accompanying text, *infra*.

²⁴⁴ Falk, *supra* note 167, at 48.

²⁴⁵ *Id.* at 54 ("Historians are in agreement that cruel punishments were the rule.").

²⁴⁶ *Id.* at 55.

²⁴⁷ John Manning, *Discipline in the Good Old Days*, in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* 50, 51 (Irwin A. Hyman & James H. Wise eds., 1979).

²⁴⁸ *Id.* at 52.

²⁴⁹ *Id.* at 59.

²⁵⁰ *Id.*

²⁵¹ See generally Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 B.Y.U.L. REV. 227 (1994) (explaining the argument and associated logical fallacies).

least from a moral perspective, the corporal punishment from this era should never be used to justify any legal argument—aside from perhaps a call for more judicial scrutiny of school administrators.

Justice Thomas only compounded the matter by suggesting those unhappy with school policies could simply work through the democratic process for better outcomes. Certainly in an ideal world, students and their parents would be able to work for change in local districts, but we live in something far short of that lofty goal. Student speech cases—be it war protest arm bands in *Tinker*,²⁵² stories in a high school newspaper that make administrators squirm in *Hazelwood*,²⁵³ or the banner in *Morse*²⁵⁴—arise when a speaker is voicing an unpopular and minority opinion, and thereby making traditional democratic advocacy routes unlikely avenues for success.

Offering that individuals can simply leave the jurisdiction is also an unhelpful and dubious suggestion. For most parents and students, private schooling represents a host of difficult expenses and leaving a school district is simply not an option—to say nothing of the complete implausibility of homeschooling for most. Logistics aside, asking an individual to move to the next town over should never be a serious answer to illegitimate treatment.²⁵⁵

By casting aside the actual concerns and realities of the modern educational system in favor of his own dogmatic application of rules favored in the colonial era and gone by the turn of the twentieth century, Justice Thomas showed himself to be out of step with the rest of the Court and many in the mainstream legal community. Yet his opinion, by virtue of it being given the weight of the highest court in the land, matters despite its flaws and outrageous conclusion.

Originalism as an ideal, as touted by Justice Thomas and others, is noble as it claims a faithfulness to the original text that modern interpretations dispense with. But originalism in practice is something entirely different and more subjective than any proponent would care to admit.

²⁵² *Tinker*, 393 U.S. at 504.

²⁵³ *Hazelwood Sch. Dist.*, 484 U.S. at 263.

²⁵⁴ *Morse*, 551 U.S. at 396.

²⁵⁵ See Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL'Y 29, 30 (2009).

IV. CONCLUSION

Even if Justice Thomas' opinion never commands a majority of the Court—and there are no signs it ever will—his views on student speech and how he came to shape those views still matter. Unless the Justice has some type of seismic conversion in the way of his thinking on the issue, school administrators will have at least one vote in their pocket when they come to the Supreme Court looking to silence a student speaker. Justices Alito and Kennedy, while they sided with *Morse* and despite whatever accidental damage they may have done to student speech rights, at least came to their decision honestly and thoughtfully. In future cases, they could be swayed on student speakers advocating a political message. Yet neither the message nor the merits would matter to Justice Thomas.

Justice Thomas' originalism in *Morse*, is a subjective inquiry wrapped in the gleam of objective historical analysis. Justice Thomas believes that the history of public education supports the notion that children were not expected to have a constitutional right of expression, and he found evidence to support that position in the historical record. The record also supports the notion that courts were not simply willing to let school administrators set whatever policies they wished without some level of inquiry and that teachers were not allowed to exert the full measure of parental authority over students. Justice Thomas ignores the changing nature of the nineteenth century public school system, eschewing facts in favor of a radical result that would overturn the settled law of *Tinker*.

There is no sin in believing student expression to be dangerous or disruptive. The sin arises in the intellectual dishonesty used to give that fear legitimacy.