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# Morse, School Speech, and Originalism

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*Originalism is a term used modernly to describe a particular and controversial approach to constitutional interpretation in which the text of the document is understood and applied as “intelligent and informed people of the time” of enactment would have understood and applied it. Originalism’s most ardent proponents on the current United States Supreme Court include Justice Antonin Scalia and, with increasing frequency and rigidity, Justice Clarence Thomas. In Morse v. Frederick, the Court’s most recent foray into First and Fourteenth Amendment protection of student speech in a public school setting, these two Justices seem to part company over the relevance and utility of an originalist analysis. Justice Thomas wrote a separate concurring opinion in which he argues that a commitment to originalism compels a fundamental reexamination of whether public school students enjoy any free speech rights at all. This Essay examines the Court’s various opinions in Morse, focusing in particular on the lessons about originalism — in the school speech setting and more generally — that might be gleaned from a careful look at Justice Thomas’s opinion and its failure to attract support even from other originalist-minded Justices.*

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## INTRODUCTION

This Essay examines various writings by members of the United States Supreme Court in *Morse v. Frederick*.<sup>1</sup> I devote special attention to Justice Thomas's concurrence, and the lessons that opinion may teach about his brand of originalism, both in the school speech setting and more generally. While I criticize Justice Thomas's originalism — as embodied in his *Morse* opinion — for its extremism, its carelessness, its selectivity, and its stubbornness, I do laud Justice Thomas for considering in *Morse* not just the original expectations of the founding generation, but also those of nineteenth-century Americans whose understandings of the reconstruction amendments deserve much more attention than some originalists often seem to give.

## I. THE MORSE MAINSTREAM — THE VIEWS OF EIGHT MEMBERS OF THE COURT

As other symposium participants have explained, the *Morse* litigation arose from an incident in Juneau, Alaska, in which a group of high school students unfurled a banner proclaiming “BONG HiTS 4 JESUS” along a public sidewalk.<sup>2</sup> The students displayed the banner during the 2002 Olympic Torch Relay as it passed through Juneau.<sup>3</sup> The event took place outside school grounds but during school hours at a time when the high school principal, Deborah Morse, had “permit[ted] staff and students to participate in the Torch Relay as an approved social event or class trip.”<sup>4</sup> When she allowed the students to leave class to watch the Relay, she directed school personnel to monitor the students at the event.<sup>5</sup> The high school's pep band and cheerleaders also performed at the Olympic Torch Relay celebration.<sup>6</sup>

Joseph Frederick was one of the students who held up the banner as TV cameras passed by.<sup>7</sup> When Principal Morse saw the banner, she confronted Frederick and instructed him to take it down.<sup>8</sup> Frederick refused and Morse took down the banner herself, later explaining that

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<sup>1</sup> 127 S. Ct. 2618 (2007).

<sup>2</sup> *Id.* at 2622.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2624.

<sup>7</sup> *Id.* at 2622.

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

she thought the banner's message encouraged illegal drug use.<sup>9</sup> She then suspended Frederick for ten days.<sup>10</sup> Frederick filed suit in federal court against Morse and the school board that employed her, seeking money damages as well as injunctive relief for violation of his First Amendment rights, among other things.<sup>11</sup> The district court denied relief, instead granting summary judgment to defendants.<sup>12</sup> On appeal, the United States Court of Appeals for the Ninth Circuit reversed and upheld Frederick's First Amendment claim.<sup>13</sup>

The United States Supreme Court, in a 5–3–1 ruling, in turn reversed in a majority opinion written by Chief Justice Roberts and joined by Justices Kennedy, Scalia, Thomas, and Alito.<sup>14</sup> In its analysis, the Supreme Court majority first characterized the case as one involving student speech in a school setting.<sup>15</sup> The Court next turned to the key precedents, including the famous 1969 *Tinker v. Des Moines Independent Community School District* ruling.<sup>16</sup> In *Tinker*, the Court invalidated a school's attempt to discipline students who wore armbands to school to protest the Vietnam War.<sup>17</sup> The Court there held that the First Amendment protected expressive armband wearing because the school could not demonstrate any substantial disruption of educational activities or the rights of other students.<sup>18</sup> The *Morse* majority also considered as a guidepost *Bethel School District No. 403 v. Fraser*,<sup>19</sup> where the Court upheld the authority of school officials to punish a student for lewd and indecent speech at a mandatory school

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<sup>9</sup> *Id.* at 2622-23.

<sup>10</sup> *Id.* at 2622.

<sup>11</sup> *Id.* at 2623.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2621.

<sup>15</sup> According to the Court, this characterization mattered because although

[o]ur cases make clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[.]” . . . we have held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” and that the rights of students “must be ‘applied in light of the special characteristics of the school environment.’”

*Id.* at 2622 (internal citations omitted).

<sup>16</sup> 393 U.S. 503 (1969).

<sup>17</sup> *Id.* at 504-06.

<sup>18</sup> *Id.* at 514.

<sup>19</sup> 478 U.S. 675 (1986).

assembly attended by students ranging from the ninth through the twelfth grades.<sup>20</sup>

From these two cases, the Court in *Morse* deduced two principles. First, students may have the right to do and say things off campus that the First Amendment does not protect when those things are done or said at school.<sup>21</sup> Second, the “substantial disruption” standard of *Tinker* is not “absolute,” and there may be other justifications besides substantial disruption that school authorities may properly invoke to restrain harmful speech.<sup>22</sup>

The key additional justification present in *Morse*, said the majority, was the overwhelming need to discourage and deter illegal drug use among students.<sup>23</sup> Findings from Congress, as well as past precedents of the Court, wrote Chief Justice Roberts, indicated that school suppression of speech — even content- or viewpoint-based suppression — was permissible when the “speech is reasonably viewed as promoting illegal drug use.”<sup>24</sup> In the present case, while the student’s banner was cryptic to be sure, the reference to “BONG HiTS” could easily and reasonably be understood as a celebration or advocacy of illegal drug use.<sup>25</sup>

In addition to the majority opinion, four Justices authored separate opinions. Each of these opinions is interesting and noteworthy for what it reveals about the Roberts Court’s attitude towards student speech claims and towards First Amendment and constitutional doctrine more generally.

