

# CONTRASTING CONCURRENCES OF CLARENCE THOMAS: DEPLOYING ORIGINALISM AND PATERNALISM IN COMMERCIAL AND STUDENT SPEECH CASES

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## INTRODUCTION

*“Whatever the reason, Justice Thomas has indeed become a free-speech defender.”*<sup>1</sup>

That’s what First Amendment<sup>2</sup> scholar David L. Hudson, Jr.<sup>3</sup> wrote back in 2002 in the process of lauding United States Supreme Court Justice Clarence Thomas as “an ardent defender of commercial free-speech rights”<sup>4</sup> and a “forceful advocate for commercial speech.”<sup>5</sup> One of the key cases supporting Hudson’s thesis and proposition is *44 Liquormart, Inc. v. Rhode Island*,<sup>6</sup> in which Justice Thomas authored a concurring opinion designed “to attack the *Central*

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1. David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 486 (2002).

2. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. See Biography: David L. Hudson, Jr., First Amendment Center Website, <http://www.firstamendmentcenter.org/biography.aspx?name=Hudson> (providing background on Hudson and describing him, in relevant part, as “a scholar at the First Amendment Center. Hudson writes for firstamendmentcenter.org and for other publications devoted to First Amendment issues. He is the author or co-author of [twenty] books, including several on the U.S. Supreme Court, the Constitution and student rights.”) (last visited Feb. 12, 2008).

4. Hudson, *supra* note 1, at 487.

5. *Id.*

6. 517 U.S. 484 (1996).

*Hudson*<sup>7</sup> test and to advocate enhanced First Amendment status for certain commercial speech.”<sup>8</sup> As Hudson put it, it was in Justice Thomas’s concurrence in *44 Liquormart* in which he “emerged as a high protector of commercial speech . . . .”<sup>9</sup> Hudson, who is not alone among legal scholars in praising Justice Thomas as a First Amendment advocate on issues like commercial speech,<sup>10</sup> concluded his law review article by asserting that “Justice Thomas more and more stakes out his claim as a Justice sensitive to First Amendment claims.”<sup>11</sup>

But just five years later, in June 2007 in *Morse v. Frederick*,<sup>12</sup> Justice Thomas was calling for the end of all speech rights for students in public school settings, writing that “[i]n light of the history of American public education, it cannot seriously be suggested that the First Amendment ‘freedom of speech’

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7. This is a reference to the United States Supreme Court’s opinion in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980). In *Central Hudson*, the high Court created a four-part test for determining whether a restriction on commercial speech was permissible under the First Amendment, writing that:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566.

8. Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 621 (2000).

9. Hudson, *supra* note 1, at 496.

10. Brooklyn Law School Professor Joel Gora, for instance, wrote in 2001 that:

Justice Thomas, along with Justice Kennedy, has turned out, in many instances, to be quite a vigorous proponent and supporter of free speech, particularly commercial speech. He takes the position that as long as the advertising is for a lawful product and it is not false or misleading, commercial speech should be judged by the same First Amendment standards as any other kind of speech. If the advertising is lawful and not fraudulent, the Court should not engage in any of these diluted balancing tests. According to Justice Thomas, commercial speech should be assimilated into the First Amendment family, not treated as a stepchild, and provided with full First Amendment protection.

Joel Gora, *The Calm After the Storm: First Amendment Cases in the Supreme Court’s 2000–2001 Term*, 18 TOURO L. REV. 29, 39 (2001) (footnotes omitted).

11. Hudson, *supra* note 1, at 501.

12. 551 U.S. 393 (2007).

encompasses a student's right to speak in public schools."<sup>13</sup> Justice Thomas boldly proclaimed in *Morse* that, if given the opportunity, he gladly would "dispense with"<sup>14</sup> the United States Supreme Court's seminal 1969 decision in *Tinker v. Des Moines Independent Community School District*.<sup>15</sup> In *Tinker*, the high court ruled that expression by public school students while on campus<sup>16</sup> is protected by the First Amendment unless actual facts exist<sup>17</sup> that might reasonably lead "school authorities to forecast substantial disruption of or material interference with school activities . . . ."<sup>18</sup>

There is, then, a jurisprudentially jarring contrast between Justice Thomas's desire to expand protection for commercial speech and to elevate advertisers up from the ranks of second-class First Amendment citizens,<sup>19</sup> on the one hand, and his simultaneous yearning to obliterate constitutional protection for the speech of public school students and to relegate them to a constitutional status

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

14. *Id.* at 422.

15. 393 U.S. 503 (1969).

16. *Tinker* centered around the black armbands worn on campus students to protest the war in Vietnam, and the Court wrote that:

A student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

*Id.* at 512–513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (emphasis added)).

17. The high Court made it clear that mere speculation of harm will not justify squelching student speech rights, opining that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. What's more, the court in *Tinker* wrote that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by *something more than a mere desire to avoid the discomfort and unpleasantness* that always accompany an unpopular viewpoint." *Id.* at 509 (emphasis added).

18. *Id.* at 514.

19. *Cf.* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 830 (2001) (writing that commercial speech currently is "treated as a second-class First Amendment citizen").

Other second-class First Amendment citizens include broadcasters, who hold reduced First Amendment rights. *See* Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1072 (1994) (describing "broadcasting's second-class First Amendment status") (footnote omitted); Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 206 (1994) (observing that "over-the-air broadcasters . . . have long resented their treatment as second-class First Amendment citizens . . .") (footnote omitted).

below that of federal prisoners,<sup>20</sup> on the other. This incongruity is exacerbated by the fact that the realms of commercial speech and student speech share much in common.

First, both are relatively new developments and bodies of law within the confines of First Amendment jurisprudence, with commercial speech “not explicitly given constitutional protection until 1976”<sup>21</sup> in *Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*,<sup>22</sup> and public school students not afforded such safeguards until 1969 in *Tinker*.<sup>23</sup>

Second, both areas also are still evolving and in a state of judicial ferment. The Supreme Court, for instance, is gradually changing the landscape of student speech rights by chipping away at *Tinker* over the decades in a string of three straight defeats for student expression that carved out exceptions to *Tinker*'s broad swath of First Amendment protection for student speech.<sup>24</sup> Justice Thomas, of

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20. The United States Supreme Court has observed that “[p]rison walls do *not* form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987) (emphasis added). Although prisoners have reduced constitutional rights, the high Court nonetheless has held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* at 89; *see also* *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (writing that inmates retain “certain protections of the First Amendment,” although “the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large”).

21. DANIEL A. FARBER, *THE FIRST AMENDMENT* 151 (2d ed. 2003).

22. 425 U.S. 748 (1976). In this case, the Supreme Court concluded that “commercial speech, like other varieties, is protected . . .” *Id.* at 770. In reaching this conclusion, the high Court recognized the “consumer’s interest in the free flow of commercial information . . .” *Id.* at 763. It also acknowledged that “society also may have a strong interest in the free flow of commercial information.” *Id.* at 764.

The Court, however, added that “untruthful” commercial speech was not protected by the First Amendment. *Id.* at 771. As the high court put it:

Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

*Id.* at 771–772 (footnote omitted).

23. *See* Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 663, 664 (1987) (writing that *Tinker* was the case “in which the Supreme Court first held that public school students are entitled to some forms of first amendment protection”).

24. *See* *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (holding “that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related

course, would radically end such censorial creep by overruling *Tinker*; there is no need for more nibbling away at *Tinker* under Justice Thomas's view—just get rid of the whole area of speech rights for students. Similarly, the domain of commercial speech is evolving and still unsettled, as evidenced by debate about the most fundamental question in the area—namely, what constitutes commercial speech?<sup>25</sup> As Robert O'Neil, professor of law and director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, wrote in 2004:

It has been clear since the mid 1970s that we lack a reliable definition of “commercial speech.” One cannot even say, with Justice Stewart's intuitive confidence about obscenity, “I know it when I see it.” All we understand with reasonable certainty is the outcome of relatively easy cases at the margins.<sup>26</sup>

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to legitimate pedagogical concerns”) (footnote omitted); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–85 (1986) (allowing schools to punish and prohibit the use of “vulgar and offensive terms in public discourse” because allowance of such speech would “undermine the school's basic educational mission”).

