THE MEANING OF "PUBLIC MEANING": AN ORIGINALIST DILEMMA EMBODIED BY *MAHANOY AREA SCHOOL DISTRICT*

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INTRODUCTION

In 2021, the Court heard the case *Mahanoy Area School District v. B. L.*, which forced the Court to answer the question of whether public schools could assert control over off-campus student speech.[1] While the majority ruled in the affirmative, Justices Thomas and Alito authored separate opinions that addressed the historical traditions of parental rights, teacher authority, and American public education. Though both Justices have donned the title of "originalists,"[2] their interpretations of the historical legal doctrine of parental delegation—*in loco parentis*—produced drastically

* I would like to thank the faculty members at Harvard Law who gave me wise feedback on this project. I would also like to thank the friends and family who provided useful insight and commentary throughout this process. Thank you to the amazing staff of JLPP for their tireless work.

1. *Mahanoy Area School District v. B. L. by and through Levy*, 141 S. Ct. 2038 (2021)

2. In an interview with The American Spectator, Justice Alito described how he incorporated originalist principles into his judicial approach. Although he always "'start[ed]'" with originalism, he believed that "'[s]ome of [the Constitution's] provisions are broadly worded. . . .We can look at what was understood to be reasonable at the time of the adoption of the [] Amendment. But when you have to apply that to things [] that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.'" Matthew Walther, *Sam Alito: A Civil Man*, THE AMERICAN SPECTATOR (April 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man; *see also* Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L.

different conceptualizations of school authority.[3] The approaches of Justices Thomas and Alito in *Mahanoy* reveal the inability of the originalist school of thought to cohesively define "original public meaning." This failure undermines the legitimacy of originalism as an interpretative tool: if jurists must use normative judgements to determine the level of generality[4] with which to define "public meaning," then can originalism really claim to provide interpretive certainty?

The two theories of public school speech regulation embraced by Justices Thomas and Alito in *Mahanoy* highlight a contextual difficulty in originalist interpretation of the historical record. Justice Alito envisions a limited version of the historical doctrine of *in loco parentis* that highlights the incompatibility between voluntary parental delegation of power and the compulsory education system.[5] Conversely, Justice Thomas relies on a limited historical record and

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REV. 507, 513 (2019) ("This rejection of the theoretical in favor of the practical is at the center of Alito's jurisprudence."). Justice Thomas employs originalist jurisprudence in many of his opinions, and some scholars have described him as a "leading originalist" Justice. *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE LAW SCHOOL NEWS (November 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74.

3. This paper will not address *parens patriae*, the Latin doctrine that describes how the government has the authority to protect any citizens who cannot protect themselves. This doctrine is distinct from *in loco parentis* and, according to some scholars, clashes with the concept of delegated authority: "While *in loco parentis* describes the relationship of an individual who has the care and custody of children in the place of the children's parents, the parental role ascribed to *parens patriae* is undertaken by a government to care for those who cannot care for themselves, such as children and the infirm. . . . This situation reveals the inherent clash between the notion that the state can be *in loco parentis* to schoolchildren yet still act as *parens patriae*." Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need Of Change*, 78 U. CIN. L. REV. 969, 972 (2010).

4. Randy E. Barnett, *William Howard Taft Lecture: Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 11 (2006).

5. In 1852, Massachusetts became the first state to pass compulsory education statutes. By 1920, all states adopted some form of legislation requiring children under the age of 14 to attend school. Hayley Glatter, *Throwbacy Thursday: Massachusetts Passes the Nation's First Compulsory Education Law*, BOSTON MAGAZINE (May 17, 2018, 7:30 A.M.), https://www.bostonmagazine.com/education/2018/05/17/tbt-compulsory-education-massachusetts [https://perma.cc/4XVK-C3JM].

produces a stricter interpretation that gives public schools broad authority to punish off-campus speech. [6]

The "types" of originalist interpretations exercised by judges vary, and the opinions of Justices Thomas and Alito in *Mahanoy* showcase these variations. Ultimately, these two opinions highlight a weakness in originalism: the lack of governing principle as to which historical record to adopt and which historical "public meaning" to take into account. Originalism, a school of legal interpretation that prides itself on its objectivity, leaves a critical element ambiguous: failing to define the meaning of "public meaning".

This paper first presents an overview of *in loco parentis*. It begins with the articulation of the doctrine in Blackstone's *Commentaries* and traces the appearance of the doctrine through early American jurisprudence. This history serves as a backdrop for a discussion of the doctrine in modern free speech cases, culminating in an analysis of how Justices Thomas and Alito employed the historical record in their "originalist" defenses of opposite conclusions. The analysis presents a modern example of how two great legal minds, each performing a thorough examination of the historical record and the original meaning of a historical doctrine, reach opposite results. The final section of this paper describes how these disparate results connect to flaws that permeate originalism and expose fractures within the originalist school of thought.

6. Justice Thomas is routinely characterized as a "strong," or "strict" originalist. "Of all the justices on the Court, Thomas is unquestionably the most willing to . . . call on his colleagues to join him in scraping away precedent and getting back to bare wood—to the original general meaning of the Constitution." RALPH A. ROSSUM, *Understanding Clarence Thomas*, 12 (2019) ("As with too many layers of paint on a delicately crafted piece of furniture, precedent based on precedent—focusing on what the Court said the Constitution means in past cases as opposed to what the Constitution actually means—hides the constitutional nuance and detail [Thomas] wants to restore.").

I. HISTORY OF IN LOCO PARENTIS IN ENGLISH AND AMERICAN JURISPRUDENCE

A. English Doctrine

The doctrine of *in loco parentis* originates in William Blackstone's *Commentaries on the Laws of England*, published in 1765.[7] In Book One, Chapter 16 (titled "Of Parent and Child"), Blackstone wrote that:

> A 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.[8]

In Blackstone's conceptualization of the parent-child relationship, the father governed his offspring. Although the English law governing this relationship came from the Roman law of father and child, the English law "softened" that of their Roman predecessors; the father no longer maintained the power of life and death over his child, but he still enjoyed enough power to enforce "order and obedience" and punish his child in a "reasonable manner . . . for the benefit of his education."[9] Blackstone further described how the father could voluntarily delegate a portion of his authority to the "tutor or schoolmaster of his child."[10] This delegated authority allowed the tutor to discipline and govern the child as needed for the "purpose[] for which [the tutor was] employed."[11] But how much power did the parent delegate, and how did discipline by the tutor interrelate with discipline by the parent?

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7. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453.
8. *Id*.
9. *Id*. *452.
10. *Id*. *453.
11. *Id*.

In the 1850s, about one hundred years after Blackstone published his *Commentaries*, the issue of *in loco parentis* emerged in the context of public school authority in England.[12] Some schoolmasters interpreted the gambit of their authority under the historical doctrine to *exceed* that of the parent; they saw their role as "not so much *in loco parentis* as an authority over and above, and distinct from the parents."[13] The power of teachers in the English public school system "might actually encroach upon that of the parents."[14] But this interpretation did not go unquestioned, and the interpretations of these English schoolmasters faced the criticism that they improperly invaded the parental sphere.[15]

Despite criticism, the doctrine of *in loco parentis* carved a space in the cultural identity of English teachers in the eighteenth and nineteenth centuries. The teachers believed that "*in loco parentis* went beyond a mere delegation of rights and responsibilities connected with children" and was "recognised as part of their professional identity, connected with their self-perception as a group concerned with the welfare of children, and instrumentalised as a strategy for retaining effective disciplinary powers."[16] To English and Welsh teachers, the classroom was a space requiring firm, yet fair, discipline; it was an "idealised statement of the circumstances

12. Rob Boddice, *In loco parentis? Public-school authority, cricket and manly character*, 1855–62, 21 GENDER AND EDUCATION 159, 164-65 (2009). The doctrine also applied to the power of universities and institutions of higher education to punish their students: "the parental authority schools exercised under the *in loco parentis* doctrine included the authority to mold the moral character of the student." W. Burlette Carter, *Responding to the Perversion of* In Loco Parentis*: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 857 (2002) (emphasis added). Carter cited a specific case from the early 1910s, and wrote that "[t]he court noted that the power extended beyond the school grounds 'to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to or from school, or after he has returned home.'" *Id.* at 858.

13. Boddice, *supra* note 12, at 166 (emphasis added).

14. *Id*.

15. *Id*.

16. Andrew Burchell, In Loco Parentis*, Corporal Punishment and the Moral Economy of Discipline in English Schools, 1945–1986*, 15 CULTURAL AND SOCIAL HISTORY 551, 564 (2018) (emphasis added).

which ought to subsist between the two halves of the classroom dynamic [between the student and the teacher]."[17] Although *in loco parentis* involved language of delegation in Blackstone's original description (1765), by the nineteenth century, educators believed it "existed independently" of parental rights, and "parents could not refuse to delegate their authority."[18] *In loco parentis*, to some, did not rely on a parent's expectations of a teacher's role in his or her child's life.

This brief account of the English tradition of *in loco parentis* in public schools draws two themes into focus: the contentious power of the schoolmaster and the role of parental delegation. These two themes appeared in early American jurisprudence as courts in the United States faced similar questions of school power and parental authority, themes that are resurrected in the opinions of Justices Thomas and Alito in *Mahanoy*.

B. State v. Pendergrass (N.C. 1837)[19]

The first case that named *in loco parentis* as a doctrine applicable to the American education scheme[20] was *State v. Pendergrass*, wherein a schoolteacher was indicted for assault and battery of one of her students, a young girl.[21] At the beginning of the opinion, the Supreme Court of North Carolina conceded that it was "not easy to

17. *Id.* at 557.

18. *Id.* at 555.

