First Amendment — Free Speech — Public Schools — Mahanoy v. B. L.

When neither the original public meaning nor existing legal precedent can answer a legal question, the judiciary must rely on more creative modes of constitutional reasoning. Last Term, in *Mahanoy Area School District v. B. L.*,[1] the Supreme Court held that a public school violated the First Amendment when it disciplined a student cheerleader for profane off-campus speech.[2] When neither history nor precedent alone could provide a definitive answer, Justice Alito's concurrence looked to the historical understanding of the common law doctrine of *in loco parentis* to provide a guiding principle for determining the scope of minors' free speech rights.[3] In doing so, the concurrence demonstrated how restoring *in loco parentis* to its earlier conception could transform the often-criticized common law doctrine into a tool to protect minors' rights while also allowing for the consideration of pragmatic developments in the modern public school system.

At the end of her first year at Mahanoy Area High School in Pennsylvania, B. L.[4] tried out for the varsity cheerleading team.[5] As part of the tryouts, B. L. agreed to a set of rules requiring cheerleaders to "respect" the school, coaches, other cheerleaders, and other teams.[6] The rules also prohibited use of "foul language and inappropriate gestures" when representing the school and banned placing "any negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet."[7] B. L. did not receive a spot on the varsity team.[8] Rather than accept the decision with "good grace," she did what many fourteen-year-olds would do — she posted her frustrations to her Snapchat story.[9] Over the weekend, she and a friend visited a local convenience store, where she took and uploaded two photos to her Snapchat story.[10] The first image was a "selfie" showing her and her friend posing with their middle fingers raised, captioned: "[F]uck school fuck softball fuck cheer fuck everything."[11] The second image included a caption conveying disappointment about her rejection from the varsity cheerleading team and

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[1] 141 S. Ct. 2038 (2021).

[2] *Id.* at 2043, 2048.

[3] *Id.* at 2048–49 (Alito, J., concurring).

[4] Although Brandi Levy has since shared her name publicly, the Court refers to her by her initials throughout the case as she was a minor at the time of the suit's filing. *Id.* at 2038.

[5] B. L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432–33 (M.D. Pa. 2019).

[6] *Id.* at 432.

[7] *Id.*

[8] *Mahanoy*, 141 S. Ct. at 2043.

[9] *Id.*

[10] *Id.*; *Mahanoy*, 376 F. Supp. 3d at 433.

[11] *Mahanoy*, 376 F. Supp. 3d at 433.

ended with an upside-down smiley face emoji.[12] These images posted to B. L.'s Snapchat story could be viewed for only twenty-four hours by about 250 people who were B. L.'s Snapchat "friends."[13] One of B. L.'s Snapchat friends, the daughter of one of the two cheerleading coaches, brought the photos to the coaches' attention.[14] The photos spread across the student body, and during the following week, several cheerleaders and noncheerleader students approached the cheerleading coaches "visibly upset" about B. L.'s posts.[15] The posts became a topic of discussion among students "during an Algebra class taught by one of the two coaches."[16] Because B. L.'s posts used profanity in connection with cheerleading, the coaches determined that B. L. had violated the cheerleading team's rules.[17] Feeling the need to enforce the cheerleading team's rules against B. L. to "avoid chaos," the coaches suspended her from the cheerleading team for the upcoming year.[18] Despite B. L.'s apologies, the school's athletic director, principal, superintendent, and school board all affirmed the coaches' decision to suspend B. L. from the team.[19] B. L., with her parents, filed suit in the Middle District of Pennsylvania.[20]

The district court granted their requests for a temporary restraining order and preliminary injunction to reinstate B. L. to the cheerleading team, then granted B. L.'s motion for summary judgment.[21] The district court explained that the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*[22] established that the First Amendment protects students' speech rights on campus, unless the speech "cause[s] material and substantial disruption at school."[23] The district court acknowledged that the Court's decisions have created three exceptions to students' broad speech rights under *Tinker*. These exceptions allow public schools to: (1) regulate "offensively lewd," "obscene," "indecent," and "vulgar" student speech;[24] (2) exercise editorial

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12 B. L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020). The upside-down smiley face emoji has been defined to "indicate silliness, sarcasm, irony, passive aggression, or frustrated resignation." *Id.* at 175 n.2 (quoting *Upside-Down Face Emoji*, DICTIONARY.COM, https://www.dictionary.com/e/emoji/upside-down-face-emoji [https://perma.cc/FM74-KJFY]).