25. Several professors have written about this definitional difficulty. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) (observing that “sometimes advertising is deemed to be public discourse rather than commercial speech, and sometimes expression that would not ordinarily be regarded as advertising is included within the category of commercial speech. The boundaries of the category are thus quite blurred.”); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 74 (writing that “the Supreme Court has cryptically offered a number of different—and not always consistent—definitions of commercial speech”) (footnote omitted); Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383, 386 (2005) (arguing that there is an “absence of any meaningful consensus regarding what is or is not commercial speech or how it ought to be treated” and asserting that “the commercial speech doctrine has become a linguistic quagmire for speakers with commercial interests and for speech that may or may not be deemed commercial”) (footnote omitted); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) (observing that “sometimes advertising is deemed to be public discourse rather than commercial speech, and sometimes expression that would not ordinarily be regarded as advertising is included within the category of commercial speech. The boundaries of the category are thus quite blurred.”).

26. Robert M. O'Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 CASE W. RES. L. REV. 1259, 1262 (2004). The reference in this quotation by O'Neil to Justice Potter Stewart regards his comments in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), that attempting to explicate the concept of obscenity amounts to “trying to define what may be indefinable” and:

that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand

Finally, both realms of law are similar in that commercial advertisers and public school students, although safeguarded by the First Amendment, receive less protection than other speakers. For instance, one federal appellate court recently observed that “other forms of expression are entitled to more protection under the First Amendment than is commercial speech.”<sup>27</sup> Indeed, Professor Tamara R. Piety wrote in 2007 that “the commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment,”<sup>28</sup> as opposed to the much more rigorous strict scrutiny standard to which content-based regulations on speech are usually subjected.<sup>29</sup> The United States Supreme Court itself has acknowledged that it has “afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”<sup>30</sup>

Similarly, the Supreme Court made it clear in *Bethel School District v. Fraser*<sup>31</sup> that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>32</sup> It reaffirmed this principle in 2007 in *Morse v. Frederick*.<sup>33</sup>

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description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.

*Id.* at 197 (Stewart, J., concurring) (emphasis added) (footnote omitted).

27. Pagan v. Fruchey, 492 F.3d 766, 770 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 7111 (2007).

28. Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007).

29. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that a “content-based speech restriction” is permissible “only if it satisfies strict scrutiny,” which requires that the law in question “be narrowly tailored to promote a compelling Government interest”); *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (writing that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”). See generally ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 903 (2d ed. 2002) (writing that “content-based discrimination must meet strict scrutiny”).

30. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

31. 478 U.S. 675 (1986).

32. *Id.* at 682.

33. 551 U.S. 393, 403–04 (2007).

With this trio of similarities—a new area of law, still evolving and fermenting, and providing reduced First Amendment protection—in mind, the question arises: How did Justice Thomas reach seemingly diametrically opposed conclusions about the scope of—indeed, the very existence of, in the case of public school students—First Amendment rights in *44 Liquormart* and *Morse*?

This article analyzes this issue and, in particular, Justice Thomas’s contrasting concurrences in *44 Liquormart* and *Morse*, through the lens of two concepts: originalism and paternalism. These concepts are employed for different reasons. With regard to the former, Justice Thomas has been “conventionally tagged as ‘originalist,’”<sup>34</sup> as Professors Eric Posner and Adrian Vermeule recently observed. What’s more, in a 2007 law journal article that analyzed and compared multiple opinions over a fifteen-year period by both Justice Thomas and Justice Antonin Scalia, Professor Bradley Jacob concluded that, of the two conservative justices, Thomas is “the Real Originalist.”<sup>35</sup> Perhaps more importantly, as illustrated later in Part II of this article, Justice Thomas’s use of originalism in *Morse* to justify abolishing an entire body of constitutional law on student-speech rights reflects what Professor James E. Fleming describes as a hallmark of originalism, namely that the “original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.”<sup>36</sup>

The concept of paternalism and, in particular, the government adopting a paternalistic, we-know-what-is-best-for-you role in its decision to regulate and restrict speech is a particularly relevant tool of analysis for dissecting Justice Thomas’s views on both commercial speech and student speech. On the commercial speech front, the concept is critical. Professor Daniel Hays Lowenstein observes that “when the Supreme Court extended constitutional protection to

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34. Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 319 (2007).

35. Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 650 (2007).

36. James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1151 (2007).

commercial speech in *Virginia Pharmacy*,<sup>37</sup> it did so in the name of rejecting *paternalism*,<sup>38</sup> which he asserts refers to “speech restrictions intended to protect the consumer against his or her own imprudent action.”<sup>39</sup> As Rodney Smolla, current dean of the Washington and Lee University School of Law, wrote in 2006:

The arc of the Supreme Court’s commercial speech decisions in recent years has been unmistakable: in case after case the Court has enforced the First Amendment protections set forth in *Central Hudson* with increasing rigor, expanding protection for commercial speech, and expressing ever-heightening skepticism and impatience for governmental restrictions on advertising grounded in protectionism and *paternalism*.<sup>40</sup>

Yet when it comes to free speech in public schools, as this article contends in Part II, Justice Thomas is extremely paternalistic in his views, asserting the primacy of the government’s *in loco parentis* role as a tool for censorship.<sup>41</sup> In addition, paternalism is a concept on which Justice Thomas has expressed views in other constitutional contexts, including race-based preferences.<sup>42</sup> It thus provides a particularly relevant variable for analyzing his opinions on both student speech and commercial advertising.

With this in mind, Part I of the article provides an overview of what the authors mean by both originalism (in Section A) and

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37. *Virginia State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

38. Daniel Hays Lowenstein, “*Too Much Puff*”: *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1237 (1988) (emphasis added).

39. *Id.* at 1238.

40. Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 452 (2006) (emphasis added).

41. See Kenneth W. Starr, *Our Libertarian Court: Bong Hits and the Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 4 (2008) (referring in *Morse*, 551 U.S. 393, to what Starr calls “Justice Thomas’ [sic] *in loco parentis* argument”).

42. For instance, Justice Thomas has opined against what he calls “a racial *paternalism* exception to the principle of equal protection.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (emphasis added). In blasting a race-based preference program, Thomas wrote that “the *paternalism* that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.” *Id.* (emphasis added).



paternalism (in Section B).<sup>43</sup> Part II then applies these two concepts as tools to analyze and critique Justice Thomas's opinions in both *Morse* and *44 Liquormart*.<sup>44</sup> Finally, the conclusion proposes that Justice Thomas not only is inconsistent in his treatment of the pair of concepts described in Part I, but that reconciliation of his decisions in these areas may not be as easy as it initially seems.<sup>45</sup>

#### I. ORIGINALISM AND PATERNALISM: AN OVERVIEW OF KEY VARIABLES IN JUSTICE THOMAS'S OPINIONS AFFECTING STUDENT SPEECH AND COMMERCIAL ADVERTISING

Section A of this part of the article provides background on the concept of originalism. Section B then describes paternalism as that word is used here by the authors. These sections are not intended to be comprehensive examinations of these concepts, but rather serve as a brief overview or literature review, as it were, of them.

##### *A. Originalism*

Originalism, a mode of constitutional interpretation<sup>46</sup> “widely thought of as conservative,”<sup>47</sup> is contentious and contested.<sup>48</sup> A pivotal point in modern debate over originalism, in one form<sup>49</sup> called

43. See *infra* notes 46–117 and accompanying text.

44. See *infra* notes 118–175 and accompanying text.

45. See *infra* notes 176–186 and accompanying text.

46. See generally PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (providing an overview of modes of constitutional interpretation and identifying dominant “modalities” as historical, textual, structural, doctrinal, ethical, and prudential).

47. Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 775 (2008).

48. Describing the roots of the modern debate about originalism, Professor Peter J. Smith writes: After the New Deal, the Warren Court was alternately accused of ignoring the original meaning of the Constitution . . . . The Warren Court's perceived excesses led to the rise of the modern originalists, and the debate over originalism dominated not only the academic literature but also political debates over judicial nominations in the 1980s. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 233 (2004) (footnotes omitted).

49. “Originalism ‘comes in several versions.’” Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 105 (1989).

“intentionalism,”<sup>50</sup> was a 1985 speech by U.S. Attorney General Edwin Meese, when he advocated a “jurisprudence of original intention.”<sup>51</sup> Meese argued that other approaches simply allowed jurists to substitute personal ideological preferences for the legitimate strictures of the Constitution. He stressed that the framers chose language that “meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic.”<sup>52</sup> Meese’s speech put an academic debate about originalism “into noisy and public view.”<sup>53</sup>

Within months, Justice William J. Brennan, Jr., an influential member of the high court under Chief Justice Earl Warren, responded with arguments that remain weapons in the anti-originalists’ arsenal. Noting that the text of the Constitution is unclear and thus requires interpretation, Brennan called efforts to anchor its meaning in its authors’ intentions “little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principles to specific, contemporary questions.”<sup>54</sup> He pointed out that records from the framing period, such as ratification debates, established both considerable ambiguity and disagreement about the scope and meaning of various provisions of the Constitution.<sup>55</sup>

Justice Brennan also argued that although “this facile historicism”<sup>56</sup> presented itself as apolitical, it actually was fraught with political implications. “A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual

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50. See, e.g., Robert Bennett, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 355, 355 (1988) (describing intentionalism as “the kind of originalism” that adopts “the notion that contemporary constitutional questions are to be answered by reference to the intentions of those responsible for putting the provision in question on the books”).