19. Neither the majority, Justice Alito, nor Justice Thomas mention this case in their opinions in *Mahanoy*.

20. North Carolina did not institute compulsory education until around 1913. NORTH CAROLINA STATE DEPARTMENT OF PUBLIC INSTRUCTION, THE HISTORY OF EDUCATION IN NORTH CAROLINA 12 (1993) ("In 1913, the first Compulsory Attendance Act was passed which required all children between the ages of 8 and 12 to attend school at least four months per year."). *Pendergrass* was decided against a non-compulsory backdrop.

21. 19 N.C. 365 (1837). A description of the facts follows: "[T]he defendant kept a school for small children . . . . [A]fter mild treatment towards a little girl, of six or seven years of age, had failed, the defendant whipped her with a switch, so as to cause marks upon her body, which disappeared in a few days. Two marks were also proved to have existed, one on the arm, and another on the neck, which were apparently made with a larger instrument, but which also disappeared in a few days." *Pendergrass*, 19 N.C. at 365.

state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils."[22] But the court stated that the power of the school teacher was "analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority."[23] The court elaborated that the teacher stepped into the shoes of the parent when the parent was not present—that is, during the school day—and the teacher exercised "delegated duties" of "preserving discipline, and commanding respect."[24] The teacher was the master, and "[w]ithin the sphere of his authority, the master is the judge [of] when correction is required, and of the degree of correction necessary . . . ."[25] The North Carolina courts believed teachers could determine how best to punish a student and could carry the punishment out to the extent they deemed necessary—as long as they had no malicious intent.

This "wickedness of purpose"[26] was the only real restraint the court referenced in its description of teacher authority. A school teacher could abuse the delegated power or act in an inappropriate manner by acting in a severe and improper way. For example, if the teacher "endanger[ed] life, limbs or health, or . . . disfigure[d] the child, or cause[d] any other permanent injury," his actions "may be pronounced . . . immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized."[27] While permanent, serious injury formed the boundary of a teacher's power, the court stated that a teacher's less excessive harms that did not cause serious injury (described as "indiscretions") were not worthy of legal correction and would "find their check . . . in parental affection, and in public opinion . . . ."[28] If not

22. *Id.*
23. *Id.*
24. *Id.* at 366, 368.
25. *Id.* at 366.
26. *Id.*
27. *Id.*
28. *Id.* at 368.

limited by the guardrails of public opinion, then the teacher's discipline and occasional excessive mistake was to "be tolerated as a part of those imperfections and inconveniences, which no human laws can wholly remove or redress."[29] The courts believed public opinion, not the law, provided the best remedy for the over-zealous punishment of children.

Despite its nod to parental affection and the restraining hand of public opinion, the court asserted an almost unlimited degree of teacher authority in the schoolroom, an authority that seemed to exist because of the initial parental delegation. By choosing to send his or her children to school, the parent placed the child under the substitute control of the teacher. The teacher had the power to act in almost any manner to maintain discipline and order in the classroom. Therefore, any transgression could be punished at the broad discretion of the schoolmaster. The risk of abuses of this power, such as malicious beatings or unfair judgment, were simply "imperfections" in an otherwise valid system of educational authority. Teachers were the parents of the classroom and were imbued with the analogous right to punish and discipline how they saw fit.[30] As long as the teacher did not permanently injure the child, he could, much like a parent, choose when, how, and to what extent he wanted to punish a child in his classroom.

29. *Id.*

30. Neither the majority, Justice Alito, nor Justice Thomas mention this case in their opinions in *Mahanoy*.

C. Lander v. Seaver (Vt. 1859)[31]

Like the *Pendergrass* court, the court in *Lander v. Seaver* granted teachers broad authority to punish children, although the court did limit the power to punish to the school yard itself.[32] About twenty years after *Pendergrass*, the Vermont Supreme Court answered the question whether a schoolmaster has "the right to punish his pupil for acts of misbehavior committed after the school has been dismissed, and the pupil has returned home . . . ."[33] The case concerned a beating a student received from his teacher the day after he verbally insulted the teacher, outside of school, in front of his peers.[34] The child's parents sued the teacher after he berated their son and struck him with a switch.[35] The court decided that "where the offence has a direct and immediate tendency to injure the school and bring the master's authority into contempt," the schoolmaster had the "right to punish the [student] for such acts if he comes again to school."[36] Even though the offense did not occur on school grounds, the teacher could discipline a student if his or her action's threatened the teacher's authority.

Unlike in *Pendergrass*, the *Lander* court addressed the specific issue of actions taken by a student outside of school hours and off school property (that is, not in the schoolhouse or on school grounds).[37] The court suggested that parental control and schoolmaster control work on a spectrum or sliding scale. When a student

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31. Vermont did not institute compulsory education until around 1870. GEORGE G. BUSH, HISTORY OF EDUCATION IN VERMONT 37 (1900) ("By an act approved November 23, 1870, attendance at school was made compulsory upon all children between the ages of 8 and 14 years."). *Lander v. Seaver* was decided against a non-compulsory backdrop.

32. *Lander v. Seaver*, 32 Vt. 114, 120 (1859).

33. *Id.*

34. *Id.* at 115.

35. *Id.* at 115.

36. *Id.* at 120.

37. *Lander* provides an important point of overlap with modern student speech cases that *Pendergrass* did not address: forms of expression. The court highlights the negative

was at school, the teacher's authority found its maximum and parental authority waned, while the opposite was true when the student returned home. At home, "the parental authority is resumed and the control of the teacher ceases, and then for all ordinary acts of misbehavior the parent alone has the power to punish."[38] The crucial exception, however, came when the student's actions off school grounds targeted the school or the teacher and occurred within the hearing of other students, having the "direct and immediate tendency" to "lessen [the schoolmaster's] hold upon [the students] and his control over the school."[39] The court clarified this concept by writing that the insult to the teacher must be done "with a design to insult him."[40] The intent of the student and the *impact* of the student's speech (that is, whether or not the speech undermined the teacher's authority) formed a significant part of the calculus for determining if a teacher could punish a student's off-campus actions.

The *Lander* court, like the court in *Pendergrass*, distinguished the scope of parental authority from that of schoolmaster authority. While the parent had the natural restraint of tenderness and "intimacy" with his child, the schoolmaster had "no such natural restraint."[41] As a result, a teacher could not "safely be trusted with all a parent's authority, for he did not act from the instinct of parental

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impact of the student's outside-of-school words, and elaborates that "writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school" are included in the realm of activity that impairs the "usefulness of the school, the welfare of the scholars and the authority of the master." *Lander*, 32 Vt. at 121.

38. *Id*. at 120.

39. *Id*. The court elaborates that the student's punishable, off-campus offense must bear "upon the welfare of the school, or the authority of the master and the respect due to him," "stir up disorder and insubordination," or "heap odium and disgrace upon the master . . . ." *Id.* at 121.

40. *Id.* at 120. This notion of student intent rears its head in twentieth and twenty-first century cases.

41. *Id.* at 122

affection."[42] Although the court's idea of restraint for the schoolmaster was "judgment and wise discretion,"[43] a very permissive standard, the court saw a fundamental difference between parental and teacher authority. The court asserted that Blackstone's *Commentaries* supported the point of a restrained delegation of authority. Within 100 years of the *Commentaries*' publication, American judges[44] interpreted *in loco parentis* to mean a limited, though still great, delegation of parental authority to the schoolmaster, bounded by judgment and professional wisdom. In this respect, the interpretation espoused by early American judges deviated from the British tradition of *in loco parentis.* From the start, judges did not see *in loco parentis* as a justification for school teachers acting *exactly* like parents. Teachers had to exercise restraint in their exertion of delegated authority, and a schoolmaster was not *per se* the legal or moral equivalent of a parent.

D. Deskins v. Gose (Mo. 1885)[45]

Like in *Lander v. Seaver*, *Deskins v. Gose* involved the punishment of a student by his teacher for foul language used by the student on his way home from school. The teacher**,** the next day,

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42. *Id.*

43. *Id.* The court meant "restraint" in the context of determining teacher liability for corporal punishment of a student. The court quoted contemporary sources that stated "if the punishment is immoderate, so that the child sustains a material injury, the master is liable in damages." *Id.* at 123. The court also cited a contemporary Massachusetts case where the "defendant asked the Judge to instruct the jury that the schoolmaster is liable only when he acts *malo animo*, from vindictive feelings, or under the violent impulses of passion or malevolence, and that he is not liable for errors of opinion or mistakes of judgment, provided he is governed by an honest purpose of heart, to promote by the discipline employed, the highest welfare of the school and the best interest of the scholar." *Id*.

44. It appears that the American tradition of the doctrine, under this interpretation, deviated from that of the British (described earlier in the paper). However, this deviation represents a possible point of further research, and it could be of import to note if the British system experienced similar interpretations of the doctrine later in the nation's history.

45. *Deskins v. Gose* occurred against a backdrop of compulsory education and a growing public school system. 85 Mo. 485 (1885).

whipped the child with a switch, and the child's parents sued.[46] The court held that the "rule of the teacher against profane swearing and fighting by pupils, either at school or on their way home, was reasonable and proper."[47] Since the teacher stood *in loco parentis* "[w]hile pupils [were] in his charge," he possessed "the power and authority . . . to inflict corporal punishment upon the refractory."[48] The *Deskins* court recognized the almost unlimited power of the teacher over the student[49] but, as in *Lander v. Seaver*, acknowledged that the teacher's exertion of the power was only reasonable "in proper cases."[50]

Notably, the court's additional descriptions of student behavior point to an important understanding of *in loco parentis* in the nineteenth century. When issuing their holding, the court wrote that, in a previous case:

> this court went to the extent of saying that when the pupil of a *public school* is released and sent back to his home, *neither the teacher nor directors had any authority to follow him to his home and govern his conduct while under the parental eye.* This court also held . . . [that if] a pupil had played truant . . . and was expelled . . . the rule was a reasonable one. Truancy is an act committed out of the school room, but being subversive of the good order and discipline of the school, may subject, as it did the scholar in this case, to suspension or expulsion. If the *effect of acts done out of the school room while the pupils are returning to their homes*, and *before parental control is resumed*, *reach within the school* room, and are *detrimental to good order* and the best interests of the school, no

46. *Id.* at 486–87.