Justice Alito, joined by Justice Kennedy, wrote separately to make clear he did not think speech “commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana’” was implicated by the Court’s rejection of Frederick’s claim.<sup>26</sup> Justice Alito’s opinion also makes explicit his view that the Court should not create additional exceptions to *Tinker*; beyond the need to avoid “substantial disruption,” lewd and indecent speech, and speech advocating illegal drug use, public schools had no additional “special characteristics . . .

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<sup>20</sup> *Id.* at 685.

<sup>21</sup> *See Morse v. Frederick*, 127 S. Ct. 2618, 2626-27 (2007).

<sup>22</sup> *See id.*

<sup>23</sup> *Id.* at 2628-29.

<sup>24</sup> *Id.* at 2625.

<sup>25</sup> *See id.*

<sup>26</sup> *Id.* at 2636 (Alito, J., joined by Kennedy, J., concurring) (quoting *Morse*, 127 S. Ct. at 2649 (Stevens, J., dissenting)).

[that would] necessarily justify any other speech restrictions” down the road.<sup>27</sup>

Justice Breyer also wrote separately<sup>28</sup> to say that he would have held that any First Amendment violation of Frederick’s rights was not sufficiently obvious — any mistake by Principal Morse was not sufficiently unreasonable — to override the so-called “qualified immunity” from damage liability enjoyed by defendants in cases like this one.<sup>29</sup> He urged the Court to overrule its recent *Saucier v. Katz*<sup>30</sup> decision, which requires a court in a qualified immunity case to resolve the question of constitutional violation before deciding whether immunity is appropriate.<sup>31</sup> Because Justice Breyer believed the immunity doctrine resolved Frederick’s damages claim (and because he believed the injunctive claim might go away for other reasons), Justice Breyer declined to weigh in definitively on whether Principal Morse’s actions violated Frederick’s First Amendment rights.<sup>32</sup> The continuing vitality of *Saucier* is an important question in its own right.<sup>33</sup> *Saucier*’s approach, requiring resolution of constitutional substance before considering reasonableness of the defendant’s conduct, does seem anomalous for a Court that in other respects and for many years has not seemed anxious to resolve constitutional questions.<sup>34</sup>

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<sup>27</sup> *Id.* at 2637.

<sup>28</sup> *Id.* at 2638 (Breyer, J., concurring in judgment in part and dissenting in part).

<sup>29</sup> *Id.* at 2639-40.

<sup>30</sup> 533 U.S. 194 (2001).

<sup>31</sup> *Id.* at 201-02.

<sup>32</sup> *Morse*, 127 S. Ct. at 2638, 2639-41 (Breyer, J., concurring in judgment in part and dissenting in part).

<sup>33</sup> The order in which the immunity question and the merits question are resolved bears on, among other things, the question of whether the Court should be more receptive to facial constitutional challenges or instead focus on “as applied” attacks. In recent years, the Court seems to be narrowing the window for facial challenges in many areas of constitutional law. See, e.g., Vikram David Amar, *What the Supreme Court’s Recent Decision Upholding Indiana’s Voter ID Law Tells Us About the Court, Beyond the Area of Election Law*, FINDLAW, May 8, 2008, <http://writ.news.findlaw.com/amar/20080508.html> (providing examples of Court’s reluctance to embrace facial challenges). If *Saucier* is overruled, as-applied challenges too will be more difficult to maintain, and thus less useful in refining and shaping substantive constitutional doctrine.

<sup>34</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (using prudential standing doctrine to avoid thorny constitutional merits question); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (holding that when possible, federal courts should construe statutes in reasonable manner so as to avoid constitutional questions). To be clear, I personally do not think *Saucier* is necessarily wrong, but it was unexpected.

Dissenting in *Morse*, Justice Stevens, joined by Justices Souter and Ginsburg,<sup>35</sup> assumed without deciding that schools could ban speech advocating illegal drug use without satisfying *Tinker*'s "substantial disruption" standard.<sup>36</sup> Justice Stevens nonetheless concluded that the school must show at least that "Frederick's supposed advocacy stands a meaningful chance of making otherwise-law-abiding students try marijuana."<sup>37</sup> The school could not do this, Stevens believed, because the banner was essentially "nonsen[sical]" and did not really advocate anything, much less advocate illegal drug use.<sup>38</sup>

By allowing school authorities to adopt content- and viewpoint-based regulations of student speech advocating illegal drugs, *Morse* does make some significant First Amendment law. Interestingly, however, there does not appear to be substantial divergence between the majority and dissent on this question of law. Even Justice Stevens's dissent allows that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting . . . [and that perhaps] our rigid imminence requirement [otherwise governing advocacy and incitement cases] ought to be relaxed at schools."<sup>39</sup> The greatest point of disagreement between the majority and the dissent appears to be how drug-related and drug-encouraging Frederick's banner really was.<sup>40</sup> (Curiously, Justice Stevens never explains why, if the banner was itself devoid of meaning, the First Amendment should protect it so vigorously in the first place — why, to use Justice Stevens's words, the First Amendment protects something that is a "nonsense message, not advocacy."<sup>41</sup>) To be sure, Justice Stevens's dissent would seem to insist on more evidence that the regulated speech actually impairs the war on drugs than would the majority, but the dispute in *Morse* seems almost as much factual as it is legal.

A more meaty legal question might be what Justice Alito and Justice Kennedy meant by bracketing "speech that can plausibly be interpreted as commenting on any political or social issue."<sup>42</sup> Would

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<sup>35</sup> *Morse*, 127 S. Ct. at 2643 (Stevens, J., joined by Souter, J., and Ginsburg, J., dissenting).

<sup>36</sup> *See id.* at 2646.

<sup>37</sup> *Id.* at 2647. This standard seems to be lower than that used in the incitement realm of First Amendment Free Speech jurisprudence, but higher than a non-trivial possibility.

<sup>38</sup> *Id.* at 2649 (observing that "[t]his is a nonsense message, not advocacy").

<sup>39</sup> *Id.* at 2646.