51. Edwin Meese, III, *Speech Before the American Bar Association* 53, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed. 2007).

52. *Id.*

53. Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 875 (2008).

54. Justice William J. Brennan, Jr., *Speech to the Text and Teaching Symposium* 58, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed. 2007).

55. *Id.* at 59.

56. *Id.*

ambiguities against the claim of constitutional right,”<sup>57</sup> Justice Brennan said. “It is far from clear what justifies this presumption against claims of right.”<sup>58</sup> He stated that the fundamental principles the Constitution enshrines are, and should be, broader than the specific circumstances that gave rise to them in the Colonial period.<sup>59</sup> “Our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours,”<sup>60</sup> he said.

As the originalism movement grew, there were successive iterations of its fundamental approach, each drawing scholarly fire. After a period of focusing on the intent of the Framers, originalists moved toward what Larry Kramer, current dean of Stanford Law School, calls “original-understanding originalism.”<sup>61</sup> This version recognized that the Constitution’s framers had no actual lawmaking authority and that the critical intent was thus not that of the *drafters*, but rather that of the *ratifiers*, who possessed the power to make it law. As Kramer points out, this move increased the range of historical materials from the founding period that addressed constitutional meaning, but it also vastly expanded the range of opinions.<sup>62</sup> Such problems with original-understanding originalism eventually led to a third version—the one generally practiced today—that Kramer calls “public-meaning originalism.”<sup>63</sup> He suggests that this version too is subject to a devastating critique, namely “that there was no agreed upon public meaning of the constitutional terms most often in dispute. This was something the Founding generation learned to its dismay early in the 1790s.”<sup>64</sup> Regardless of which version of originalism to which one subscribes, at the core of the concept, as Professor Robert W. Bennett recently put it, “is the view that the

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57. *Id.*

58. *Id.*

59. *Id.*

60. Brennan, *supra* note 54, at 61.

61. Larry Kramer, *Panel on Originalism and Pragmatism* 153, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed. 2007).

62. *See id.* (writing that “[the] indeterminacy argument became stronger, as indeterminacy is obviously a greater concern when you expand the number of people whose views count from the small group of fifty-five in Philadelphia to include everybody who voted on the Constitution”).

63. *Id.* at 154.

64. *Id.* at 154.

appropriate guideposts for constitutional interpretation are ‘original’ ones, sources that probe constitutional ‘meaning’ by reference to the meaning entertained by the people around at the time the Constitution was enacted.”<sup>65</sup>

Any version of originalism, however, faces multiple methodological challenges. One suggests that those of the founding generation were not themselves originalists in interpretive orientation.<sup>66</sup> H. Jefferson Powell, for example, argues that “[o]f the numerous hermeneutical options that were available in the framers’ day—among them, the renunciation of construction altogether—none corresponds to the modern notion of intentionalism.”<sup>67</sup> Moreover, judges of the late eighteenth century routinely looked well beyond the bounds of written constitutions in protecting the rights of citizens; as legal scholar Suzanna Sherry put it, “[a]s Bolingbroke proposed in theory and the new American states translated into action, judges were to look to natural law and the inherent rights of man, as well as to the written constitution, in determining the validity of a statute.”<sup>68</sup> If indeed the Constitution and Bill of Rights were created in such a legal environment, it is very difficult to argue that, normatively, originalism of any stripe is the required and exclusive interpretive method.

In the realm of the First Amendment Free Speech and Press Clauses, the problems with originalism are, if anything, magnified. One difficulty is that, for at least some members of the framing generation, the contemporary understanding of the free speech principle was derived from English law via the enormously influential commentator William Blackstone. Blackstone, “the oracle of the common law in the minds of the American Framers,”<sup>69</sup> as

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65. Robert W. Bennett, *Originalism: Lessons from Things That Go Without Saying*, 45 SAN DIEGO L. REV. 645, 646 (2008).

66. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1184 (1987) (describing “the recent attempt by nonoriginalists to demonstrate that originalism was not intended by the framers—an effort to hoist the originalists by their own petard”) (footnote omitted).

67. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

68. Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1145 (1987).

69. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 12 (1985).

historian Leonard Levy put it, had opined that freedom of the press consisted of the absence of prior restraints on the press, but not the absence of criminal or other sanctions after publication: “Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.”<sup>70</sup> Levy cites influential framer and legal expert James Wilson of Pennsylvania, for example, adopting the Blackstonian position at the Pennsylvania ratifying convention: “What is meant by liberty of the press is that there should be no antecedent restraint on it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.”<sup>71</sup> The law of seditious libel, for example, would be unaltered under the Blackstonian formulation.

The Blackstonian understanding, of course, creates enormous problems for First Amendment originalism. As First Amendment scholar Rodney A. Smolla put it: “If Blackstone’s view of free speech was the *real* original meaning of the First Amendment, then arguably 90 percent of modern free speech jurisprudence—which goes well beyond Blackstone’s prohibition against prior restraints—is intellectually dishonest and historically illegitimate.”<sup>72</sup> Smolla argues that the evidence from the framing generation suggests at least some members regarded the scope of free speech as limited by Blackstone’s formulation.<sup>73</sup> Others certainly saw the First Amendment speech and press guarantees as providing enhanced protection beyond that of the common law, but the problem for a First Amendment originalist is refereeing a debate between long-dead framers, ratifiers, and other knowledgeable citizens, and arriving at a

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70. LEONARD W. LEVY, ED., *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 104–05 (1966) (quoting SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND*) (citation omitted).

71. LEVY, *supra* note 70, at 104 (quoting *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, Vol. II, *Ratification of the Constitution by the States* 455 (Merrill Jensen, ed., State Historical Society of Wisconsin, 1976)).

72. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 32 (1992).

73. *Id.* at 33.

correct conclusion about the scope of freedom of speech that makes some sense in light of current jurisprudential realities.<sup>74</sup>

As Smolla sums up the basic problem, “there is a high probability that many of those involved in the adoption of the First Amendment never really focused on the precise meaning of the principles it embodied at all.”<sup>75</sup> This is a serious blow to First Amendment originalism because the “original meaning” is, to a significant degree, a blank slate.

Of course, the concept of the First Amendment as a limitation exclusively on federal power ended when it was applied to the states through the doctrine of incorporation in the first part of the twentieth century.<sup>76</sup> Because the Fourteenth Amendment’s Due Process Clause<sup>77</sup> is the instrument of that process of incorporation, one might assume that originalists would need to examine the original meaning of *that* provision in order to properly apply free speech guarantees to the states. The Fourteenth Amendment, however, adds only further layers of indeterminacy to originalist claims. As First Amendment scholar Steven J. Heyman has noted, the antislavery Republican Party sponsors of the Fourteenth Amendment were interested in protections for speech and press rights, but “[t]he Republicans’ discussion of freedom of speech and press during the Reconstruction Amendment debates was confined to general terms and sheds little light on the scope of these freedoms.”<sup>78</sup>

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74. As Larry Kramer put it:

[I]nsofar as there were, at the time [of the framing], two or more plausible positions on the correct original public meaning of a provision of the Constitution, all one does in embracing one of them today is to take sides in a historical dispute that was not resolved at the time of the Founding, and so is not resolvable on such terms today.

Kramer, *supra* note 61, at 154–55.

75. SMOLLA, *supra* note 72, at 36.

76. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925).