47. *Id.* at 485.

48. *Id.*

49. The New Hampshire Supreme Court relied on a similar assumption in *Heritage v. Dodge*, 9 A. 722 (N.H. 1887), heard two years after *Deskins*. The court quoted Blackstone's *Commentaries* and wrote that the "the law clothes the teacher, as it does the parent, in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment." *Heritage*, 9 A. at 723. Because the school teacher showed reasonable judgment in doling out corporal punishment, he was not held personally liable. *Id*.

50. *Deskins*, 85 Mo. At 485.

> good reason is perceived why such acts may not be forbidden, and *punishment inflicted on those who commit them*.[51]

In other words, in *Deskins,* the Missouri Supreme Court articulated an overall theory of school authority over conduct committed outside the classroom that allowed the teacher to punish conduct at school and between school and home. The student's conduct *en route* home, however, needed to impact the classroom in a disruptive manner.[52] Once the child reached home, he fell under the exclusive control of his parents.

Deskins presents a different conclusion than that reached by the Vermont Supreme Court in *Lander v. Seaver*, which held that a schoolmaster had the right to punish students for misbehavior after school and once the "pupil has returned home."[53] While both courts acknowledged a teacher's broad authority under *in loco parentis* to inflict corporal punishment on a student whose actions disrupted class, *Deskins* concluded that actions done *in the home* were not punishable by the school. Less than three decades separated the rulings of these two courts, but one barred teacher authority from reaching into the home and the other did not. This subtle yet critical difference suggests that *in loco parentis* may not have had a uniform interpretation throughout the United States. In the nineteenth century, perhaps there was no national consensus among the judiciary at all about whether *in loco parentis* gave teachers the authority to regulate and punish a student's entirely at-home conduct.

II. *IN LOCO PARENTIS* IN MODERN AMERICAN JURISPRUDENCE

Almost a century after *Deskins*, the Supreme Court heard a case about student punishment. However, this case did not involve the right of a teacher to beat a student, but rather concerned the

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51. *Id.* at 488 (emphasis added).

52. This standard is predictive of the standards the Court adopts in *Tinker, Morse*, and *Mahanoy*: to be punishable by a school, conduct not in the classroom must, at minimum, be disruptive of some sort of educational activity.

53. *Lander v. Seaver*, 32 Vt. 114, 120 (1859).

right of the teacher to punish a student for his or her conduct off-campus. These modern cases were decided against the uncertain backdrop of *Pendergrass*, *Seaver*, and *Deskins*, and the Supreme Court, much like the state courts discussed in the previous section, struggled with how to define the boundaries of teacher-parent authority.

A. Tinker v. Des Moines Independent Community School District (1969)

In one of the most famous free speech cases of the 1960s, the Supreme Court heard the case of three students who were suspended for wearing armbands to protest the United States' continued engagement in the Vietnam War.[54] The Court held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[55] If a school wants to regulate or punish student speech on campus, the conduct in question must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[56] Because the Tinker children were not causing an actual disruption by wearing their armbands (that is, they were only engaging in symbolic behavior that did not directly interfere with a teacher's control of the classroom), the school failed to meet the burden imposed by the Court's standard.[57] Justice Black, however, dissented from this view in a manner that seemed to foreshadow Justice Thomas's later opinions: Justice Black compared "parental and educational authority and their proper roles in the formation of 'good citizens,'" which sounded "eerily similar to the arguments given in support of the doctrine . . . ."[58] Although neither the major-

54. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 504 (1969).

55. *Id.* at 506.

56. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

57. *Tinker*, 393 U.S. at 509.

58. Tyler Stoehr, *Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought to Be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1703 (2011).

ity's opinion nor Justice Black's dissent explicitly named the doctrine *in loco parentis*, "the majority's heated denunciation of the idea that 'school officials possess absolute authority over their students' stands as the polar opposite to Justice Thomas's portrayal of *in loco parentis* . . . ."[59] Despite this apparent reticence to reference *in loco parentis*,[60] the "Tinker Test" formed the core of Supreme Court jurisprudence on public school and teacher regulation of free speech and served as the backdrop for the cases analyzed below.

B. Morse v. Frederick (2007)

Almost forty years after their ruling in *Tinker*, the Supreme Court heard a case that pushed the boundaries of the "Tinker Test." At an off-campus school event, a group of teenage boys unfurled a banner that stated "Bong Hits 4 Jesus," and, when asked to take the sign down, one student refused.[61] The principal suspended the student for ten days on the justification that the student violated a school policy that barred any endorsement of illegal drug use.[62] The student sued the principal for a violation of his First Amendment right to free speech, and the case came before the Supreme Court in 2007.[63]

The Court held that the principal did not violate the student's right to free speech on the grounds that public school students do

59. *Id.* at 1702 (emphasis added).

60. The Court was equally reticent to include *in loco parentis* in its opinion in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), and only mentions the doctrine once by name: "These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684 (emphasis added). The Court employs *in loco parentis* in its opinion in *Hazelwood School District v. Kuhlmeier*, 482 U.S. 912 (1987), where the Court asserted that "students' First Amendment rights are recognized, but overruled by . . . [the fact that] schools are responsible not just for educating the children in their case, but also for overseeing their development into citizens of a democratic society." Stoehr, *supra* note 58, at 1707.

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

62. *Id.* at 398.

63. *Id.* at 399.

not have the same right to expression as adults.[64] While *Tinker* suggested public school students possessed a right to express their views on political issues without school discipline, the Court distinguished *Morse* on the grounds that a "cryptic"[65] and "pro-drug"[66] message did not fall into the same category as peacefully wearing black armbands; in *Morse*, the banner disrupted the school's compelling interest in discouraging illegal drug use.[67] The fact that the banner was displayed off-campus was insignificant. It was school interests, not geography, that outlined the limits of the school's disciplinary authority.

1. Justice Thomas's Concurrence

Justice Thomas's concurrence provided an alternative justification, one that rested on the historical tradition of public education:

> In my view, the history of public education suggests that the First Amendment,[68] as originally understood, does not protect student speech in public schools . . . .[P]ublic education proliferated in the early [1800s] . . . .If students in public schools were originally understood as having free-speech rights, one would have

64. *Id.* at 404–06.

65. *Id.* at 401.

66. *Id.* at 402.

67. *Id.* at 407.

68. In this opinion, Justice Thomas engaged with the Constitution and the First Amendment and states that both remained silent on the matter of free speech for public school students. *Id.* at 418–19 (Thomas, J., concurring). Since the Court did not ground its reasoning in *Tinker* in direct Constitutional evidence of the right, the right must not exist for students. *See id.* at 410–21. Justice Thomas noted that *Tinker* relied on *Meyer v. Nebraska*, 262 U.S. 390 (1923), to indicate that the Constitutional protection of free speech extended to school students, but *Meyer* occurred in the private school context and relied on the much-criticized *Lochner* opinion. *Morse*, 551 U.S. at 420 n.8 (Thomas, J., concurring). Justice Thomas further stated that "[i]n the name of the First Amendment, *Tinker* . . . undermined the traditional authority of teachers to maintain order in public schools," and argued that the Court interfered with a historical tradition that rightly placed the determination of proper discipline in the hands of local school districts. *Id.* at 421. The Constitution's silence on student speech barred the Court from assigning the right to students; without Constitutional grounding, the Court needlessly trampled on a historical, local tradition.

> expected [nineteenth]-century public schools to have respected those rights and courts to have enforced them. They did not.[69]

Justice Thomas went on to name the legal doctrine of *in loco parentis* as granting schools the court-supported right "to discipline students, to enforce rules, and to maintain order."[70] While conceding that widespread public education did not exist when Blackstone first recorded this notion of schoolmaster authority,[71] Justice Thomas stated that cases like *Pendergrass* were clear examples of "state courts [applying] the *in loco parentis* principle to public schools" accompanied by judicial reluctance "to interfere in the routine business of school administration."[72] In Justice Thomas's view, *Pendergrass* and other similar cases in the mid-1800s supported his assertion that "[c]ourts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals."[73] *In loco parentis* and the historical tradition surrounding the doctrine placed "almost no"[74] limits on school authority over their students, and, at most, "limited the imposition of excessive physical punishment."[75] That is, *in loco parentis* gave schools broad authority to act as parents.

To Justice Thomas, the history of public schooling[76] in the United States, and the Court's practice of generating exceptions to its *Tinker* Test,[77] indicated the Court got it wrong: students in public schools

69. *Id.* at 410–11.

70. *Id.* at 413.

71. *Id.* at 411-12.

72. *Id.* at 413–14 (emphasis added).

73. *Id.* at 414.

74. *Id.* at 419.

75. *Id.* at 416.

76. Justice Thomas describes this history succinctly: "Early public schools gave total control to teachers, who expected obedience and respect from students." *Id.* at 419.

77. Justice Thomas also criticized the Court's holding in *Tinker* and stated that "the better approach" was "to dispense with Tinker altogether." *Id.* at 422. The Court's habit of creating exceptions to the rule established in *Tinker* moved the Court farther from its original decision.

did not have a First Amendment right to free speech. Justice Thomas pushed back on the majority's logic in three main ways:

> (1) Under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.[78]

Further, the arguments that compulsory education changed the delegation of parental authority under *in loco parentis* held little sway with Justice Thomas. To him, parents still made the decision to send their children to public school, and if they did not like the rules, they could change them through civic engagement and legislative action—or by moving.[79] Any action taken by the Court to limit public school authority took control away from these traditional methods of regulation and gave the power, unjustly, to the judiciary.[80]

2. Justice Alito's Concurrence

Justice Alito's concurrence challenged Justice Thomas's central assumption; he sharply rebuked the idea that public schools had almost unlimited authority over their students' speech.[81]. Justice Alito quickly disregarded the doctrine of *in loco parentis* and stated that "[w]hen public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents."[82] What Justice Thomas called a historical principle Justice Alito labeled "a dangerous fiction"[83]:

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78. *Id.* at 419 (emphasis added).