<sup>40</sup> *See id.* at 2649.

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

<sup>42</sup> *Id.* at 2636 (Alito, J., joined by Kennedy, J., concurring).

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the Court permit punishment of a student for wearing to school a T-shirt bearing the message: “Register your disagreement with the war on drugs by civil disobedience!” Is this proscribable drug advocacy, or protected political speech? Justices Alito and Kennedy hold the key going forward here.

## II. JUSTICE THOMAS IN *MORSE* AND THE ROLE OF ORIGINALISM

In the remainder of this Essay, I devote attention to Justice Thomas’s separate concurrence in *Morse*,<sup>43</sup> in which he advocates on originalist grounds the overruling of *Tinker* and the judicial oversight of school officials that seminal ruling ushered in.<sup>44</sup>

Justice Thomas’s concurrence asserts essentially three points. First, the free speech rights of students should be assessed as the “First Amendment was originally understood.”<sup>45</sup> Second, at our country’s founding and during the nineteenth century, schools “managed classrooms with an iron hand” under the doctrine of *in loco parentis*.<sup>46</sup> That doctrine embraced the idea that the “power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor.”<sup>47</sup> Third, under these principles, the First Amendment simply “does not protect student speech in public schools.”<sup>48</sup> Taken together, these points lead Justice Thomas to conclude that *Tinker* and the freedom it guarantees to students are “without basis in the Constitution” and should no longer be respected.<sup>49</sup>

Justice Thomas’s concurrence did not draw an extended response from any other Justice on the Court. Without referring directly to Justice Thomas’s opinion, Justices Alito and Kennedy did reject the “dangerous fiction” of *in loco parentis* because they believe school officials, as agents of the State, should be limited and distrusted the way all agents of the State are.<sup>50</sup> They plausibly suggest that it is not realistic to think that parents mean to delegate parental authority to public schools, especially when parents often have little choice about whether to send their children to public schools if they cannot afford

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<sup>43</sup> See *id.* at 2629-36 (Thomas, J., concurring).

<sup>44</sup> *Id.* at 2633-34.

<sup>45</sup> *Id.* at 2630.

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

<sup>47</sup> *Id.* at 2631 (quoting 2 J. KENT, COMMENTARIES ON AMERICAN LAW \*205, \*206-07 (O.W. Holmes ed., 12th ed., Little, Brown, & Co. 1873 (1826-1830))).

<sup>48</sup> *Id.* at 2630.

<sup>49</sup> See *id.*

<sup>50</sup> *Id.* at 2637 (Alito, J., joined by Kennedy, J., concurring).



the cost of private education.<sup>51</sup> Notwithstanding this implicit reference, there is no real engagement of Justice Thomas's arguments by the rest of the Court. Understanding why sheds light on the some of the weaknesses of originalism, at least Justice Thomas's brand, in this area of constitutional law and also more broadly. To see this, we must begin with a brief primer on contemporary originalist theory.

Originalism is a term used modernly to describe a particular approach to constitutional (and sometimes statutory) interpretation that seeks to understand and apply the text of the document as "intelligent and informed people of the time"<sup>52</sup> of enactment would have. Justice Antonin Scalia, the American jurist most often associated and credited with the development of originalism in recent American jurisprudence, has explained that originalism seeks to construe text "reasonably, to contain all that it fairly means."<sup>53</sup> Under originalism, the meaning that counts is "the original meaning of the text"<sup>54</sup> — "how the text of the Constitution was originally understood"<sup>55</sup> by interpreters of the day. What "the original draftsmen intended"<sup>56</sup> might be evidence of what the words meant at the time, but any divergence between drafters' intentions and the most likely understandings of those words at the time of enactment would be resolved in favor of the latter.<sup>57</sup> In any event, according to Justice Scalia, the "Great Divide with regard to constitutional interpretation [today] is not that between Framers' intent and [original] objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."<sup>58</sup> Originalists reject the notion of "current meaning" and a "Living Constitution" primarily because, they argue, it vests too much discretion in modern judges and justices to do whatever they feel.<sup>59</sup> Although Justice Scalia was perhaps the first current Justice to extensively discuss originalism, Justice Thomas has surely pursued the originalist ideology with zeal.

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<sup>51</sup> See *id.*

<sup>52</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 38 (Amy Gutmann ed., 1997).

<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.* at 38.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* ("What I look for [is] . . . the original meaning of the text, not what the original draftsmen intended.")

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 38-44 (criticizing "flexibility and liberality" of "current meaning" approaches).

Indeed, *Morse* is far from the first time Justice Thomas has stood alone on the Court in the originalist position he has staked out. His federalism writings, especially in Commerce Clause cases, are perhaps the most noteworthy examples.<sup>60</sup> Justice Thomas's enthusiasm in this regard is memorialized in Jeffrey Toobin's recent book, *The Nine: Inside the Secret World of the Supreme Court*, in which Toobin recounts an appearance Justice Scalia made at a synagogue at which he was asked to compare his own jurisprudence to that of Thomas. According to Toobin, Scalia responded by saying "I am an originalist . . . but I am not a nut."<sup>61</sup>

Justice Scalia's distancing of himself from Justice Thomas is a bit ironic, because Justice Thomas's seeming extremism is reminiscent of Justice Scalia's own marginalization on the Court about a decade ago. In *Romer v. Evans*<sup>62</sup> and *United States v. Virginia*<sup>63</sup> in 1996, Scalia expressed some extreme originalist views that placed him virtually alone on the Court.<sup>64</sup> Justice Scalia's characterization of Justice Thomas is also unfair because in some ways, Justice Thomas's explication of originalism is more defensible — less nutty — than Justice Scalia's.<sup>65</sup> Nonetheless, no one on the Court seems even to grapple with Justice Thomas's views in *Morse*. I believe there are three reasons why Justice Thomas gets nowhere in convincing the other Justices in *Morse* — why his colleagues might view him as "nutty." After offering and explaining these reasons, I suggest at least one

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<sup>60</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 57, 58 (2005) (Thomas, J., dissenting) (reiterating view that Court should return to original understanding of Commerce Clause, whose "text, structure and history" concern "selling, buying and bartering" but not "productive activities like manufacturing and agriculture").