77. The Fourteenth Amendment provides, in relevant part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

78. STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 21 (Yale Univ. Press 2008).

Even Justice Antonin Scalia recognizes problems with originalism in the realm of the First Amendment, acknowledging that “sometimes there will be disagreement as to how the original meaning applies to new and unforeseen phenomena,”<sup>79</sup> such as to “sound trucks, or to government-licensed over-the-air television.”<sup>80</sup> His solution to such problems is vague, as he asserts that “in such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment.”<sup>81</sup>

As this article demonstrates in Part II, Justice Thomas engaged in his own effort in *Morse v. Frederick*<sup>82</sup> to follow the trajectory, as Justice Scalia might say, of free speech rights (or lack thereof) of public school students.<sup>83</sup> As Notre Dame Professor Richard W. Garnett put it, in *Morse* “Justice Thomas filed, to the horror of some and the fascination of others, another ‘yes, I really mean it about this originalism business!’ concurrence.”<sup>84</sup>

### *B. Paternalism*

*Webster’s Ninth New Collegiate Dictionary* defines paternalism, in relevant part, as “a system under which an authority undertakes to supply needs or regulate conduct of those under its control in matters affecting them as individuals.”<sup>85</sup> *Black’s Law Dictionary*, in turn, gives this general definition a legal twist by recognizing that the authority figure is the government; it defines paternalism as a “government’s policy or practice of taking responsibility for the individual affairs of its citizens, [especially] by supplying their needs or regulating their conduct in a heavy-handed manner.”<sup>86</sup> Despite

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79. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Princeton Univ. Press 1997).

80. *Id.*

81. *Id.*

82. 551 U.S. 393 (2007).

83. See *infra* notes 118–155 and accompanying text.

84. Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 47 (2008).

85. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 862 (1988).

86. BLACK’S LAW DICTIONARY 1148 (7th ed. 1999).

such dictionary definitions, paternalism is a concept that, as attorney Thaddeus Mason Pope writes, “lacks a clear and crisp definition.”<sup>87</sup>

For the United States Supreme Court, paternalism seems to boil down to notions of both needs and interests and, in particular, on behalf of whose needs and interests the authority—the government—supposedly is acting. As former Justice Sandra Day O’Connor put it when writing the majority opinion in the commercial speech case of *Florida Bar v. Went For It, Inc.*,<sup>88</sup> “[t]here is an obvious difference between situations in which the government acts in its own interests . . . and situations in which the government is motivated primarily by paternalism.”<sup>89</sup>

The underlying insinuation of adopting paternalism in the law is that the government, like a father (the meaning of the root “pater”<sup>90</sup>) with his child, purportedly knows what is in the best interest of the citizens under its control. Indeed, as criminal law philosopher Joel Feinberg has argued, paternalism “suggests the view that the state stands to its citizens . . . as if they were children.”<sup>91</sup> We need, in other words, government protection from ourselves.<sup>92</sup>

The negative implication of this, to put it in its most brutally crass form, is that citizens are too stupid to know what is in their best interest. More charitably put, in social science terms, there is a negative correlation between the capacity of a person to rationally reason and the level of paternalism that should be allowed.<sup>93</sup> Indeed, Professor Piety contends that “minimal capacities to reason and

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87. Thaddeus Mason Pope, *Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 661 (2004). Pope notes that some use terms of hard (or strong) paternalism and soft (or weak) paternalism to try to distinguish shades of the concept, with the differences between them “blurred.” *Id.* at 662. A complete examination and discussion of this distinction is beyond the scope of this article.

88. 515 U.S. 618 (1995).

89. *Id.* at 631 n.2.

90. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 862 (1988).

91. 3 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW, HARM TO SELF* 4 (1986).

92. See Blake C. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 14 (1998) (writing that in the realm of contract law, paternalism sometimes “is designed to protect the bargainer from herself”).

93. A negative correlation is one in which low levels of one variable are associated with high levels of another variable. See GUIDO H. STEMPEL, III ET AL., *MASS COMMUNICATION RESEARCH AND THEORY* 159 (2003) (describing both negative and positive correlations).



formulate a conception of the good”<sup>94</sup> apparently “dictate how much government interference (paternalism) is deemed acceptable.”<sup>95</sup> The interference here is with an individual’s autonomy.<sup>96</sup>

Kathleen Sullivan, former dean of the Stanford Law School,<sup>97</sup> contends that in the United States “we have an anti-paternalism principle for government telling us what to think and say.”<sup>98</sup> She suggests that the existence of such an anti-paternalism instinct is partly:

because we’re afraid of government manipulating ideas and engaging in thought control as a means of serving other values. And when we tell people what they can hear or read, or listen to or watch, we’re doing it to prevent ideas from reaching and influencing them. That has a different valence than the direct regulation of conduct.<sup>99</sup>

Indeed, as Professor Dale Carpenter recently observed, while American law is littered with examples of paternalism,<sup>100</sup> “in the law

94. Tamara R. Piety, “*Merchants of Discontent*”: *An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, SEATTLE U. L. REV. 377, 399–400 (2001).

95. *Id.* at 400.

96. See Paul Roberts, *Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform*, 5 BUFF. CRIM. L. REV. 173, 228 (2001) (writing that “paternalism is regarded with suspicion in contemporary western culture, and with good reason, since it competes with the values of liberty, *personal autonomy*, and individual choice that people in liberal societies hold dear”) (emphasis added).

97. Sullivan works today in private practice. See Kathleen M. Sullivan, Quinn Emanuel Urquhart Oliver & Hedges, LLP website, <http://www.quinnemanuel.com/attorneys/sullivan-kathleen-m.aspx> (last visited Mar. 10, 2009) (providing brief biographical information about Sullivan).

98. Ronald K.L. Collins et al., *Thoughts on Commercial Speech: A Roundtable Discussion*, 41 LOY. L.A. L. REV. 333, 338 (2007) (quoting Sullivan).

99. *Id.*

100. Carpenter writes the following:

[P]aternalism pervades the law. Examples of paternalism include: laws requiring people to wear helmets while operating a motorcycle; laws requiring the use of seatbelts in cars; laws forbidding gambling; laws against usury; laws forbidding swimming when no lifeguard is present; laws against dueling; limitations on the legal rights and capacity of minors and mentally disabled people; restrictions on the use of recreational drugs; the Social Security system, which compels individual investment in retirement; the prohibition against suicide; and compulsory education laws.

Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 580 (2004).

of free speech, and perhaps in this area of the law alone, paternalism has been largely rejected.”<sup>101</sup> Carpenter defines paternalism, in the domain of First Amendment jurisprudence, as “a restriction on otherwise protected speech justified by the government’s belief that speaking or receiving the information in the speech is not in citizens’ own best interests.”<sup>102</sup>

In the seminal commercial speech case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>103</sup> the U.S. Supreme Court suggested that the antithesis to a “highly paternalistic approach”<sup>104</sup> to speech regulation is to assume “that people will perceive their own best interests.”<sup>105</sup> The high Court’s 1976 decision in *Virginia Pharmacy* extending First Amendment protection to truthful commercial speech, as Professor Carpenter puts it, represented its “first explicit rejection of paternalism”<sup>106</sup> in this realm of expression. Carpenter contends that with the outcome of the *Virginia Pharmacy* decision, “suddenly paternalism is the dirtiest word in the constitutional lexicon.”<sup>107</sup>

Yet in the realm of public schools, the notion of paternalism that provides the government (in the form of public school administrators and teachers) with the ability to interfere with the speech autonomy of students is embraced and embodied by the U.S. Supreme Court in the concept of *in loco parentis*.<sup>108</sup> Professor Andrea Kayne Kaufman succinctly summed up this concept in a recent law journal article, writing that “*in loco parentis*, coming from Latin, means ‘in place of parent’ and refers to the legal authority and obligations teachers, administrators, and other school personnel have to safeguard

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101. *Id.* at 581.

102. *Id.* at 582–83.

103. 425 U.S. 748 (1976).

104. *Id.* at 770.

105. *Id.*

106. Carpenter, *supra* note 100, at 588.

107. *Id.* at 587.

108. See generally Brian Jackson, Note: *The Lingering Legacy of in Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991) (providing an excellent overview of the historical origins and development of the concept of *in loco parentis*).

students.”<sup>109</sup> Professor Bruce C. Hafen and attorney Jonathan O. Hafen assert that “the [Supreme] Court has significantly narrowed its early student expression opinions, having resurrected in its recent cases the doctrine of *in loco parentis* as a rationale for school authority.”<sup>110</sup> *In loco parentis* may be said to be resurrected because, when the Supreme Court decided *Tinker*<sup>111</sup> in 1969, it “turned away from the *in loco parentis* doctrine”<sup>112</sup> and began, instead, to recognize the autonomy of students to choose what to say in school settings. As Professor Anne Proffitt Dupre wryly wrote, “when the *Tinker* Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common-law doctrine of *in loco parentis*—slipped out the back door.”<sup>113</sup> This article makes it clear in Part II, however, that while *in loco parentis* may have waned as a tool for government control over student speech in *Tinker*, it waxed in Justice Thomas’s concurrence in *Morse*.