79. *Id.* at 420. *Accord* Stoehr *supra* note 58, at 1735–36 (arguing that compulsory education is not involuntary as long as parents have the options to homeschool their children, enroll their children in a private or charter school, or move).

80. *Id.* at 421.

81. *Morse*, 551 U.S. at 424 (Alito, J., concurring).

82. *Id.*

83. *Id.*

> 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*.[84]

Justice Alito embraced the reality of modern schooling: compulsory education laws leave parents with few to no alternatives besides sending their children to public school. It is foolish to try and apply a fiction—that parents have options about where to send their children for school—to support the application of *in loco parentis* today. Public school teachers are not "parental" but "governmental"; teachers are state actors working for state institutions. With this justification, Justice Alito asserted that any modern doctrine outlining the limitation of students' free speech in public school had to come from "special characteristic[s] of the school setting," not from a historical—and inapplicable—doctrine of parental delegation of authority.[85]

C. Mahanoy Area School District v. B. L. (2021)

This disagreement between Justices Thomas and Alito appeared again, and most saliently, in the recent case of *Mahanoy Area School District v. B. L.* In *Mahanoy*, the Supreme Court faced the question of whether a public school could punish a student's off-campus speech.[86] B. L., a disgruntled cheerleader, posted a "snap" on her private Snapchat "story" that contained profane language and expressed her disappointment at failing to make both the varsity softball and varsity cheerleading teams.[87] Several of her approximately

84. *Id.*
85. *Id.*
86. *Mahanoy*, 141 S. Ct. 2038, 2042-3 (2021).
87. *Id.* at 2043.

250 "friends" on the app saw the content, photographed the message, and showed it to the cheerleading coaches.[88] As a result, B. L. was suspended from participation on the junior-varsity cheerleading team.[89] B. L.'s parents sued the school.[90]

The Court held that while schools could regulate speech on campus and at school-controlled events, students still maintained the right to free speech off campus (and on-campus, to a lesser degree).[91] Justice Breyer wrote that the "special characteristics" that allowed schools to limit and punish disruptive student speech did not "always disappear when a school regulate[d] speech that [took] place off campus"[92]; in some limited circumstances, public schools could regulate off-campus speech.[93] Justice Breyer justified the Court's limitation of schools' off-campus speech regulation in three ways: (1) "a school, in relation to off-campus speech, will rarely stand *in loco parentis*," (2) a school would be able to regulate "all the speech a student utters during the full 24-hour day" if allowed to control off-campus speech, and (3) a school "has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[94]

For the first time in a majority opinion, the Court referenced *in loco parentis* by name. Justice Breyer discussed the historical doctrine but described it in a geographically-limited fashion: "The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[95] Justice Breyer elaborated that there was "no reason to believe

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2047.
92. *Id.* at 2045.
93. *Id.*
94. *Id.* at 2046.
95. *Id.*

B. L.'s parents had delegated to school officials their own control of B. L.'s behavior" at the off-campus convenience store where B. L. posted her profane "snap."[96]

3. Justice Alito's Concurrence

Justice Alito echoed Justice Breyer's opinion of *in loco parentis* in his concurrence. At the beginning of his opinion, Justice Alito wrote that "the doctrine of *in loco parentis* 'rarely' applies to off-premises speech."[97] In a close analysis of Blackstone's description of the doctrine, Justice Alito determined that *in loco parentis* only worked in the context of private education or tutelage; the doctrine primarily served as a "term in a private employment agreement between a father and those with whom he contracted for the provision of educational services for his child, and therefore the scope of the delegation that could be inferred depended on 'the purposes for which [the tutor or schoolmaster was] employed.'"[98] Justice Alito's interpretation of *in loco parentis* took into account the historical context of the *type* of education common in the time of Blackstone and early American jurisprudence: private schools and tutors voluntarily hired by parents, not compulsory education mainly carried out by large public schools. As a result, Justice Alito viewed Blackstone's description of the "delegation" of parental authority as voluntary and controlled by the parent. The tutor had authority when teaching, but the parent *retained* ultimate authority despite the temporary delegation. This model of education, however, no longer exists; "[t]oday, of course, the educational picture is quite different . . . . [It is] compulsory."[99] Parents do not enter into specific educational contracts with public schools, and the State's role in education has necessarily increased.

96. *Id.* at 2047.
97. *Id.* at 2049 (Alito, J., concurring).
98. *Id.* at 2051 (footnote omitted).
99. *Id.*

Unlike Justice Thomas's concurrence in *Morse*, Justice Alito's concurrence in *Mahanoy* undercut the application of *in loco parentis*, as applied in original jurisprudence, to modern American schools:

> If *in loco parentis* is transplanted from Blackstone's England to the [twenty-first] century United States, what it amounts to is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform. Because public school students attend school for only part of the day and continue to live at home, the degree of authority conferred is obviously less than that delegated to the head of a late-[eighteenth] century boarding school…[100]

Justice Alito remained firm in his analysis that the *scope* of the authority parents delegated to public schools today did not match the form of delegation envisioned by Blackstone. While parents delegated the power for schools to "carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree," they delegated nothing more; "authority," according to Blackstone, was what the parents *wanted* the educator to possess.[101] In the modern public school context, this relationship correlates weaker authority because students are actually with their parents for half of the day: the school is not housing them or raising them, rather educating them for part of the day.[102] Parents retain ultimate control and only delegate the authority necessary to educate their children and shuttle them to school-sponsored activities.[103]

Therefore, to Justice Alito, the Court needed to ask only one question: "whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question."[104] If B. L.'s

100. *Id.* at 2052.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 2054.

parents did not reasonably delegate the power to Mahanoy School District to regulate their daughter's speech at a gas station, then the school cannot punish her. Enrollment in the public school district was not a "complete transfer of parental authority over a student's speech," and B. L.'s parents, had the "primary authority and duty to raise, educate, and form the character of their [daughter]."[105] It is unreasonable to think that B. L.'s parents authorized the school to deprive her of her right to free speech under the First Amendment.

Ultimately, Justice Alito's concurrence presented a view that student free speech existed on a spectrum.[106] On one end, the school comfortably exerted parent-delegated authority during school hours on campus and during extracurricular activities. On the other end, the school lacked almost any delegated authority to regulate "student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations."[107] Public school regulation of student speech had no absolutes; school authority originated from the expectations and understandings of the students' parents. Therefore, if parents did not expect or want teachers disciplining their children for actions outside the classroom, then the teachers lacked the authority to do so.

4. Justice Thomas's Dissent

Justice Thomas's *Mahanoy* dissent argued the opposite of Justice Alito's concurrence. Justice Thomas stated that "150 years of history" support the suspension of B. L. and the parental authority of the public school.[108] At the highest level of generality, Justice Thomas agreed with the majority. He believed schools operate *in loco parentis* while the student was at school and that their authority

105. *Id.* at 2053.
106. *Id.* at 2054–55.
107. *Id.* at 2055.
108. *Id.* at 2059 (Thomas, J., dissenting).

diminished only slightly off-campus.[109] But he believed the majority omitted an "important detail" about the level of authority a school wielded when it operated as a substitute for the parents or *in loco parentis*.[110]

Justice Thomas's analysis of the history of *in loco parentis* led him to state that "schools historically could discipline students in circumstances like those presented [in *Mahanoy*]."[111] The majority, he asserted, neglected the historical record and did "not attempt to tether its approach to anything stable."[112] Justice Thomas cited *Lander v. Seaver* as one of the cases supporting his historically-based argument, and he opined that many "[c]ases and treatises from that era reveal that public schools retained substantial authority to discipline students."[113] The historical record provided clear evidence of expansive teacher authority when the teacher acted *in loco parentis*.

But Justice Thomas's most significant departure from the logic of the majority and Justice Alito's concurrence was his belief that schools could readily discipline off-campus speech: "although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment."[114] This "proximate cause" language differed from the stricter limitation on school authority that the majority outlined in *Tinker* and reiterated in *Mahanoy*; if a student's after-school conduct *risked* harm to the school environment, the teacher could punish the student. Justice Thomas focused on the historical rule that the *effect* of speech, not the *location* of the speaker, governed a school's ability to regulate the student's expression. The "Lander test" supported this point and served as one example in

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

the historical tradition of schools controlling speech that could harm the school environment. Justice Thomas stated that the "Lander test focuses on the *effect* of speech, not its location."[115] Because of this historical precedent, Justice Thomas believed the majority erred in determining the public school could not punish B. L. for offensive and profane language directed at the school.[116] Essentially, Justice Thomas's analysis of *in loco parentis* recognized the school's authority to discipline a wide range of off-campus misconduct, unlike previous Court rulings.

III. ANALYSIS OF ORIGINALISM AND IN LOCO PARENTIS IN MAHANOY

Both Justices Thomas and Alito consider themselves originalists, but they applied differing levels of analysis when considering the historical record; Justices Thomas and Alito considered the culture surrounding the original usage of *in loco parentis*, but beyond this baseline commonality, the two approaches were stark opposites. Justice Alito saw *in loco parentis* as verbiage describing the voluntary, contract-like conveyance of parental authority to educators for a limited purpose, but Justice Thomas saw the doctrine as an almost "blank check" for schools to regulate student speech that impacted the school environment.[117] Justice Alito reached a different conclusion because of his use of, in his words, a form of "practical"

115. *Id.* at 2062.