<sup>61</sup> JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 103 (2007). It may seem odd that a (usual) intellectual ally on the Court would be so harsh in his discussion of Justice Thomas, but Justice Scalia is well known for caustic criticism of even those on his same general side of the Court. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in judgment) (stating that Justice O'Connor's argument concerning *Roe v. Wade* "cannot be taken seriously").

<sup>62</sup> 517 U.S. 620 (1996).

<sup>63</sup> *United States v. Virginia (VMI)*, 518 U.S. 515 (1996).

<sup>64</sup> In *Romer*, Justice Scalia argued that a person's orientation could constitutionally be the basis of any non-criminal punishment (which is absurd), and in *VMI* he asserted that "unbroken traditions" existing in 1868 should be preserved, not disturbed, under equal protection analysis, leaving landmark cases like *Brown v. Board of Education*, 347 U.S. 497 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967), unexplained and vulnerable. *VMI*, 518 U.S. at 569 (Scalia, J., dissenting).

<sup>65</sup> See *infra* notes 146-51 and accompanying text.

reason why there is something to be taken seriously in what Justice Thomas writes.

#### A. *Originalism Uber Alles*

Justice Thomas's is an originalism that consumes everything else, including *stare decisis*. No member of the Court over the last century has been so open and cavalier about his disdain for the constraining nature of precedent, at least in the constitutional setting.<sup>66</sup> As Justice Thomas has written, "[w]hen faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."<sup>67</sup> I well understand that some jurists may ascribe too much weight to constitutional doctrine and too little to the constitutional document. Indeed, I have argued that courts are often careless in their invocation of *stare decisis*.<sup>68</sup> But Justice Thomas's formulations often fail to acknowledge any role for *stare decisis*. In *Morse*, for example, Justice Thomas engages in no discussion of the substantial reliance society has built up around *Tinker*. *Tinker* is one of the few cases, such as *Regents of the University of California v. Bakke*,<sup>69</sup> *Roe v. Wade*,<sup>70</sup> and *Miranda v. Arizona*,<sup>71</sup> that non-lawyers have heard of.<sup>72</sup> Many (perhaps most) high school government texts devote significant coverage to *Tinker*.<sup>73</sup> School authorities and American citizens have internalized *Tinker*. What Justice O'Connor said of *Bakke* is also largely true of *Tinker*, that a generation of parents and school

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<sup>66</sup> See TOOBIN, *supra* note 61, at 102-03.

<sup>67</sup> *Kelo v. City of New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting).

<sup>68</sup> See, e.g., Akhil Reed Amar & Vikram David Amar, *How Should the Supreme Court Weigh Its Own Precedent?*, FINDLAW, Dec. 13, 2002, <http://writ.news.findlaw.com/amar/20021213.html> (arguing for more careful and thoughtful use of *stare decisis*).

<sup>69</sup> 438 U.S. 265 (1978).

<sup>70</sup> 410 U.S. 113 (1973).

<sup>71</sup> 384 U.S. 436 (1966).

<sup>72</sup> Notably, the Court has protected that reliance on these three cases. See *Grutter v. Bollinger*, 539 U.S. 306, 314 (2005) (crediting reliance on *Bakke*); *United States v. Dickerson*, 530 U.S. 428, 432 (2000) (crediting reliance on *Miranda*); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992) (crediting reliance on *Roe*).

<sup>73</sup> See, e.g., CTR. FOR CIVIC EDUC., *WE THE PEOPLE* 98-100 (1988) (discussing *Tinker* in widely used middle school text book); CTR. FOR CIVIC EDUC., *WE THE PEOPLE: THE CITIZEN AND THE CONSTITUTION* 163-64 (10th ed. 2002) (discussing freedom of speech in school setting in widely used high school civics text).

administrators have devised academic programs with *Tinker's* guidelines in mind.<sup>74</sup>

Even Justice Scalia, a die-hard originalist, acknowledges the importance of *stare decisis*, especially in the First Amendment setting. In responding to charges by Professor Laurence Tribe that originalism cannot account for decisions to invalidate laws banning flag burning and cross burning,<sup>75</sup> Scalia has written that “[o]riginalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.”<sup>76</sup>

Lest I be accused of being too hard on Justice Thomas, and too easy on Justice Scalia, let me observe as an aside that Justice Scalia too has some explaining to do regarding his views of the intersection of *stare decisis* and originalism. In some respects, *all* of the Justices can be accused of inconsistency in their invocation of *stare decisis*.<sup>77</sup> As for Justice Scalia, one powerful criticism concerns his disinclination (as of yet) to call for the elimination of the so-called “exclusionary rule” in Fourth Amendment cases (under which evidence of guilt is excluded because police officers obtained it in violation of the Fourth Amendment).<sup>78</sup> As my (sometimes co-author and) brother Akhil Amar points out in a *Harvard Law Review* article,<sup>79</sup> there does not seem to be a strong reliance interest in preserving the exclusionary rule if the rule is misguided as a matter of Fourth Amendment meaning.<sup>80</sup> That is, it seems incredibly unlikely that any criminal factors into his risk-reward calculus when deciding whether to undertake a crime the possibility that evidence of his crime will be suppressed under the exclusionary rule. As Akhil has pointed out, to state this supposed reliance interest

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<sup>74</sup> See *Grutter*, 539 U.S. at 323 (“Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.”)

<sup>75</sup> See Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 52, at 129, 138-39.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., Vikram David Amar, *The Supreme Court’s Problematic Use of Precedent Over the Past Term: Why Overruling or Refashioning May, In Some Cases, Be Better than Selective Interpretation*, FINDLAW, July 20, 2007, <http://writ.news.findlaw.com/amar/20070720.html> (analyzing inconsistent and incoherent uses of *stare decisis* in recent Roberts Term).

<sup>78</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (explaining basics of exclusionary rule).

<sup>79</sup> Akhil Reed Amar, *Heller, HLR and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008).