Writing in another article, Professor Hafen suggests that paternalism is perhaps essential in public school settings when it comes to principles of freedom of expression:

Public education seeks affirmatively to teach the capacity to enjoy First Amendment values—to mediate between ignorance and educated expression. *It is a process that invites intrusion, requires authoritarian paternalism,* and depends upon the exercise of unsupervisable discretion. There must be legal protection against clearly harmful abuse of this flexibility, but without some strong influence from those apparent enemies of

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109. Andrea Kayne Kaufman, *What Would Harry Potter Say About BONG HITS 4 JESUS? Morse v. Frederick and the Democratic Implications of Using In Loco Parentis to Subordinate Tinker and Curtail Student Speech*, 32 OKLA. CITY U.L. REV. 461, 462–63 (2007).

110. Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L.J. 449, 455 (1996).

111. See *supra* note 16 and accompanying text (describing the *Tinker* opinion).

112. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 72 (1996).

113. *Id.* at 60.

personal autonomy in the educational process, little serious education is possible.<sup>114</sup>

Paternalistic censorship that teaches values was embraced by the U.S. Supreme Court in *Bethel School District v. Fraser*,<sup>115</sup> in which the majority observed that “the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>116</sup> In summary, the rationale for the paternalism reflected in the censorship of the speech of public school students proceeds as follows: students don’t really know what is appropriate for them to say or not to say in public school settings and, in fact, it is the government (principals and teachers), standing in the place of parents, that does understand and know what types of speech best serve the interests (short-term and long-term) of students. *In loco parentis* provides a ready-made vehicle for facilitating such paternalism, allowing government officials to play the role of surrogate parents as they see fit. Boston College Professor Mary-Rose Papandrea observed in 2008 that “various members of the Supreme Court have suggested that the need to defer to school officials outweighs student speech rights due to the importance of supporting parental decision-making, the *in loco parentis* doctrine, the inherent differences between children and

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114. Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 663, 669 (1987) (emphasis added).

115. 478 U.S. 675 (1986). The Supreme Court held in *Bethel Sch. Dist. No. 403 v. Fraser*, a case involving a high school student who gave a speech loaded with sexual innuendoes, that:

The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.

*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). In upholding the school’s discipline of the student, who made the speech in a captive-audience situation before about 600 other students, the high Court added that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” *Id.* at 683.

116. *Id.* at 681.

adults, and the so-called ‘special characteristics’ of the school environment.”<sup>117</sup>

Given this background and understanding, the authors use the term paternalism in this article, in the context of the government regulation of speech, to stand for the principle that the government is justified in restricting and regulating speech either: because the audience of the speech needs help in understanding it or will make wrongheaded choices with the information (restrictions on commercial speech designed to protect the consumer); or because the speakers simply don’t know and understand what speech is appropriate to be conveyed in a specific environment (restrictions on the speech students in public schools).

In other words, paternalism can be reflected both in terms of government control over the flow of speech *to* an audience and the flow of speech *from* a speaker in a government-controlled setting.

## II. CRITIQUING JUSTICE THOMAS’S CONCURRENCES IN *MORSE* AND *44 LIQUORMART* THROUGH THE LENSES OF ORIGINALISM AND PATERNALISM

Section A of this part of the article examines Justice Thomas’s concurrence in *Morse v. Frederick*. Section B then critiques his concurrence in *44 Liquormart, Inc. v. Rhode Island*. In both sections, the concepts of originalism and paternalism are employed as the tools of analysis.

### A. *Morse v. Frederick*

#### 1. *Originalism in Morse*

The difficulties with First Amendment originalism were transparent in Justice Thomas’s concurrence in *Morse v. Frederick*.<sup>118</sup> As noted earlier, *Morse* was the latest in a series of limitations placed

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117. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1031 (2008).

118. 551 U.S. 393 (2007).

on student First Amendment rights by the high court since its seminal student speech case in *Tinker v. Des Moines Independent Community School District*.<sup>119</sup> *Tinker*, which arose after students wore black armbands to school to protest the Vietnam War, held that student speech was protected unless it would “materially and substantially disrupt the work and discipline of the school.”<sup>120</sup> Later decisions narrowed the seemingly broad protection provided by the *Tinker* “substantial disruption” rule.<sup>121</sup>

*Morse* arose when Joseph Frederick, a public high school senior, and friends unfurled a large banner with the phrase “BONG HiTS 4 JESUS” at the 2002 Olympic Torch Relay in his hometown of Juneau, Alaska.<sup>122</sup> The students were attending the relay with the permission of school authorities and were situated across the street from the high school. When Principal Deborah Morse demanded the students take down the banner, all but Frederick agreed to do so. He was subsequently suspended from school for ten days. Morse justified her actions based on her interpretation of the banner as encouraging illegal drug use, which school policy forbade.<sup>123</sup> The school superintendent subsequently upheld the suspension, noting that Frederick’s “speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay.”<sup>124</sup> Frederick then filed suit in federal court alleging violation of his First Amendment rights.

While the U.S. Supreme Court’s majority upheld the suspension, reversing a Ninth Circuit ruling that Frederick’s First Amendment rights had been violated, Justice Thomas, in a solo concurring

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119. 393 U.S. 503 (1969).

120. *Id.* at 513.

121. *See* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that disruption was not the only ground on which student speech could be suppressed; other grounds included lewd or indecent speech by students); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (finding that schools possess enhanced control over student speech taking place in school-sponsored activities—in this case, a student newspaper).

122. 551 U.S. at 396–97.

123. *Id.* at 398.

124. *Id.* at 398–99.

opinion, went much further than the majority. “I write separately,” Justice Thomas wrote, “to state my view that the standard set forth in *Tinker* . . . is without basis in the Constitution.”<sup>125</sup>

In prototypical originalist fashion, Justice Thomas’s analysis sought guidance from the framing generation’s understanding of the scope of free speech rights. He concluded that “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”<sup>126</sup> The evidence for this proposition, however, is slim to nonexistent. Justice Thomas noted that there were no public schools during the colonial period,<sup>127</sup> meaning that there would necessarily be a complete absence of evidence from the period of the framing and ratification of the Bill of Rights.

However, Justice Thomas asserted, public education was growing at the time of the ratification of the Fourteenth Amendment. This led him to conclude that “[i]f students in public schools were originally understood as having free-speech rights, one would have expected nineteenth-century public schools to have respected those rights and courts to have enforced them. They did not.”<sup>128</sup>

This analysis is really rather remarkable in that Justice Thomas argued, with great confidence, that the First Amendment does not apply to a state institutional setting that did not exist in 1791, and that, because of federalism, would not have been under the purview of the First Amendment even if it had existed. The claim that public education was “relatively common”<sup>129</sup> by 1868, when the Fourteenth Amendment was ratified, seems of little relevance since, of course, the actual application of the doctrine of incorporation, which applied the First Amendment to the states, did not take place until the twentieth century was well underway.<sup>130</sup>

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125. *Id.* at 410 (Thomas, J. concurring).

126. *Id.* at 410–11.

127. *Id.* at 411.

128. *Morse*, 551 U.S. at 411.

129. *Id.*

130. The earliest glimmer of First Amendment incorporation occurred in *Gitlow v. New York*, 268 U.S. 652 (1925).

It is hardly surprising, then, that few would have even contemplated First Amendment claims on behalf of public school students in the nineteenth century. Even Justice Thomas's claims about the very *existence* of public education in the nineteenth century are misleading and anachronistic—as commentators Doug Kendall and Jim Ryan have argued,

[e]ven by the time the [Fourteenth] Amendment was adopted . . . public schools were just getting started. Few students attended school for more than five years; public high schools were virtually nonexistent; and compulsory education was still decades away. Despite the vast differences between public education then and public education today, Justice Thomas evidently believes the question of whether students have free-speech rights should be answered by conducting an imaginary séance with 18<sup>th</sup>- and 19<sup>th</sup>-century Framers and ratifiers . . . .<sup>131</sup>

Kendall and Ryan's point about the brief period of most public education is particularly relevant to *Morse*; at the time of the precipitating incident, Joseph Frederick was eighteen years of age, almost unimaginable in a nineteenth-century public school setting.

Justice Thomas supports his view with sources from and about nineteenth-century educational practice that emphasized “strict discipline. Schools punished students for behavior the school considered disrespectful or wrong. . . . To meet their educational objectives, schools required absolute obedience.”<sup>132</sup> Justice Thomas's harsh Dickensian vision of childhood,<sup>133</sup> as one commentator described it, was on full display as he marshaled citations and authorities backing his assertion that nineteenth-century schools were ruled “with an iron hand.”<sup>134</sup> But as noted above, whatever the

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

132. *Morse*, 551 U.S. at 412 (Thomas, J., concurring).