116. Thomas also claims that B. L.'s participation in an extracurricular activity makes the school's ability to control her speech even stronger. *Id.*

117. One of the reasons Justices Thomas and Alito reach different conclusions could be because of different interpretations of the schools as either organs of the state or as substitute parents. This paper will not focus on the specifics of this point because "the Court has vacillated between [the] two conceptions of administrative authority . . .[and] has yet to affirmatively choose one over the other." Stoehr, *supra* note 58, at 1720. Digging into the specifics of this issue in these terms gives less insight into Justices Thomas and Alito's analyses of the historical record and would try to resolve an issue that the Court itself has not resolved. This paper only touches on this state-parental distinction as evidence of the Justices' different interpretive frameworks; I will not attempt to resolve the issue by declaring a "correct" interpretation one way or the other.

originalism[118] that takes into account the underlying principle of a historical doctrine and applies the principle to modern parent-school relationships. Justice Thomas, on the other hand, looked strictly at the original public meaning of the phrase, as interpreted by early American jurists and used in cases from the nineteenth century, and applied that same meaning in a modern context.[119] Jus-

118. This description of Justice Alito's originalism is borrowed from the Yale Law Journal Forum. Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164 (2016), http://www.yalelawjournal.org/forum/the-distinctive-role-of-justice-samuel-alito [https://perma.cc/W7ZA-4CJS]. Neil Siegel writes: "Unlike Justices Scalia and Thomas, Justice Alito is not to any significant extent an originalist. Although he has described himself as a 'practical originalist' on the ground that he believes 'the Constitution means something and that that meaning doesn't change,' his conduct on the Court suggests that the emphasis should be placed on the qualifier 'practical.' The higher the level of generality of the originalist inquiry, the less actual difference there is between originalism and living constitutionalism. And Justice Alito is fairly described as an originalist only at a high level of abstraction . . . ." *Id.* (footnotes omitted). In an interview with The American Spectator, Justice Alito described how he incorporated originalist principles into his judicial approach. Although he always "'start[ed]'" with originalism, he believed that "[s]ome of [the Constitution's] provisions are broadly worded . . . .We can look at what was understood to be reasonable at the time of the adoption of the . . . Amendment. But when you have to apply that to things . . . that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.'" Matthew Walther, *Sam Alito: A Civil Man*, THE AMERICAN SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man/ [https://perma.cc/2GYJ-UY6E]. The author of the article reflected that "[Justice] Alito is not widely recognized as a legal theorist in his own right. He is, in the strictest sense, a practical jurist. Since he has never been a full-time academic . . . , nearly everything he has ever said about the law and its interpretation has been in the courtroom rather than the classroom." *Id.* Justice Alito's opinion in *Mahanoy* seems to follow, to a tee, his self-described formula of a "practical" originalism. He takes into account the original meaning of *in loco parentis* but interprets it as an underlying principle that evolves with parental expectations; the original public meaning is not sacrosanct.

119. At the Rosenkranz Originalism Conference, Justice Thomas stated that "'Words have meaning at the time they are written. When we read something that someone else has written, we give the words and phrases used by that person natural meaning in context…." *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE LAW SCHOOL NEWS , (Nov. 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-

tices Thomas and Alito both believed they stayed true to the historical meaning of *in loco parentis*, but their reasoning and final opinions differ. So, which form of originalism is "right," and which is "wrong"?

The stark difference between the two approaches highlights a failure in originalism – the lack of a governing principle about *which* historical record is adopted and *which* historical "public meanings" are taken into account. *In loco parentis*, like many doctrines, derives meaning from both the principles it represents as well as the results it generates when applied to real-life situations. Abstractly, *in loco parentis* represents the relationship between parents and schools and how the delegated authority is balanced between the two spheres of control in a child's life; twenty-first century parents want to discipline children for the non-criminal content they post on their social media accounts, so schools lack the authority to doll out punishment for a tasteless Twitter post. As applied in specific instances in the 1800s, *in loco parentis* was used to justify corporal punishment of students for actions outside the classroom. Just as a child that cursed at a teacher in a field could be beaten the next day in class, should a child that posts a profanity-laden message about a teacher on Facebook face suspension from the principal? *Which of these two different original public meanings applies?*

This section examines these differences in Justices Thomas and Alito's opinions to highlight a deep flaw in originalism: the theory itself provides no justification for *which* approach to take, meaning jurists must look to normative value judgements when deciding *which* public meaning to apply. Justice Alito's "public meaning" focuses on the principle of parental authority as it was understood in

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originalism-conference-features-justice-thomas-74#:~:text=For%20Justice%20Thomas%2C%20originalism%20is,the%20people%2C%E2%80%9D%20he%20said [https://perma.cc/UPK9-9777]. Thomas also declared that to some, the law seemed "'pliable, and perhaps much too pliable.'" *Id.* Thomas's view of original public meaning cuts against the idea that the law "ebb[s] and flow[s] based on preferences and prevailing popular opinions." *Id.* To Thomas, the public meaning of words at the time of the specific law's enactment gives the words their meaning. That meaning stays constant throughout time.

the nineteenth century and today, while Justice Thomas's "public meaning" focuses on how jurists at the time expected the doctrine to be applied; Justice Alito extracts an underlying principle from the historical record, while Justice Thomas investigates the historical applications of the doctrine. While Justice Alito's opinion fails to consider the specifics of the historical record, Justice Thomas hyper-analyzes a narrow subset of four cases[120] that disregards the understanding of the general public about the role of a parent in disciplining a child. The meaning of "public meaning" remains a glaring fault in originalism. A school of legal interpretation that prides itself on its objectivity leaves this critical element ambiguous.

What is the result of this failure in originalism? Two Justices, each analyzing the historical record, produce diametrically opposed answers to the same problem. This section provides an overview of popular critiques of originalism and connects those critiques with the issue of the different "public meanings" employed by Justices Thomas and Alito in *Mahanoy*.

A. Public Meaning Originalism and Criticisms

The appeal of originalism for many scholars and jurists is its objectivity: the original meaning of the text, not the personal beliefs of the interpreter, governs how the text should be read today. In response to critiques lodged against the first iteration of originalism—original intent originalism[121]—originalists "made a major

120. *Lander v. Seaver*, 32 Vt. 114 (Vt. 1859); *Deskins v. Gose*, 85 Mo. 485 (Mo. 1885); *Burdick v. Babcock*, 31 Iowa 562 (1871); *Dritt v. Snodgrass*, 66 Mo. 286 (1877); *King v. Jefferson City School Bd.*, 71 Mo. 628 (1880). However, Thomas only uses *Dritt* as an example of cases that distinguish *Lander*. Therefore, he only uses *Lander*, *Deskins*, *Burdick*, and *King* as examples from the historical record to support his argument of original public meaning and original public understanding. *See Mahanoy*, 141 S. Ct. at 2059.

121. Original intent originalism focused on the intent of the founders, and other constitutional drafters, at the time the Constitution was written; it did not necessarily take into account general understandings of the public at the time the Constitution was ratified.

conceptual move: they rearticulated originalism as original meaning originalism in place of original intent originalism." This approach "focused on the constitutional text's public meaning when it was adopted, which is grounded in original language conventions."[122] Public meaning originalism worries less about the *intent* of those who authored the Constitution and more about what they believed the words meant when they committed the phrases to paper. Therefore, originalists adhering to this popular approach typically look to "the Constitution's text and structure, contemporary dictionaries, contemporary usage in American public and private life—such as in newspapers, speeches, [] diaries,"[123] drafted legislation, and court cases.[124] These historical tools provide evidence of what the words meant when they were written; the historical record helps jurists divine the original public meaning. Originalism purports to stay true to the founders' intent and hold the branches of government accountable to the people: we must preserve the original words used to craft the Constitution because they formed the delicate balance of our governmental structure. The Constitution had, and has, a specific *meaning* that froze in time, and that meaning (meaning being singular) is the meaning the legal system should employ. Public meaning, therefore, sits at the heart of originalism and forms part of the justification for why originalism is the best interpretative approach.

However, many critics have poked holes in this logic. Despite its characterization as an empirical interpretive school, public meaning originalism requires judges to make normative decisions about

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122. Lee Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 UNIV. OF CAL. 1181, 1188 (2017).

123. *Id.* at 1194.

124. Phrased differently, "the publicly available context in which the Constitution's text was drafted and ratified provides additional information about the text's meaning, additional information that enhances its meaning. Contextual enrichment includes, among other things, the publicly available purposes for which the text was adopted, the text's immediate and long-term historical background, and the broader milieu in which the text was adopted." *Id.* at 1196.

whether to focus on original public meaning as embodied in abstract principles or on original public meaning as embodied in practical applications.[125] Ronald Dworkin first articulated one of these critiques, arguing that originalism was based on ambiguous "public meaning" that left many questions of interpretation unresolved.[126] Dworkin's theory implied that "detailed historical research [was] not necessary to establish founding intent" but that "abstract theorizing" could work in its place.[127] To Dworkin, the "Constitution represents the abstract intentions of the Founders, and those abstract intentions are more fundamental than any concrete intentions that they may have had."[128] Therefore, when an "originalist" encounters text, she must ask herself whether she is looking to the original meaning of the *application* the Framers sought to implement or to the original meaning of the *principles* the Framers sought to embody. In other words, she must choose between (1) meaning based on "expected application" and (2) meaning based on "semantic content."[129] Does the Eighth Amendment simply prohibit the use of punishments like draw and quarter (which were considered cruel by the eighteenth century public)? Or does the Eighth Amendment prohibit the use of punishments that would be considered "cruel," as the texts states, by the public at any point in time?[130] "On either the specific or the abstract version of originalism, the putative original meaning of the text has been fixed as of the time of enactment; the dilemma is precisely how to determine which version of meaning is in play."[131] The problem is not what the word "cruel" actually means, but which set of moral

125. These two phrases are borrowed from Adrian Vermeule's book, *Common Good Constitutionalism.* 95 (2022).

126. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 95 (2022).

127. Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 THE REVIEW OF POLITICS 197, 200 (2000).

128. *Id.* at 203.

129. Vermeule, *supra* note 126, at 95.

130. Barnett, *supra* note 4, at 11*. ("Does the text ban particular punishments of which they were aware, or does it ban all cruel and unusual punishments?").

131. Vermeule, *supra* note 126, at 96.

standards and expectations it carries with it. That question, Dworkin believes, originalism cannot answer on its own.

As an echo to Dworkin's critique, many scholars today point to the host of "originalist" varieties that are employed by jurists. "[S]elf-professed originalists may focus on framers' intent, ratifiers' intent, the dominant understanding of framers and ratifiers combined, or the public meaning of the text."[132] Public meaning may seem straightforward – it is the public's understanding of what the law meant at the time it was written. However, this interpretive tool assumes that the historical public was a monolith – the belief that there is a single public meaning[133] fails to take into account the diversity of opinion within the legal community, let alone general society.[134] "[O]riginalism's commitment to determinate meanings is in fundamental conflict with its quest for public meanings."[135] Did the public at the time of the Eighth Amendment's passage understand the law to apply only to the use of stockades? Or did the public believe the law targeted cruelty itself, not specific punishments? Some scholars claim that the search for public meaning is the

132. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 5 (2009).

133. James W. Fox, Jr. elaborates on this issue in his article, *Counterpublic Originalism and the Exclusionary Critique*: "The problem is that there will be multiple meanings and understandings lurking in what originalists would see as 'public' meaning. In that case the first step in this originalist two-step can be impossible to fix with precision. The heart of the argument will still be about public meaning in the first step, not about when or how to engage in 'construction.' While this concern is less of an issue with precise text (length of terms and minimum age for offices, for instance), for most clauses that actually need some level of interpretation or construction, the task is much less clear." 67 ALABAMA L. REV. 675, 710 (2016).

134. "The originalist model asserts that a particular meaning, intention, or understanding was both fixed *and* widely shared at the time of adoption. That is why current generations must follow this meaning, intention, or understanding today. For example, original meaning originalism considers legally binding the objective public meaning of the words at the time of adoption, which presumes a wide and durable consensus on meaning. But the honored authority's views or practices may not have been the consensus view or representative of what most other Founders, Framers, ratifiers, or citizens believed. On certain topics there may have been no consensus view. . . ." Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 683 (2013).

135. *See* Fox, *supra* note 133, at 689.

"search for a historical impossibility."[136] Originalism itself provides no answer to these questions, and jurists must independently decide which approach yields the best normative result.

The cases leading up to *Mahanoy* offer a prime example of the uncertainty inherent in "original public meaning." The *Lander v. Seaver* (1859) court reached a different conclusion about the meaning of *in loco parentis* than the *Deskins v. Gose* (1885) court. *Lander* held that a schoolmaster had the right to punish students for misbehavior after school and once the "pupil has returned home,"[137] while *Deskins* stated that actions done *in the home* were not punishable by the school. *In loco parentis* did not have a uniform interpretation throughout the United States; in the nineteenth century, there was no "public meaning" about how the doctrine should apply to the balance of parent-teacher authority. Today, a jurist could not simply reference the historical meaning of *in loco parentis* without first distinguishing the contrary opinions asserted by other courts at the time. The result is that the "public meaning" of *in loco parentis* does not seem to have *one* "meaning."

B. Justice Alito's Public Meaning as the Underlying Principle

While Justice Thomas describes the historical record as one of almost unlimited schoolmaster authority in his *Morse* concurrence, Justice Alito declares the use of the record surrounding *in loco parentis* as *baseless*.[138] Justice Alito argues for a limited application of *in*

136. *Id.* at 714.

137. *Lander*, 32 Vt. at 120.

138. "There is no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech. At the time of the adoption of the First Amendment, public education was virtually unknown, and the Amendment did not apply to the States….[R]esearch has found only one pre-1868 case involving a public school's regulation of a student's off-premises speech [*Lander v. Seaver*]…. This decision is of negligible value for present purposes. It does not appear that any claim was raised under the state constitutional provision protecting freedom

loco parentis because (1) the involuntary nature of compulsory education negates the doctrine's underlying principle, and (2) the traditional role of parents to raise their children is undermined by reading broad schoolmaster authority into the doctrine.[139]

1. Underlying Principle of Voluntary Delegation

Unlike Justice Thomas, Justice Alito argues that the rise of compulsory education in the late-nineteenth and early-twentieth centuries has gutted the doctrine of *in loco parentis*. Once based on the parent's voluntary delegation of power to an educator, the doctrine finds no place in a state-controlled public education system that re-

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of speech. And even if flinty Vermont parents at the time in question could be understood to have implicitly delegated to the teacher the authority to whip their son for his off-premises speech, the same inference is wholly unrealistic today." *Mahanoy*, 141 S. Ct. at 2053 n.14 (Alito, J., concurring).

139. Justice Alito makes a third point that presents the most straightforward argument against a "transplant" of *in loco parentis*: the fact that the doctrine was formulated and applied in jurisprudence before the incorporation of the Bill of Rights to the states, and *long* before the government saw the right to free speech extend to students. Justice Alito writes that "the original public meaning of the free-speech right protected by the First and Fourteenth Amendments" was in no way understood by Congress or the ratifying legislatures "as permitting a public school to punish a wide swath of off-premises student speech." *Id*. When Congress ratified the First Amendment, a widespread system of public education did not exist, and the Bill of Rights "did not apply to the States." *Id.* Justice Alito uses the historical context of incorporation under the Fourteenth Amendment to criticize the application of *in loco parentis* to modern schools. Critics of Justice Thomas's dissent echo Justice Alito's argument. One argues that the relevance of *in loco parentis* "to First Amendment claims that were neither considered nor litigated [at the time] seems tangential at best….[I]n an area of the law in which First Amendment claims were inconceivable in the nineteenth century for all the reasons discussed above, the status quo offers no normative guidance….[T]he cases Justice Thomas cites in which nineteenth-century courts upheld various school disciplinary practices, 'neither the First Amendment nor any state constitutional free speech argument was even raised, and many of them did not involve censorship at all.'" Matthew D. Bunker and Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U.L. REV. 321, 345 (2010) (internal citation omitted). Since the doctrine was not historically applied in the First Amendment context, it should not apply to questions of student free speech.

quires students to attend some form of school. If the *principle* underlying the doctrine was one of parental authority, then it cannot map on to today's compulsory school system. Justice Alito states that if the doctrine was "transplanted" into the modern American public school, it simply amounts to "a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[140] This statement marks a serious point of departure from Justice Thomas's vision of the doctrine.

As previously mentioned, Justice Alito hangs the relevance of *in loco parentis* on the notion of proportionality between parental expectations and school authority, an interpretation that he believes adheres to the historical public's understanding of what *in loco parentis* meant. In his view, a school can only do what a parent would expect the school to do as the educator of his or her child.[141] Justice Alito's approach seems to align with the idea that "the doctrine is now anachronistic in an era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function."[142] Again, we see the expectations of the "educational functions" come into play – a school only has the authority to punish or control a child in their role as an educational institution that houses children

140. *Mahanoy*, 141 S. Ct. at 2052 (Alito, J., concurring).

141. Tyler Stoehr's article digs deeper into the notion of voluntary delegation and comes to the opposite conclusion of Justice Alito; the actual acts taken under the delegation of parental authority do not have to align with the specifics of parental expectations, only the initial delegation of power. Stoehr writes that "while the grantor *expects* conformity [with her expectations], she does not *require* it as a precondition of the grant of that authority. Rather, the grantor probably realizes that the grantee [the school] will still be allowed to exercise independent judgment, particularly in high-pressure or emergency situations, and while the grantor *may* have acted differently in these situations, as long as the grantee did his or her best to conform to what he or she believed was proper under the circumstances, the grantor cannot reasonably claim that the grantee did not possess the authority to act." Stoehr, *supra* note 58, at 1734. In other words, even if the parent who delegated the authority to the school would not, on their own, "have suppressed the speech in question, it does not follow that the administrator could not do so *under the authority that was originally delegated*." *Id.*

142. Stuart, *supra* note 3, at 971.

for only a portion of the day. Unlike Justice Thomas, Justice Alito believes the historical trappings of private tutors and boarding schools are inapplicable, and only the bare bones of *in loco parentis* remain.

This emphasis on the voluntariness of parental delegation suggests that Justice Alito sees the doctrine as based on the principle of parental authority and autonomy – as the views of parents evolve through time, so will the scope of the delegated authority. Unlike Justice Thomas, he believes the limits of school power are not frozen in time but fluctuate with parental expectations. This perspective, Justice Alito believes, is what the "public" understood *in loco parentis* to mean in the 1800s: parents vesting schools or tutors with authority while retaining ultimate control over their children.