<sup>80</sup> *Id.* at 160-61.

here is to realize how unpersuasive it is.<sup>81</sup> Yet Justice Scalia, who has made clear he does not think the exclusionary rule follows from the best reading of the Constitution itself, has not called for its elimination, presumably because he labors under an incomplete account of *stare decisis* himself.<sup>82</sup>

Turning back to *Morse*, Justice Thomas ignores not only *stare decisis*, but also exactly what the world would really look like if we were to follow his instincts. He admits that “treating children as though it were still the [nineteenth] century would find little support today,” but never even asks, let alone explains, why this is so.<sup>83</sup> Put to one side the link between *in loco parentis* and severe corporal punishment. A true embrace of *in loco parentis* in all its particulars would sanction even blatant viewpoint discrimination in schools. Pro-war buttons could be explicitly permitted, but anti-war armbands punished. Students could be disciplined for taking any even quiet position that diverges from the political orthodoxy of school officials. Indeed, students could be punished for failing to declare faithfulness to favored ideas. Justice Thomas’s approach, in other words, would overrule not only *Tinker*, but also the famous *West Virginia Board of Education v. Barnette*<sup>84</sup> case, in which the Court held that public school children enjoy a First Amendment right to decline to recite the Pledge of Allegiance if they so choose.<sup>85</sup> Thus, a true embrace of *in loco parentis* would allow schools to compel speech in the same way that parents can compel speech at home.

A related criticism of Justice Thomas’s *Morse* opinion is that the Court has already rejected, or at least minimized the importance of, originalism in these contexts. In *Brown*, after talking about how originalism did not yield a definitive answer, the Court observed:

An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education [at the time of the Fourteenth Amendment]. . . . [T]he movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. . . . As a consequence, it is not surprising that there

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<sup>81</sup> *Id.*

<sup>82</sup> *See id.*

<sup>83</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2635 (2007) (Thomas, J., concurring).

<sup>84</sup> 319 U.S. 624 (1943).

<sup>85</sup> *See id.* at 642.

should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.<sup>86</sup>

It's one thing to reject *stare decisis* in favor of originalism; it seems more extreme to reject *stare decisis on the question of originalism* in particular settings.<sup>87</sup>

### B. Original Sloppiness

Justice Thomas's originalism is not only extreme; it is also careless. His opinion in *Morse* relies heavily on cases upholding school-imposed punishment for transgressions, such as truancy, that have nothing to do with speech.<sup>88</sup> He describes in any meaningful detail just four cases from the 1800s upholding punishment for student speech.<sup>89</sup> But, importantly, all of these cases involved disruptive student speech and none involved speech on matters of truly public concern. The speech in *Tinker* was just the opposite: nondisruptive and undeniably political.<sup>90</sup>

Of the four cases Justice Thomas discusses, one involved "profane" speech, which even *Tinker* has not been understood to protect. In *Deskins v. Gose*,<sup>91</sup> an 1885 court in Missouri permitted punishment of a student for "profane language" and for "fighting and quarrelling."<sup>92</sup> The remaining three cases Thomas discusses involved degrading or "humiliat[ing]" or "incendiary" criticism<sup>93</sup> — ridicule — of school officials, not persons outside the school community.

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<sup>86</sup> *Brown v. Bd. of Educ.*, 347 U.S. 497, 489-90 (1954).

<sup>87</sup> Justice Thomas apparently disagrees with the historical record described in *Brown*. He observed in *Morse* that "[b]y the time the States ratified the Fourteenth Amendment, public schools had become relatively common." *Morse*, 127 S. Ct. 2618, 2630 (Thomas, J., concurring). The Court has indicated that reinterpretations of fact can justify overruling past cases, even momentous ones, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992), but Justice Thomas does not pursue that route, perhaps because his factual assertion may not bear the weight of such an analysis.

<sup>88</sup> See *Morse*, 127 S. Ct. at 2631-32 (Thomas, J., concurring) (discussing *Sheehan v. Sturgess*, 2 A. 841, 843 (Conn. 1885), and *State v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365 (1837)).

<sup>89</sup> See *id.* at 2632-33 (discussing *Wooster v. Sunderland*, 148 P. 959 (Cal. Ct. App. 1915), *Vanvactor v. State*, 15 N.E. 341 (Ind. 1888), *Deskins v. Gose*, 85 Mo. 485, 487-88 (1885), and *Lander v. Seaver*, 32 Vt. 114, 115 (1859)).

<sup>90</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510-11 (1969).

<sup>91</sup> 85 Mo. 485 (1885).

<sup>92</sup> *Id.* at 489.

<sup>93</sup> See *Wooster v. Sunderland*, 148 P. 959, 959-60 (Cal. Ct. App. 1915); *Lander v. Seaver*, 32 Vt. 114, 121 (1859).

The case Justice Thomas's opinion features most prominently is *Lander v. Seaver*,<sup>94</sup> in which a student was punished for pejoratively calling his teacher "Old Jack Seaver" in the presence of other students.<sup>95</sup> Justice Thomas quotes the following language from the 1859 opinion upholding the punishment:

[L]anguage used to other scholars to stir up disorder and subordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools.<sup>96</sup>

But cases like *Lander* in which students criticize or ridicule their teachers and principals, involve a different question than does nondisruptive expression about events outside school — the issue presented by *Tinker*. Interestingly, there are virtually no modern cases that forcefully uphold student speech rights under *Tinker* in the *Lander* setting of disrespect to teachers. The *Tinker* opinion itself disclaims any protection for student speech that "s[EEKS] to intrude in . . . school affairs."<sup>97</sup> Moreover, the *Tinker* opinion relies extensively on the lower court ruling in *Burnside v. Byars*<sup>98</sup> (so much so that Justice White concurs separately in *Tinker* to make clear he does not embrace everything the Fifth Circuit said in *Byars*),<sup>99</sup> which emphasized that the First Amendment did not protect student speech that "attempt[ed] to undermine the authority of the school."<sup>100</sup>

It might seem counterintuitive that, under *Tinker*, students may more easily criticize the President of the United States than a teacher. After all, students are likely to know and care more about their school environment than any other matter of public concern. But the absence

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<sup>94</sup> 32 Vt. 114 (1859).