133. Stephen Kanter, *Symposium: Speech and the Public Schools After Morse v. Frederick: Bongs Hits 4 Jesus As a Cautionary Tale of Two Cities*, 12 LEWIS & CLARK L. REV. 61, 99 (2008).

134. *Morse*, 551 U.S. at 411 (Thomas, J. concurring).



practice of the time, if free speech claims remained inchoate during the period, historical practice does not prove limitations on the scope of the First Amendment, even if we accept originalist criteria at face value. These arguments are the legal equivalent of the naturalistic fallacy—deriving limitations on Constitutional norms directly from historical practices, divorced from any legitimate evidence from Constitutional text, history, doctrine, or other sources.

Justice Thomas’s approach is an exemplar of Justice Brennan’s concern that originalism creates a sort of presumption against claims of constitutional rights—in this case, through an examination of historical practices that were not informed by any constitutional scrutiny at the time. There are no doubt many practices from nineteenth-century institutions that were felt to be constitutional at the time—segregation comes to mind<sup>135</sup>—that no judge, including Justice Thomas, would today find to be constitutionally valid.

As discussed more fully in a later section,<sup>136</sup> Justice Thomas also devotes considerable attention to the common-law doctrine of *in loco parentis*. Unquestionably, *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, but its relevance to First Amendment claims that were neither considered nor litigated seems tangential at best. The Constitution, after all, trumps the common law, as any first-year law student knows. And in 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. As one commentator has argued, in the cases Justice Thomas cites in which nineteenth-century courts upheld

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135. In fact, Justice Thomas took a very different approach, completely ignoring the nineteenth-century practice of school segregation, as one astute commentator has pointed out, in a case decided just days after *Morse*. Hans Bader, *Bong Hits for Jesus: The First Amendment Takes a Hit*, 2006–07 CATO SUP. CT. REV. 133, 156–57 (2006–2007). In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), as Bader points out, Justice Thomas voted with the majority to strike down the use of students’ race by school boards to enhance diversity. Had Thomas been faithful to his position that nineteenth-century school practice was conclusive as to its constitutionality, he would have had to vote the other way, given the widespread nineteenth-century educational practice of using race in school placement decisions.

136. See discussion *infra* Part II.A.2.

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.”<sup>137</sup>

Justice Thomas concludes his concurrence with a candid assertion of his own policy preferences. The *Tinker* regime, he wrote, “has undermined the traditional authority of teachers to maintain order in public schools.”<sup>138</sup> Defiance has become commonplace—a perfect example, Justice Thomas notes, is found in Frederick’s conduct in this case: “Frederick asserts a constitutional right to utter at a school event what is either ‘[g]ibberish,’ . . . or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical . . . .”<sup>139</sup> In these lines, it seems, the apolitical originalist recedes and the angry social conservative comes to the fore. In the imaginary, pristine world of Justice Thomas’s originalism, policy preferences such as these would have no bearing on the outcome and be of no interest to the judge or his readers. The originalist judge is bound by the original public meaning of the Constitution, regardless of pragmatic considerations and social consequences in the present. In the originalist mythos, it is the consideration of the judge’s own ideology and preferences that polluted Constitutional law in the Warren era.

But perhaps Justice Thomas has gotten the cart before the horse. Perhaps it is not the objective use of history that actually drives his interpretations of the Constitution. Perhaps it is, as in *Morse*, his social philosophy that leads to strained and implausible uses of history to implement his conservative vision.

## 2. *Paternalism in Morse*

Just as Justice Thomas resorts to the tenets of originalism in his desire to quash and quell the speech rights of public students, so too did his *Morse* concurrence reek of a heavy dose of paternalism drawn

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137. Bader, *supra* note 135, at 155.

138. *Morse*, 551 U.S. at 421 (Thomas, J., concurring).

139. *Id.* (citations omitted). But, of course, so much of our First Amendment tradition involves the robust protection of defiance and impertinence. See generally STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (Harvard Univ. Press 1990).

from his historical analysis. For Justice Thomas, it is clear that the government, in the form of public school teachers and administrators, knows what speech is in the best interests of minors. As Justice Thomas bluntly summed it up, “in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”<sup>140</sup>

This is the world to which Justice Thomas would like to return—one in which students only listened—they did not speak—to what government authorities taught them. Students apparently lacked the capacity to think and therefore to speak for themselves; the government knew that silence on their part was golden. To return to Joel Feinberg’s observation, paternalism “suggests the view that the state stands to its citizens . . . as if they were children,”<sup>141</sup> and this seems to hold literally true here for Justice Thomas.

The notion of the government, standing in the shoes of a parent knowing what is best for his or her child, knowing what speech is best for students was clear for Justice Thomas, as he glommed on to the doctrine of *in loco parentis* to support his apparent view that children are better seen and not heard when they are under government control (in other words, when they are in school-place settings). “A review of the case law shows that *in loco parentis* allowed schools to regulate student speech,”<sup>142</sup> Justice Thomas wrote. In the realm of expression, the doctrine of *in loco parentis* provided, in Justice Thomas’s view, public schools with near-absolute power to quash student speech. As Justice Thomas put it, “the doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way,”<sup>143</sup> other than in the area of what he called “excessive physical punishment.”<sup>144</sup> Justice Thomas’s use of originalism lead him in *Morse* to conclude that:

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140. *Morse*, 551 U.S. at 412 (Thomas, J., concurring).

141. FEINBERG, *supra* note 91, at 4.

142. *Morse*, 551 U.S. at 414 (Thomas, J., concurring).

143. *Id.* at 416.

144. *Id.*

several points are clear: (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.<sup>145</sup>

Justice Thomas used the term *in loco parentis* a whopping fifteen times in his *Morse* concurrence;<sup>146</sup> it clearly was the lynchpin for his analysis. By way of stark contrast, the opinion of the court, authored by Chief Justice John Roberts and siding with Principal Deborah Morse, never once uses the term *in loco parentis*. The concurrence of Justices Alito and Kennedy used the term *in loco parentis* only once and it did so specifically to reject it as the vehicle through which the government can justify censorship of student expression.<sup>147</sup>

For Justice Thomas, the high court's landmark decision in *Tinker* extending First Amendment speech rights to public school students was a huge mistake because the court turned its back on *in loco parentis* and, instead, began to recognize the autonomy of students as humans.<sup>148</sup> In *Tinker*, the Supreme Court announced, with great rhetorical flourish, that "state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution."<sup>149</sup> For Justice Thomas, however, state-operated schools are enclaves of government paternalism, where students are not treated as persons possessing their own liberty interests but rather are, in the view that the *Tinker* court rejected,

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145. *Id.* at 419.

146. *Id.* at 410–22.

147. *See id.* at 424 (Alito, J., concurring) (reasoning that "[i]t is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities," and concluding that it is "wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*").

148. As Justice Thomas wrote, "*Tinker's* reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling, a role limited by *in loco parentis*." *Id.* at 417–19 (Thomas, J. concurring).

149. *Tinker v. Des Moines Indep. Cmty Sch. Dist*, 393 U.S. 503, 511 (1969).

“closed-circuit recipients of only that which the State chooses to communicate.”<sup>150</sup>

Sadly, Justice Thomas suggested that parents who object to the government (that is, public schools) dictating to their children what speech is and is not in their best interest have a remedy: “they can send their children to private schools or home school them; or they can simply move.”<sup>151</sup> This represents a bizarre kind of love-it-or-leave-it logic when it comes to the power of government paternalism; if you think you know better than the government what speech your child has a right to say, then leave the government’s control.

The bottom line for Justice Thomas in *Morse*, then, is that the application of historicism, as a method of constitutional interpretation, leads him to the adoption of governmental paternalism in the realm of public schools. This, in turn, leads to a defeat for the speaker and the First Amendment. In other words, once historicism clears the way for Justice Thomas to conclude that *Tinker* should be scrapped, what is laid bare—what we are left with—is the resurrection of the old doctrine of *in loco parentis*.