The "original public meaning" of *in loco parentis* was not the school's ability to punish the child for any infraction, rather it was a principle of parental delegation. Justice Alito makes the normative judgment that fidelity to the *principle* underneath *in loco parentis* honors the history of the doctrine in a way that focusing solely on the *application* of the doctrine does not. While the historical record indicates nineteenth-century parents condoned corporal punishment or religious education,[143] schools performed those functions *because they met parental expectations*; the public understood the role of the schools to be limited to that delegation. For example, the use of corporal punishment under *in loco parentis* does not justify corporal punishment today. Instead, schools should only do what parents authorize. Justice Alito chooses to focus on the original public's understanding of *in loco parentis* as a delegatory principle, not as authorization for specific punishments. Since parents expect schools to adhere to state-mandated responsibilities, their voluntary delegation shrinks and the sweeping vision of *in loco parentis*

143. As Matthew Bunker and Clay Calvert write, "[u]nquestionably, *in loco parentis* may have supported the disciplinary practices of nineteenth-century American schools and justified courts of the period in granting considerable discretion to teachers and administrators in matters of discipline." Bunker and Calvert, *supra* note 139, at 345.

fades. Justice Alito's practical originalism produces a limited conception of *in loco parentis* – the opposite of Justice Thomas. Essentially, Justice Alito adopts an *abstract* approach to *in loco parentis* that focuses on ideas of parental control, while Justice Thomas adopts an approach that analyzes *specific* instances of the doctrine in the historical record.

2. Underlying Principle of the Parental Sphere

Justice Alito's second line of argument against the expansive power of *in loco parentis* involves the doctrine's clash with the traditional role of the parent to raise their child, a clash that again traces to public understanding of the *principle* of parental delegation. Justice Alito writes that "[i]n our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children."[144] Morality, religion, and definitions of "right and wrong" all fall under the parent's control.[145] When a school regulates the conduct of a student when the child is no longer on campus or at a school-sponsored event, the school reaches into the parent's sphere of authority. A school's intrusion in these areas is "unwelcome" and occurs when "teachers promulgate norms perceived as not only requisite for classroom cohesion but…as universal norms fostering good community citizens and

144. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring).

145. The Court has recognized parental authority to determine the education of their children in *Meyer v. Nebraska*, where the Court held "[the language teacher's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment." 262 U.S. 390, 400 (1923). The Court also acknowledged that a parent had "the natural duty…to give his children education suitable to their station in life." *Id*. In other cases of the same era, the Court saw the parent's responsibility and right to control the moral and religious training of their children. *See Prince v. MA*, 321 U.S. 158, 165 (1944) ("The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here…"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) ("we think it entirely plain that the Act [requiring children to attend secular public school] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children").

character."[146] The farther the school reaches into the student's life, the closer it gets to colliding with the responsibilities, and rights, of the parent.

Justice Alito calls upon the strong historical tradition of parental "authority and duty" in his concurrence to justify the appropriateness of a limited interpretation of *in loco parentis*.[147] Even in the time of Blackstone, the parent's authority was ordained by natural law and seen as supreme. Therefore, the public would understand *in loco parentis* as not interfering with their parental rights. To this day, the "legal treatment of the parent-child relationship remains mired in ancient tradition…." If the Court wants to respect the rights of parents as understood by the nineteenth century public, Justice Alito suggests, *in loco parentis* cannot be excised from the past and thrown into the present; to do so would threaten the rights of parents to raise their children and disregard the public's original understanding of parental control as almost absolute. Unlike the public meaning employed by Justice Thomas, the public meaning Justice Alito chooses focuses on how the public *abstractly* understood the separation between the school and the parent. Justice Alito adopts an abstract original public meaning of *in loco parentis* and makes the normative value judgment that the *principle* of parental authority understood at the time the law was written best embodies the original meaning, not the specific *applications*.

C. Justice Thomas's Public Meaning as Application

Justice Thomas emphasizes the importance of American educational tradition and stresses the authority of the historical record. He starts his opinion by writing that the majority's overall points are correct – school authority waxes and wanes in relation to the student's geographic location (on- or off-campus). But Justice

146. Joan F. Goodman, *Should schools be in loco parentis? Cautionary thoughts*, 16 ETHICS AND EDUCATION 407, 412 (2021).

147. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring).

Thomas asserts that the majority fails to address what level of authority a school has when it operates *in loco parentis*.[148] He provides an in-depth review of the "150 years of history supporting the [school's authority]."[149] Unlike Justice Alito's concurrence, Justice Thomas sees the historical record as applicable as it stands: the original meaning of *in loco parentis* does not "evolve" as parental expectations change, but has a set meaning that originated at its articulation by Blackstone and remained constant in its application by nineteenth-century jurists. Justice Thomas adopts an original public meaning of *in loco parentis* that uses the specific *applications* of the doctrine as evidence of its meaning; he makes the normative value judgment that these *applications* embody the original meaning, not the abstract *principle* of parental authority.

1. Adherence to Historic Applications

Justice Thomas anchors his original meaning interpretation to early American jurisprudence and educational treatises published in the eighteenth and nineteenth centuries, specifically *Lander v. Seaver* and *Deskins v. Gose*.[150] He references his concurrence in *Morse* when describing the zenith of school authority—while the student was at school—and references *Lander v. Seaver* to support his assertion that "authority also extended to when students were traveling to or from school." Justice Thomas's version of originalism deferred to what ordinary citizens at the time of the passage of the 14th

148. One of Justice Thomas's critics acknowledges that Blackstone's articulation of *in loco parentis* undeniably gives schools and teachers broad authority: "So did Blackstone really mean, when he described the common law responsibilities of the teacher as *in loco parentis*, that teachers would have nearly unbridled discretion in the charge of children? His language suggests he did…[We] find no outermost limits to the relationship of the teacher to the child than we do about the relationship of the parent to the child, at least from this minimal fraction of Blackstone's work that has been quoted time and again as the foundation for court decisions about student-school relationships." Stuart, *supra* note 3, 987 (emphasis added).

149. *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

150. In addition to *Lander* and *Gose*, Justice Thomas also incorporates T. Stockwell's *The School Manual, Containing the School Laws of Rhode Island*, which described the "well settled" rule of a school's broad authority to punish student conduct at home. *Id.*

Amendment would have understood the doctrine to entail, and Justice Thomas relies on *Lander v. Seaver*'s 1859 holding to support his point. He also references the Missouri Supreme Court's holding in *Deskins v. Gose*, decided less than thirty years after *Lander*. Justice Thomas interprets *Gose* as a direct endorsement of *Lander* and points to the Missouri court's citation of *Lander* as evidence:

> [W]hatsoever has a direct and immediate tendency to injure the school in its important interests, or to subvert the authority of those in charge of it, is properly a subject for regulation and discipline, and this is so *wherever* the acts may be committed.[151]

Justice Thomas does not address the other part of the *Gose* opinion, discussed previously in this paper, which outlined how student actions done *in the home* were not punishable by the school; although *Gose* endorsed *Lander*'s broad holding, it seemed to differ from the Vermont Supreme Court on this point. Justice Thomas's dissent, and Justice Alito's concurrence, do not address these differences. However, Justice Thomas does generally assert that even those cases that include general statements protecting the parent's control of the home attach this protection to child conduct that does not impact the school environment: "these courts made it clear that the rule against regulating off-campus speech applied only when that speech was 'nowise connected with the management or successful operation of the school.'"[152] Justice Thomas dubs this understanding "the Lander Test;" if the student's at-home conduct touched the classroom, the teacher could punish the student.

Justice Thomas also highlights *Gose*'s engagement with truancy as evidence of the wide acceptance that schools could reach into students' lives outside of school. As *Gose* and contemporary cases assert, "'[i]f the effects of acts done out of school-hours reach within the schoolroom during school hours and are detrimental to good order and the best interest of the pupils, it is evident that such acts

151. *Mahanoy*, 141 S. Ct. at 2060 n.* (Thomas, J., dissenting) (citing F. Burke, Law of Public Schools 116, 129 (1880) (citing *Lander*)).

152. *Id.* at 2060 (citing *King v. Jefferson City School Bd.*, 71 Mo. 628, 630 (1880)).

may be forbidden.'"[153] Justice Thomas incorporates an additional case from 1871, *Burdick v. Babcock*,[154] to support his point.[155] In *Burdick*, the Iowa Supreme Court asserted a powerful claim that Justice Thomas's dissent echoes: actions that disrupt a schoolroom *must* be punished, despite their geographic location.[156] The court in *Burdick* wrote that

> So, if, by the exercise of parental authority, the child is made to act in such a manner as to interfere with the progress of his fellow pupils, it is the *duty* of those having charge of the school to remove the evil by dismissing the pupil causing it. The *good of the whole school* cannot be sacrificed *for the advantage of one pupil who has an unreasonable father*.[157]

By referencing this case, Justice Thomas implicitly endorses an expansive view of school authority – the ability to trump an "unreasonable" parent. This endorsement cuts against Justice Alito's point of parental expectation as the backbone of *in loco parentis*. Justice Thomas does not assert that a parent's thoughts or expectations of the school's authority influences the authority a teacher can exert for the benefit of his or her classroom environment. A parent's desires can, and sometimes must, cave to the school's authority *in loco*

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153. *Id.* (citing *Burdick v. Babcock*, 31 Iowa 562, 565, 567 (1871)).

154. Neither Justice Alito nor the majority mention this case in their opinions in *Mahanoy*.

155. Justice Thomas's dissent does not touch on the part of the *Burdick v. Babcock* opinion that states "Any rule of the school, not subversive of the rights of the children or parents, or in conflict with humanity and the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper." *Burdick*, 31 Iowa at 567.

156. "The child, through no fault of his own or of his parents, may be afflicted with a contagious disease, yet, as the good of other pupils demanded it, he may be for that reason forbidden attendance at the school. [internal citation omitted]. So, if, by the exercise of parental authority, the child is made to act in such a manner as to interfere with the progress of his fellow pupils, it is the duty of those having charge of the school to remove the evil by dismissing the pupil causing it. The good of the whole school cannot be sacrificed for the advantage of one pupil who has an unreasonable father." *Id.* at 569.

157. *Burdick*, 31 Iowa at 569 (emphasis added).

parentis of a broader student body.[158] Justice Thomas, like the historical cases he cites, focuses on the "effect of [student] speech, not its location."