<sup>95</sup> *Id.* at 115.

<sup>96</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2632 (2007) (Thomas, J., concurring) (quoting *Lander*, 32 Vt. at 121).

<sup>97</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

<sup>98</sup> 363 F.2d 744 (5th Cir. 1966).

<sup>99</sup> See *Tinker*, 393 U.S. at 515 (White, J., concurring).

<sup>100</sup> *Byars*, 363 F.2d at 749.

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of protection for speech that undermines the authority of school officials is in perfect keeping with the line of cases involving public employee speech. From *Pickering v. Board of Education*<sup>101</sup> to *Garcetti v. Ceballos*,<sup>102</sup> the Court has recognized that when public employees speak even on matters of public concern, their speech interests must be weighed against the needs of their workplace such that some speech can be suppressed that would otherwise be protected if uttered by a private employee.

Justice Thomas's opinion in *Morse* anticipates that some might try to characterize *Lander* as involving speech that humiliates or parodies teachers and that is therefore unprotected because it distinctively undermines the schools' mission.<sup>103</sup> But Justice Thomas insists this possible distinction between *Lander* and *Tinker* does not weaken his originalist/*in loco parentis* attack on *Tinker*.<sup>104</sup> He proclaims in this regard that "[in the nineteenth century], state courts repeatedly reasoned that schools had discretion to impose discipline to maintain order. *The substance of the student's speech or conduct played no part in the analysis.*"<sup>105</sup>

This statement is simply wrong. The substance of the student's speech or conduct did matter. In *Lander*, Justice Thomas's originalist "Exhibit A," if you will, the court gave the following reason as to why the school could punish the misbehaving student:

[The student's] misbehavior, it is especially to be observed, has a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination. *It is not misbehavior generally, or towards other persons, or even towards the master in matters in no ways connected with or affecting the school.* For [speech unconnected with school operations,] we think the parents, and they alone, have the power of punishment.

But where the offense has a direct and immediate tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with a design to insult him, we think he has the right to punish the scholar for such acts . . . .

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<sup>101</sup> 391 U.S. 563, 574 (1968).

<sup>102</sup> 547 U.S. 410, 422 (2006).

<sup>103</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2632 (2007) (Thomas, J., concurring).

<sup>104</sup> *Id.* at 2635.

<sup>105</sup> *Id.* (emphasis added).



The misbehavior must not have merely a remote and indirect tendency to injure the school.<sup>106</sup>

Justice Thomas's opinion completely fails to mention, let alone explain or distinguish, this passage. Thus, contrary to what Justice Thomas asserts in *Morse*, the substance of the student's speech figured prominently in the *Lander* analysis; the court there did not rely on unqualified invocations of *in loco parentis*.<sup>107</sup>

Indeed, the court in *Lander* explicitly limited its embrace of *in loco parentis*, and stated the doctrine in much more narrow terms than Justice Thomas emphasizes:

It is also said that [the master] stands *in loco parentis*, and is invested with *all* the authority and immunity of the parent. Such would seem to be the doctrine of the passage cited from [earlier works].

. . . This parental power [in the hands of the parent] is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.

The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from instinct of parental affection. . . .

"The master is *in loco parentis*, and has such a *portion* of the powers of the parent committed to his charge, as may be necessary to answer the purposes for which he is employed."<sup>108</sup>

Thus, *Lander* itself cautions against the embrace of absolute delegation of parental power to school authorities.

As Justice Scalia has famously cautioned, good originalism must carefully frame historical questions. Whether the Framers and ratifiers of the Constitution intended to protect or ignore a putative right depends on how narrowly the right is defined. Courts must thus be scrupulously attentive to the level of generality at which we ask the historical question of whether something is protected, proscribed, or neglected.<sup>109</sup> Justice Thomas's invocation of nonspeech cases (cases, for

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<sup>106</sup> *Lander v. Seaver*, 32 Vt. 114, 120-21 (1859) (emphasis added).

<sup>107</sup> See *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring); *Lander*, 32 Vt. at 120-21.

<sup>108</sup> *Lander*, 32 Vt. at 122 (internal citations omitted) (emphasis added).

<sup>109</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.).

example, involving punishment of students for truancy and for fighting) suggests he is not at all careful to descend to “the most specific [identifiable] level”<sup>110</sup> at which to ask the historical questions. Cases involving lewd or insubordinate speech similarly do not address the question whether the kind of speech at issue in *Tinker* and *Morse* is protected. Indeed, if there were no speech cases from the nineteenth century at all, does Justice Thomas really think judicial rejection of claims of excessive punishment for truancy in the name of *in loco parentis* really supports the proposition that no student speech is protected as an originalist matter? If cases involving schools but not speech count, why don’t cases involving speech but not schools count?

The most Justice Thomas could really say is that he did not find any cases *in favor* of students asserting speech rights. But the lack of cases either way *could* show that schools often respected students’ speech rights when speech was expressed in mature, nondisruptive and noninsubordinate ways. In this regard, Justice Thomas has done no better than the great originalist Hugo Black.<sup>111</sup> Justice Black’s famous *Tinker* dissent, which also purported to challenge the majority on traditional and originalist grounds,<sup>112</sup> failed to locate any historical authority that contradicted the majority’s position. The originalist case against student speech rights may exist, but to my mind that case has not been proven.

### C. Original Selectivity

Justice Thomas’s originalism is not just careless, it is also selective. Indeed, one of the most striking things about his opinion, and the majority’s for that matter, is the disconnect between *Morse* and the other big school case from last Term, *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>113</sup> In *Parents Involved*, a 5–4 majority held that local school boards in Seattle, Washington, and

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

<sup>111</sup> My brother, Akhil Amar, has described Hugo Black as “a liberal lion and a confessed textualist-originalist.” Colloquium, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 *YALE L.J.* 1997, 2008 n.33 (2006). For prominent (if not always convincing) examples of Justice Black’s use of originalism, see his writings in *Adamson v. California*, 332 U.S. 46 (1947), *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>112</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 520 (1969) (Black, J., dissenting).