Historicism and paternalism, when coupled together for Justice Thomas in *Morse*, thus permit his own form of judicial activism in which he alone<sup>152</sup> calls for overturning *Tinker* and abandoning in its entirety a muddled body of student-expression jurisprudence. This is decidedly at odds with what Kathleen Sullivan, as noted earlier, describes in the United States as “an anti-paternalism principle for government telling us what to think and say.”<sup>153</sup>

The media often consider Justice Thomas a conservative,<sup>154</sup> but his combined use of historicism and paternalism would lead him in *Morse* to ignore principles of precedent and stare decisis. *Morse*, it

150. *Id.*

151. *Morse*, 551 U.S. at 420 (Thomas, J., concurring).

152. See Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 130 (2008) (reviewing the *Morse* decision and writing that “only Justice Thomas appeared to be interested” in “a path to general repeal of the First Amendment in public schools”).

153. Collins et al., *supra* note 98, at 338 (2007) (quoting Sullivan).

154. See Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1543 (2008) (writing that “there are, according to the media, the ‘conservative’ Justices—Scalia, Thomas, Roberts, and Alito . . .”).

should be noted, was the first student-speech case Justice Thomas heard since taking his seat on the high court, and now we know that, if he had had his druthers, it also would have been his last. As noted in the Introduction, Professor James E. Fleming asserts that a hallmark of originalism is that the “original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.”<sup>155</sup> In *Morse*, this was true for Justice Thomas, with originalism leading back to a bygone paternalism and trumping the line of student-speech rights cases that started with *Tinker*.

#### B. *44 Liquormart, Inc. v. Rhode Island*

##### 1. *Originalism in Liquormart*

Justice Thomas the iconoclast was fully present in a concurrence in the 1996 commercial speech case of *44 Liquormart, Inc. v. Rhode Island*,<sup>156</sup> but Justice Thomas the originalist kept a low profile. In *44 Liquormart*, Justice Thomas advocated a dramatic restructuring of First Amendment advertising doctrine in a case dealing with liquor advertising. The case arose when Rhode Island sought to enforce a state statute banning alcoholic beverage advertising that referred to the price of the goods, other than price tags or signs within stores. The state justified this regulation with the claim that by preventing price competition among liquor stores, the state could further its goal of temperance.<sup>157</sup>

Retailer 44 Liquormart challenged the law after the state fined the store for a newspaper advertisement that did not directly list the price of alcohol products, but instead used the word “WOW” to suggest low prices.<sup>158</sup> The Supreme Court struck down the state advertising ban unanimously, although the Court had a considerable divergence of rationales. The principal opinion for the Court, written by Justice Stevens, largely maintained the traditional distinction between

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155. Fleming, *supra* note 36, at 1151.

156. 517 U.S. 484 (1996).

157. *Id.* at 489–91.

158. *Id.* at 492.

commercial speech and more fully protected speech and also supported the continued use of the *Central Hudson* test,<sup>159</sup> with some suggested modifications. The *Central Hudson* test applies a form of First Amendment intermediate scrutiny to advertising regulations that is more deferential to government than the strict scrutiny test the Court applies to attempts to regulate fully protected speech.<sup>160</sup>

Justice Thomas's concurrence from the outset struck a combative tone, suggesting that a distinction between nonmisleading commercial speech and other types of protected speech was constitutionally untenable. Justice Thomas attacked the application of the *Central Hudson* test in cases in which advertising regulations are designed "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace."<sup>161</sup> The Justice Thomas concurrence at least suggested a nearly wholesale abandonment of the distinction between commercial speech and noncommercial speech, which would have profound implications for commercial speech doctrine.

What is particularly notable about the Justice Thomas concurrence of *44 Liquormart* is that the analysis is largely textbook doctrinal legal analysis. Justice Thomas explicates case after prior case from the Court's commercial speech jurisprudence, with barely a glance at history or the framing generation. This Justice Thomas takes the doctrinal landscape as a given and smartly negotiates his way through the jurisprudential minefield to reach his desired conclusion. The irony, of course, is that, historically, First Amendment protection for advertising is at least as controversial as protection for student speech. In fact, the First Amendment status of advertising was settled *against* its recognition for many years in a way that student speech never was after the doctrine of incorporation actually began to be applied.<sup>162</sup>

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159. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

160. See generally Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the Central Hudson and O'Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723 (2001).

161. *44 Liquormart, Inc.*, 517 U.S. at 518 (Thomas, J. concurring).

162. Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding that commercial advertising is not constitutionally protected) with *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (holding that compelling students to salute the flag violates free speech clause of First Amendment).

In terms of the framing periods of the First and Fourteenth Amendments, free speech protection for commercial speech is hardly a settled question.<sup>163</sup> Justice Thomas does assert that he does not “see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”<sup>164</sup> To support this statement he cites, among other things, dicta from several cases and a brief by American Advertising Federation. However, arch-originalist Justice Antonin Scalia, in his own *44 Liquormart* concurrence, felt the question was too close to call. Justice Scalia wrote that much more evidence would be needed, including evidence from state legislative practices of the nineteenth century vis-à-vis their own state constitutional guarantees of free speech, to properly evaluate the question of advertising’s status on originalist criteria.<sup>165</sup> Justice Scalia, at least, acknowledged the highly contested nature of any originalist assertion that commercial speech should be recognized as within the scope of the First Amendment.

Thus, Justice Thomas makes a nod toward originalism in *44 Liquormart*, but in a way that evinces little interest in the complexity of the historical determination. By simply assuming that the original meaning of the First Amendment included commercial speech—and by presenting the question as a straightforward one—Justice Thomas is able to move forward on a doctrinalist path toward his preferred result.

The juxtaposition of *Morse* and *44 Liquormart* reveals something significant about Justice Thomas’s First Amendment originalism, aside from the shared theme of chemical intoxication. In a case in which he apparently found the speaker and the class of speech distasteful (*Morse*), Justice Thomas went to great lengths to build an implausible historical case against First Amendment recognition of

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163. “[T]here is a legitimate argument that on the original understanding, the government could regulate libelous speech, blasphemous speech, and commercial advertising.” CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 65 (Basic Books 2005). For an opposing view, citing historical sources during the framing periods of the First and Fourteenth Amendments, see generally Daniel E. Troy, *Advertising: Not ‘Low Value’ Speech*, 16 *YALE J. ON REG.* 85 (1999).

164. *44 Liquormart, Inc.*, 517 U.S. at 522 (Thomas, J. concurring).

165. *Id.* at 517 (Scalia, J. concurring).



the category of speech. But in a case in which he presumably approved of the category of speech (*44 Liquormart*), Justice Thomas barely broke a sweat in exploring the originalist bona fides of the speech, however controversial its historical status in fact is. Justice Thomas's standard for recognition of the speech in *Morse* was as follows: "[i]f students in public schools were originally understood as having free-speech rights, one would have expected 19<sup>th</sup>-century public schools to have respected those rights and courts to have enforced them."<sup>166</sup> Had he substituted "advertisers" for "students in public schools" and "19<sup>th</sup>-century state legislatures" for "19<sup>th</sup>-century public schools," he would have faced exactly the question that Justice Scalia asserted was without adequate historical evidence in *44 Liquormart*.

Despite decades of precedential support for both student speech and commercial speech (on non-originalist grounds), Justice Thomas apparently wishes to remake First Amendment doctrine in his own image, with very different standards of historical proof depending on the topic. As constitutional scholar Jack Balkin has argued: "[t]oday's originalism is hauled out to attack decisions that judges and politicians don't like. But when it comes to decisions they do like, or would be embarrassed to disavow, the same judges and politicians quickly change the subject."<sup>167</sup>

Of course, whether originalists follow their own tenets rigorously and consistently is an entirely different question from whether originalism is a coherent doctrine or a normatively desirable mode of constitutional interpretation. But if one wishes to assert that originalism is not simply a cover for one's personal ideology, it would seem that one's methodology should be beyond reproach. Particularly in the case of Justice Thomas, who is willing to abandon decades of First Amendment precedent where he believes that precedent flawed on historical grounds, an impeccable methodology would seem vital, especially when considering entire categories of

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166. *Morse*, 511 U.S. at 411 (Thomas, J. concurring).

167. Jack Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226>.

protected speech. In the cases examined here, however, such a standard appears to be unmet.