Moreover, Justice Thomas identifies specific cases and applications of *in loco parentis* to form his interpretation of original public meaning. Unlike Justice Alito, who focused on principles, Justice Thomas looks at how judges actually used the doctrine to justify their decisions; he derives public meaning from the use of *in loco parentis* in four court cases: *Lander*, *Deskins*, *Burdick*, and *King*, an 1880 Missouri Supreme Court case. Justice Thomas's public meaning does not focus on abstract ideas of parental control and delegation, but grounds his interpretation in the practical application of the doctrine. To Justice Thomas, the best way to determine the public meaning is to look to instances where the doctrine was given legal authority.

2. Conspicuous Absence of the First and Fourteenth Amendments

Although somewhat tangential, another potential weakness of originalism appears in Justice Thomas's rejection of the argument that the First Amendment applies to public schools; in order to remain ideologically consistent, Justice Thomas rejects a body of constitutional law that recognizes some limited applications of free-speech protections in the public school context.

Justice Thomas's dissent has faced sharp criticism for not adequately addressing the incorporation of the First and Fourteenth Amendments. One critic levelled the complaint that the "evidence for [Justice Thomas's proposition that the First Amendment, as

158. Justice Thomas's point cuts against the argument that parents voluntarily give schools permission to care for their child only, not to punish their children for the protection of other children. A critic of this argument agrees with Justice Thomas's approach: "for any student at school, that students' parents have, by virtue of *in loco parentis* doctrine, given the school the authority to [control] *their child* . . . .it seems irrelevant that student safety is an 'institutional goal'" rather than an individualized decision for each student. Stoehr, *supra* note 58, at 1732 (emphasis added). Once a parent had delegated the authority, the school can use it however they wish.

originally understood, does not protect student speech in public schools], is slim to nonexistent." Justice Thomas noted that there were no public schools during the colonial period, meaning that there would necessarily be a complete absence of evidence from the period of the framing and ratification of the Bill of Rights[159] But critiques, like the one written here, seem to misunderstand Justice Thomas's point. He barely mentions the First and Fourteenth Amendments in his dissent—why?[160]

Unlike Justice Alito, Justice Thomas's argument presumes near-absolute authority for public schools. The original meaning of *in loco parentis* trumps the Court's modern interpretation of school authority in line with other constitutional principles. Justice Thomas's use of originalism, here and in *Morse*, to justify "abolishing an entire body of constitutional law on student-speech rights" reflects "a hallmark of originalism, namely that the 'original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.'"[161] The Court's version of school authority that it began building in *Meyer v. Nebraska* crumbles under the weight of original meaning. As one scholar writes, "[w]hat is important here is that *in loco parentis* has made a deep imprint…it has become a way of referring to a generalized power to make decisions affecting children that might conceivably have something to do with schooling."[162] Unlike Justice Alito's concurrence, Justice Thomas's dissent seems to echo this statement; the authority of the school, and the tradition surrounding its power, exists independent of the Constitution.

159. Bunker and Calvert, *supra* note 139, at 343.

160. Justice Thomas only mentions the First Amendment in a reference to the majority's opinion, and he only references the Fourteenth Amendment to say that it does not apply to schools since they are not government actors. *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

161. Bunker and Calvert, *supra* note 139, at 327.

162. Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 2, *In Loco Parentis and the Duty to Protect*), 51 UNIV. OF MEM. L. REV. 577, 582 (2021) (emphasis added).

Towards the end of his dissent, Justice Thomas points out three issues he finds with the majority's opinion[163] and highlights the counterpoints his critics may assert:

> Plausible arguments can be raised in favor of departing from that historical doctrine. When the Fourteenth Amendment was ratified, just three jurisdictions had compulsory-education laws. [internal citation omitted]. One might argue that the delegation logic of *in loco parentis* applies only when delegation is voluntary [internal citation omitted]. The Court, however, did not make that (or any other) argument against this historical doctrine. Instead, the Court simply abandoned the foundational rule without mentioning it.[164]

The historical understanding of *in loco parentis* at the time of its articulation by Blackstone, and throughout the decades following, form the backbone of Justice Thomas's opinion; despite modern Supreme Court jurisprudence to the contrary, he considers the specific applications of the doctrine in four cases from the 1800s. Early jurisprudence and treatises point towards broad school authority based on the effect of student speech, and the First Amendment's protections do not apply.

D. Differences as a Failure of the Originalist Project

Can originalism survive critique when jurists utilizing "public meaning" reach such opposite conclusions? Is this a rare embarrassment to the originalist school of thought, or a chronic problem that decades of development have failed to resolve? Why spend so

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163. Justice Thomas's first issue is that "the majority gives little apparent significance to B. L.'s decision to participate in an extracurricular activity." *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting). The second issue is that "the majority fails to consider whether schools often will have *more* authority, not less, to discipline students who transmit speech through social media." *Id.* The third issue is that "the majority uncritically adopts the assumption that B. L.'s speech, in fact, was off campus," although the "location of her speech is a much trickier question than the majority acknowledges." *Id*. at 2063.

164. *Id.* at 2061-62 (emphasis added) (internal citations omitted).

much time discussing a concept that one Justice only mentions once in his concurrence?[165]

Justice Alito's "public meaning" focuses on the principle of parental authority, while Justice Thomas's "public meaning" focuses on how jurists expected the doctrine to be applied. Justice Alito engages in an un-rigorous analysis of the historical record that does not take into account original understandings of jurists or schoolmasters. In contrast, Justice Thomas bases his version of original public meaning on only *four* cases that span 25 years and three states. Originalism itself provides no justification for *which* approach to take; it remains unclear whether Justice Thomas's or Justice Alito's "public meaning" generates the better, "originalist" result. Both Justices ultimately employed normative value judgements[166] when deciding *which* public meaning to apply. Justice Alito believed focusing on the historic understanding of the underlying principle adapted the doctrine to modern times: that is, parental expectations are the embodiment of *in loco parentis*, despite the evidence of case law, and should be respected by the public school system today. Justice Thomas, however, believed that analyzing the decisions of three state courts allowed him to extract a "public" understanding of the doctrine: that is, the application of *in loco parentis* during the 1800s spells out the exact limits, or *lack* of limits, the doctrine holds today. The "level of generality"[167] jurists should use in their historical analysis lies at the heart of the debate

165. Justice Thomas does not use the phrase "public meaning" in his dissent, while Justice Alito only mentions the phrase once: "There is no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech. Compare *post*, at 2059 – 2061 (Thomas, J., dissenting)." *Mahanoy*, 141 S. Ct. at 2053 n.14 (Alito, J., concurring).

166. "Any interpretation of original public meaning is a wholly fictitious construct – a construct made possible only because. . . [at the Founding] there was no original understanding or settled means of fixing meaning." Larry Kramer, *Two (More) Problems With Originalism*, 31 HARV. J. OF L. AND PUB. POL. 907, 913 (2008).

167. Barnett, *supra* note 4, at 11*.

over public meaning. The *meaning* of "public meaning" remains a dilemma.

Public meaning sits at the heart of originalism and forms part of the justification for why originalism is the best interpretative approach. The Constitution had, and has, a specific *meaning* that froze in time, and that singular meaning is what the legal system should employ today. Original meaning is the cornerstone of originalism. Therefore, if originalists cannot agree on what the meaning *was*, they cannot agree on what the meaning *is*, and fractures among jurists will inevitably form. Some may view this disagreement within originalism as a strength – it illustrates the historical debates jurists must engage before coming to a conclusion. But to others, it represents a weakness in originalism and serves as yet another example of why the interpretive approach is ill-suited for modern jurisprudence. And, when "originalist" Supreme Court Justices disagree, the flaw is broadcast on the national stage.

CONCLUSION

Courts do not have a uniform voice when describing a school's role as disciplinarians. While some recent cases point towards a "substitute parent" model, others seem to envision the schools as organs of the state. And the multiple opinions issued in *Mahanoy* highlight this lack of certainty on the Court.

Justices Thomas and Alito present two different "originalist" opinions and come to different conclusions. This difference originates in their approach to analyzing the historical record: Justice Alito envisions a limited version of *in loco parentis* that focuses on the historical voluntariness of parental delegation, while Justice Thomas relies on a stricter "original meaning" interpretation that gives public schools broad authority to punish off-campus speech.

These interpretive differences indicate how the originalist judge's determination of the scope of the historical record and the context of historical jurisprudence warrant cautious and deliberate study.

A judge's decision to translate the underlying principle of a historical doctrine or the literal definition of the doctrine into modern jurisprudence is outcome determinative. When attempting to answer the question "what is the original meaning," originalist thinkers must wrestle with the questions of context and extent. A judge must decide how to incorporate historical doctrines, statutes, and public traditions that concern relationships between parties. Does the judge adopt the historical customs surrounding the relationships, or allow the expectations of the relationship to evolve into a modern context? Both approaches are "true" to the historical record and both involve a close study of the original meaning of the legal concept.

These questions strike at the core of the originalist project. *Mahanoy* displays the quintessential struggle of originalist scholars to decide which history they adopt, as well as the extent they let that history inform their understanding of modern jurisprudence. As mentioned earlier, this paper provides no *answers* or *solutions*; it does not attempt to praise Justice Thomas's or Justice Alito's opinion as the "true" originalism, or to criticize one as deviating from originalist principles. Instead, it presents a salient example of how two brilliant minds can perform a detailed examination of the historical record, apply "originalist" principles, and *fundamentally* disagree about the original "public meaning" and its implications for modern jurisprudence.

Hopefully, the lessons and analyses of this paper will encourage originalist scholars to think critically about how they approach these questions of historical interpretation and develop a consistent approach that honors and respects the historical traditions of American jurisprudence. Originalism has its flaws, and until the question of *which* public meaning is answered, it remains exposed to critique.