<sup>113</sup> 127 S. Ct. 2738 (2007). The Supreme Court consolidated *Parents Involved* with a factually similar case originating in the Sixth Circuit, *McFarland ex rel. McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (6th Cir. 2005).

Louisville, Kentucky, ran afoul of the Equal Protection Clause of the Fourteenth Amendment when they voluntarily — without a court order — adopted race-based programs to redress de facto racial segregation in their respective school districts.<sup>114</sup> The majority concluded that the school districts' use of individual students' race as a factor in assigning students to a particular school failed “strict scrutiny” because the programs were not “narrowly tailored” to advance a “compelling” objective.<sup>115</sup>

Although the details of the two school assignment plans differed in some particulars, a description of how the Seattle School District plan operated will suffice to provide context for analyzing the important legal issues. In assigning students to particular schools, the District asked area students entering high school to register their preferences for any of the ten high schools within the District.<sup>116</sup> The District placed as many students in their “first choice” school as possible.<sup>117</sup> The District, however, could not meet every student's first choice; at least four of the ten schools were typically oversubscribed — more students wanted admission than the schools could accommodate.<sup>118</sup>

In these oversubscribed schools, the District admitted students pursuant to four “tiebreakers.”<sup>119</sup> First, the District considered whether an applicant had a sibling attending the school.<sup>120</sup> Second, the District examined the racial composition of the school and the individual race of each applicant.<sup>121</sup> Third, the District considered the applicant's geographical proximity to the school.<sup>122</sup> The fourth tiebreaker was a random lottery.<sup>123</sup>

Under the second tiebreaker, considered before geography or a lottery, the District examined whether the oversubscribed school was “racially imbalanced.”<sup>124</sup> The District considered a school imbalanced if its racial makeup — the percentage of nonwhite students versus white students at the school — diverged by more than ten percent

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<sup>114</sup> See *Parents Involved*, 127 S. Ct. at 2759.

<sup>115</sup> *Id.* at 2757.

<sup>116</sup> *Id.* at 2746-47.

<sup>117</sup> *Id.* at 2747.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F. 3d 1162, 1171 (9th Cir. 2005) (en banc).

<sup>124</sup> *Parents Involved*, 127 S. Ct. at 2747.

from the racial makeup of the whole District.<sup>125</sup> Because the entire Seattle District was roughly sixty percent nonwhite and forty percent white, a particular school was considered imbalanced if less than about fifty percent or more than around seventy percent of its students were nonwhite.<sup>126</sup> Alternatively, a school would be imbalanced if less than approximately thirty percent or more than about fifty percent of its student body were white.<sup>127</sup>

A majority of the United States Supreme Court rejected the Seattle plan and the similar Louisville plan.<sup>128</sup> Chief Justice Roberts, in an opinion that Justices Kennedy, Scalia, Thomas, and Alito joined, held that the plans failed strict scrutiny because they were not tailored carefully enough in numerous respects.<sup>129</sup> Even so, much of the Court's debate turned on how to read history, how to understand the *Plessy v. Ferguson*<sup>130</sup> era, and the seminal *Brown v. Board of Education*<sup>131</sup> opinion.

Four Justices in *Parents Involved* — Chief Justice Roberts, and Justices Scalia, Thomas, and Alito — invoked the legacy of *Brown* in controversial ways.<sup>132</sup> After asserting that “when it comes to using race to assign children to schools, history will be heard,”<sup>133</sup> the plurality quoted the *Brown* remedial ruling<sup>134</sup> (issued a year after the merits ruling) to the effect that “full compliance” with the merits ruling required school districts “to achieve a system of determining admission to the public schools on a nonracial basis.”<sup>135</sup>

Justice Thomas, as he did in *Morse*, wrote separately even though he joined the plurality's opinion as well.<sup>136</sup> His separate opinion amplified this colorblind mandate, becoming the most forceful, detailed explication of the modern colorblind position yet.<sup>137</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *Id.* at 2767.

<sup>129</sup> *See id.* at 2769. In particular, both plans defined race too crudely, focusing only on whites and blacks, but essentially ignoring other races. *See id.* at 2756-57.

<sup>130</sup> 163 U.S. 537 (1896).

<sup>131</sup> 347 U.S. 483 (1954).

<sup>132</sup> *See Parents Involved*, 127 S. Ct. at 2767-68.

<sup>133</sup> *Id.* at 2767.

<sup>134</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>135</sup> *Parents Involved*, 127 S. Ct. at 2767 (quoting *Brown's* remedial opinion) (emphasis removed). Needless to say, the Court's invocation and interpretation of *Brown* (and *Plessy*) were quite controversial. For one analysis, see Amar, *supra* note 77 (criticizing majority's treatment of *Brown* and *Plessy*).

<sup>136</sup> *See Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).

<sup>137</sup> For an earlier prominent assertion of a colorblind approach, see *Adarand*

One question, for present purposes, is why Justice Thomas does not discuss *in loco parentis* in *Parents Involved*. Surely parents can take account of the race of the people they want their children to associate with, so why cannot school officials? A related question is why *Morse* and *Parents Involved* are markedly divergent on the question of deference to local authorities and so-called “legislative facts” — matters of general knowledge about the way people and institutions operate, upon which legislatures and agencies routinely make policy decisions.

Consider the deference to school authorities in *Morse* about how Frederick’s banner might affect other students and the school environment.<sup>138</sup> The Court required no evidence demonstrating that such speech is likely to increase drug use; rather the Court deferred to local school authorities’ predictions.<sup>139</sup> But where was such *in loco parentis* deference concerning the expected benefits of an integrated learning environment in *Parents Involved*? There, the Court seemed to insist that the school districts prove specific facts with voluminous evidence as to exactly how their proposed policies might help kids in the classroom.<sup>140</sup> Why deference was appropriate where the First Amendment was involved, but not where the Equal Protection Clause was involved, is completely unexplained. If the Roberts Court is going to avoid criticisms of methodological inconsistency, it must address these questions in the future.

Of even more specific relevance to this Essay, Justice Thomas’s discussion of originalism in *Parents Involved* is undeveloped at best.<sup>141</sup> In all the modern racial classification cases over the last generation, the colorblind Justices have never had to explain how their view — that

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*Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995).