## 2. *Paternalism in Liquormart*

In stark opposition to Justice Thomas's heavy dose of originalism in *Morse* leading to the unearthing and adoption of paternalism in the realm of student speech, his Spartan use of originalism in his *44 Liquormart* concurrence coincided with a rejection of paternalism. In particular, Justice Thomas blasted Rhode Island's prohibition on the advertising of the retail prices of alcoholic beverages as a misguided effort "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace."<sup>168</sup>

Rhode Island had adopted its prohibition on truthful information about a lawful product in order to serve its "substantial interest in promoting temperance."<sup>169</sup> For Justice Thomas, the means to serve this interest—the prohibition on retail price advertising—smacked of government paternalism because they centered on "keeping would-be recipients of the speech in the dark." He thus criticized the application, in such scenarios, of the *Central Hudson* test, which gives commercial speech less than full First Amendment protection.<sup>170</sup> Thomas wrote that the high Court "has never explained why manipulating the choices of consumers by keeping them ignorant is more legitimate when the ignorance is maintained through suppression of 'commercial' speech than when the same ignorance is maintained through suppression of 'noncommercial' speech."<sup>171</sup>

Calling for more substantial protection for commercial speech like that originally afforded by the high Court in 1976 in *Virginia Pharmacy*,<sup>172</sup> Justice Thomas wrote:

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168. *44 Liquormart, Inc.*, 517 U.S. at 487.

169. *Id.* at 504.

170. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (setting forth the *Central Hudson* test).

171. *44 Liquormart, Inc.*, 517 U.S. at 526 (Thomas, J., concurring).

172. *Virginia State Bd. of Pharm.*, 425 U.S. 748. *See supra* note 22 (describing the high Court's reasoning for the holding in this case).

In my view, the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not. Rather than continuing to apply a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Bd. of Pharmacy*.<sup>173</sup>

In summary, Justice Thomas rejects paternalism in *44 Liquormart*. The government should not restrict the free flow of speech to its citizens in order to keep them in the dark so as to lead to a result that the government considers desirable. As attorney Jay Bender observed in a 2002 article that examines the *44 Liquormart* decision, “Thomas’s position stems from a belief that individuals should have the widest range of information about commercial choices in the marketplace, and is consistent with his faith in the ‘antipaternalistic premises of the First Amendment.’”<sup>174</sup> In scenarios where the government tries to keep consumers ignorant of truthful information for their own good, Justice Thomas would require the government to prove a much more rigorous standard of scrutiny than that provided under *Central Hudson*.<sup>175</sup>

#### CONCLUSION

There are, of course, many ways to analyze judicial opinions. This article simply has employed one possible approach for trying to unpack and understand the contrasting concurrences of Justice Clarence Thomas in *Morse v. Frederick* and *44 Liquormart v. Rhode Island*. If David Hudson was correct back in 2002 when he asserted

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173. *44 Liquormart, Inc.*, 517 U.S. at 528 (Thomas, J., concurring).

174. Jay Bender, *The Decline of Paternalism and the Commercial Speech Doctrine*, 13 S.C. L. REV. 26, 29 (2002).

175. Justice Thomas made this clear in another concurring opinion—in particular, his concurrence in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (Thomas, J., concurring) (describing how he would apply strict scrutiny to such scenarios).

that “Justice Thomas has indeed become a free-speech defender,”<sup>176</sup> it is clear after *Morse* that his defense of free speech is limited to particular domains and certainly does not encompass student expression.

In *Morse*, Justice Thomas’s massive deployment of originalism, with his repeated citations and references to historical decisions and writings, whisked him down a road of censorship and government paternalism that was facilitated by embracement of the doctrine of *in loco parentis* that originalism unearthed. The end result, for Justice Thomas, would be to jettison a relatively new area of First Amendment jurisprudence and to eliminate all speech rights for students in public schools.

In contrast, Justice Thomas’s cursory, if not passing, reference to originalism in *44 Liquormart* carried him down a road toward enhanced freedom of speech and to the adoption of a decidedly anti-paternalism stance in the realm of commercial speech. The end result, for Justice Thomas, would be to expand protection of speech in a relatively new area of First Amendment jurisprudence.

The implications drawn from these divergent outcomes—the latter free-speech friendly, the former not so much—are somewhat jarring. On the one hand, students have no First Amendment right to speak in educational settings where they might learn and reach self-discovery through their own contributions (including both learning from their own speech mistakes and learning how to become critical thinkers through challenging ideas). On the other hand, fictitious corporate entities and businesses possess a right to advertise prices so that others may learn where to purchase cheap booze so that they may drink.

Is there a way to reconcile these two seemingly incongruous, if not opposite, outcomes on the paternalism front? The initial answer would seem to be yes. In the case of commercial speech, the anti-paternalism streak of Justice Thomas relates to an unenumerated First

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176. Hudson, *supra* note 1, at 486.

Amendment right of the audience to receive speech.<sup>177</sup> The government has an obligation not to block this flow of information, at least when it is truthful and when the recipient is an adult (those who can legally purchase the alcohol that so concerned Rhode Island) who can make his or her own decisions.

In the case of student speech, the pro-paternalism exhibited by Justice Thomas relates, on the specific facts of *Morse*, not to the right to receive speech, but rather to what can be said—the right to speak. It was student Joseph Frederick’s right to engage speech—speech that Thomas derisively characterized as “such impertinence”<sup>178</sup>—that was quashed.

In a nutshell, it seems like Justice Thomas’s anti-paternalism deals with the right of adults to receive speech, while his pro-paternalism deals with the right (or lack thereof) of minors to speak. But the implications of Justice Thomas’s pro-paternalism in *Morse*, however, are not limited to empowering the government to tell students what they can and cannot say. In his world, the ability to censor student speech and to discipline student conduct, both under the guise of *in loco parentis*, go hand in hand with the ability to educate and to teach as the government sees fit. As Justice Thomas wrote in his concurrence about the world which historicism returns him, “early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled ‘a core of common values’ in students and taught them self-control.”<sup>179</sup>

In other words, this represents a unidirectional flow of communication, in which there is a transmission of speech from government authorities (school teachers) to students. The receipt of information is completely controlled by the government, with students having no input and no room for, as Justice Thomas put it,

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177. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (opining that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”); *Griswold v. Conn.*, 381 U.S. 479, 482 (1965) (writing that “the right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . .”); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (writing that the First Amendment freedom to distribute literature “necessarily protects the right to receive it”).

178. *Morse*, 551 U.S. at 421 (Thomas, J., concurring).

179. *Id.* at 411.

“debates or exploration of competing ideas.”<sup>180</sup> As Justice Thomas wrote elsewhere in *Morse*: “in the earliest public schools, teachers taught, and students listened”;<sup>181</sup> and “[e]arly public schools gave total control to teachers.”<sup>182</sup>

This all suggests that Justice Thomas’s pro-paternalism stance affects not just what students can say, but also the speech that they can receive. Students are not allowed to challenge the received information—to question it, to debate it—in any way because the government knows best what speech they should receive.

Disturbingly, then, Justice Thomas’s opinion in *Morse* stands in stark opposition to the marketplace of ideas metaphor that dominates First Amendment jurisprudence.<sup>183</sup> As the Supreme Court wrote in *Tinker*, “the classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>184</sup> Justice Thomas’s use of originalism in *Morse* then not only leads him back to *in loco parentis*, but also to reject the marketplace metaphor in educational settings.

Moreover, the originalist methodology Justice Thomas deploys in *Morse*, based as it is on paternalistic practices not informed by constitutional scrutiny, is a disturbing one in a broader sense. The eighteenth and nineteenth centuries in the U.S. were, of course, periods of tremendous legal inequality for numerous groups, including African-Americans, women, and Native Americans. Authoritarian and patriarchal arrangements were the norm, in educational and employment settings, and even families. As legal historian Kermit Hall has pointed out, “[t]he eighteenth-century

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180. *Id.*

181. *Id.* at 412.

182. *Id.* at 419.

183. The marketplace of ideas theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH 2* (Lawrence Erlbaum Associates) (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 237 (1991). See generally SMOLLA, *supra* note 72, at 6–8 (providing an overview of the goals, strengths and weaknesses of the marketplace of ideas theory).

184. *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

American family was a vital link the chain of social authority . . . . Within the family, as in the larger political society, patriarchy ordered social relations.”<sup>185</sup> This is the world, with its oppressive and anachronistic social practices, that Justice Thomas wishes to revisit, indeed resurrect, to determine the scope of First Amendment protection for speech—or at least speech he appears to dislike.

As constitutional scholar Jack Balkin has argued, “[n]obody, and I mean nobody, whether Democrat or Republican, really wants to live under the Constitution according to the original understanding once they truly understand what that entails. Calls for a return to the framers’ understandings are a political slogan, not a serious theory of constitutional decision-making.”<sup>186</sup> In the vital realm of freedom of speech, only serious theories need apply.

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185. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 150 (Oxford Univ. Press) (1989).

186. Balkin, *supra* note 167.