<sup>138</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (Thomas, J., concurring).

<sup>139</sup> *Id.* at 2628-29.

<sup>140</sup> See, e.g., *Parents Involved*, 127 S. Ct. at 2756 (“The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts — or rather the white/nonwhite or black/other’ balance of the districts, since that is the only diversity addressed by the plans.”).

<sup>141</sup> One commentator framed the general point as follows:

[In *Morse*,] Justice Thomas essentially asked whether those alive at the time that the Fourteenth Amendment was ratified would have thought that students had free speech rights, and he answered no. Putting aside whether that answer was correct, neither Justice Thomas nor Justice Scalia, who occasionally likes to practice the same form of “expectations” originalism, asks a similar question here.

James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 150-51 (2007).

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government cannot use race whatsoever — can be squared with the fact that the Congress that passed the Fourteenth Amendment did use race to help African Americans. Justice Breyer in *Parents Involved* finally started, at least, to call out the colorblind Justices on this, pointing out that the federal government, even in the nineteenth century, at times offered relief to all African Americans, and not just newly freed slaves.<sup>142</sup> Justice Thomas had only this to say by way of response:

The dissent half-heartedly attacks the historical underpinnings of the color-blind Constitution. . . . What the dissent fails to understand, however, is that the color-blind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination — indeed, it requires that such measures be taken in certain circumstances. Race-based government measures during the 1860's and 1870's to remedy state-enforced slavery were therefore not inconsistent with the color-blind Constitution.<sup>143</sup>

Thomas's comment here is the entirety of what originalists have said about originalism and the "color-blind Constitution" in all the cases over the past two decades. And it is far from enough. Why? Because Justice Thomas does not address the fact that slavery was not illegal until 1866 and the adoption of the Thirteenth Amendment! So why does the government have authority to use race to rectify slavery unless the government as a general matter can use race to rectify racial problems (such as de facto segregation) that go beyond past state lawlessness?

#### D. *Some Praise for Justice Thomas in Morse*

Before closing, let me offer one piece of praise for Justice Thomas. Many people, including to a small extent Justice Scalia, have eschewed (or at least downplayed) originalism in the First Amendment context on the ground that the Framers were of different minds on the meaning of free speech and the theory of free speech that best explains the constitutional text.<sup>144</sup> The dust-up over the Sedition Act of 1796 is

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<sup>142</sup> See *Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting).

<sup>143</sup> *Id.* at 2782 n.19 (Thomas, J., concurring) (internal citations omitted) (emphasis removed).

<sup>144</sup> See, e.g., Scalia, *supra* note 52, at 45 (noting that historical ambiguity surrounding original understandings of First Amendment complicates use of originalism in that area).

supposed to show this lack of consensus as to original meaning. As Ronald Dworkin has written in a critique of originalism:

[D]isagreement about what [the right of free speech] comprises was much more profound when the amendment was enacted than it is now. When the dominant Federalist party enacted the Sedition Act in 1798, its members argued, relying on Blackstone, that “the freedom of speech” meant only freedom from “prior restraint” . . . . The opposing Republicans argued for a dramatically different view of the amendment . . . [The parties disagreed and] [n]o one supposed that the First Amendment codified some current and settled understanding, and the deep division among them showed that there was no settled understanding to codify.<sup>145</sup>

Justice Thomas circumvents this difficulty surrounding the original meaning of the First Amendment in two ways, both of which I think are helpful to good, careful originalism. First, he explores state constitutional antecedents and analogues to the federal Constitution.<sup>146</sup> For all the increased modern emphasis on comparativism,<sup>147</sup> we need to delve more deeply into the state constitutional foundations and vindications of federal constitutional values. Second, he focuses less on the founding era and more on the era leading into and coming out of the Reconstruction Amendments.<sup>148</sup> As Michael Kent Curtis and other first-rate historians have shown, there might be much more consensus in the 1850s and 1860s on key questions than in the 1780s and 1790s.<sup>149</sup> And good originalism must be sensitive to constitutional meanings at the time federal provisions were incorporated against the states and understandings of the “privileges and immunities” of national citizenship protected in the Fourteenth Amendment.<sup>150</sup> After all, only by virtue of the Fourteenth

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<sup>145</sup> See Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 52, at 115, 124-25.

<sup>146</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2630 n.1 (2007) (Thomas, J., concurring).

<sup>147</sup> See, e.g., Vikram David Amar & Mark V. Tushnet, *Preface* to *GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW*, at vi-vii (Vikram David Amar & Mark V. Tushnet eds., 2009) (noting desire for more comparative materials among those who study constitutional law).

<sup>148</sup> See *Morse*, 127 S. Ct. at 2630-33.

<sup>149</sup> See generally Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 *AKRON L. REV.* 231, 234 (2000) (arguing that lawyers need to draw more lessons from First Amendment history during antebellum and reconstruction eras).

<sup>150</sup> See, e.g., Amar, *supra* note 79, at 175-78.

Amendment are states and school districts bound by federal free speech norms in the first place.<sup>151</sup> Reconciling the founding and the reconstruction is something originalists have not done particularly well, and at least Justice Thomas's *Morse* opinion can be used as evidence that that is a necessary job for originalists to undertake if originalism is to convince its skeptics.

#### CONCLUSION

The meaning of the First Amendment (both in schools and elsewhere) is likely to be fought over in many important rulings from the Roberts Court. And, of course, the ongoing question about the kind of originalism the Court should employ in free speech and other constitutional arenas is undeniably one of the dominant constitutional themes of the modern era. All the opinions in *Morse* give us clues as to the former, and Justice Thomas's writing, and the reaction to it, sheds important light on the latter. If originalism, in free speech cases and elsewhere, is going to win over detractors, its proponents need to be mindful of concerns about how aggressively, how carefully, and how consistently it is employed.

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<sup>151</sup> See generally Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151 (1992) ("For every textualist should know that the First Amendment's text explicitly restrains only *Congress*, but the plain words of the Fourteenth Amendment do govern action by the states . . . .")