13 *Mahanoy*, 141 S. Ct. at 2043.

14 *Mahanoy*, 376 F. Supp. 3d at 433.

15 *Id.*

16 *Mahanoy*, 141 S. Ct. at 2043.

17 *Id.*

18 *Mahanoy*, 376 F. Supp. 3d at 433.

19 *Mahanoy*, 141 S. Ct. at 2043.

20 *Mahanoy*, 376 F. Supp. 3d at 429.

21 *Id.* at 433, 445.

22 393 U.S. 503 (1969).

23 *Mahanoy*, 376 F. Supp. 3d at 435.

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

control for pedagogical purposes over speech in school-sponsored expressive activities;[25] and (3) regulate speech that can "reasonably be regarded as encouraging illegal drug use."[26] The Third Circuit had previously held that the first exception "cannot be extended" to off-campus speech.[27] Because B. L.'s speech did not fall under any other exception and did not cause substantial disruption, the district court held that Mahanoy Area School District's suspension of B. L. from the cheer team violated her First Amendment rights.[28] The school district appealed.[29]

The Third Circuit affirmed.[30] The Third Circuit explained that the *Tinker* framework and the Supreme Court's later student speech decisions "reveal[] that a student's First Amendment rights are subject to narrow limitations when speaking in the 'school context' but 'are coextensive with [those] of an adult' outside that context."[31] The Third Circuit explained that, under circuit precedent, B. L.'s speech was off-campus speech.[32] It then declined to extend *Tinker* to any off-campus speech.[33] Because B. L.'s Snapchat photo fell squarely outside the school context, the Third Circuit determined that the school district lacked authority to regulate her speech and thus violated the First Amendment.[34] The school district petitioned for certiorari.[35]

The United States Supreme Court granted certiorari to consider, for the first time, the constitutionality of public school authority to regulate off-campus student speech.[36] The Supreme Court affirmed the Third Circuit's decision but on different grounds.[37] Writing for the Court, Justice Breyer[38] held that public schools have special interests in regulating off-campus student speech, but only in situations implicating the

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[25] *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).

[26] *Id.* at 435–36 (citing Morse v. Frederick, 551 U.S. 393 (2007)).

[27] *Id.* at 441 (citing J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932–33 (3d Cir. 2011) (en banc)).

[28] *Id.* at 445.

[29] B. L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).

[30] *Id.*

[31] *Id.* at 178 (alteration in original) (quoting *Blue Mountain Sch. Dist.*, 650 F.3d at 932).

[32] *Id.* at 180 (citing *Blue Mountain Sch. Dist.*, 650 F.3d at 920–23, 932–33; Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–09, 214–16 (3d Cir. 2011) (en banc)).

[33] *Id.* at 189. The court defined off-campus speech as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *Id.*

[34] *Id.* at 191. Judge Ambro concurred separately, arguing that the panel failed to exercise judicial restraint by going beyond the facts presented by the case to decide whether *Tinker* applied to off-campus speech. *Id.* at 194 (Ambro, J., concurring).

[35] *Mahanoy*, 141 S. Ct. at 2044.

[36] *See id.*

[37] *Id.* at 2048.

[38] Justice Breyer was joined by Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett.

school's regulatory interests.[39] The Court rejected the Third Circuit's rule restricting a public school's regulatory rights established in *Tinker* to on-campus speech, instead explaining that a school may have regulatory interests when off-campus speech concerns bullying, harassment, and online-based learning.[40] The Court reasoned that three features of off-campus speech will typically diminish the strength of a school's authority to regulate off-campus speech as opposed to on-campus speech.[41] First, off-campus speech is typically "within the zone of parental, rather than school-related, responsibility," and the school rarely stands *in loco parentis* — in the place of a parent — when a student speaks off campus.[42] Second, because off- and on-campus speech together encompass *all* speech uttered by a student, courts should be especially skeptical of a school's efforts to regulate off-campus speech without a meaningful justification.[43] Third, schools have a continued interest in protecting unpopular expression off campus, given that America's public schools function as "the nurseries of democracy."[44] Justice Breyer explained that because B. L. was off campus at a convenience store, the school was not standing *in loco parentis*.[45] Further, any classroom discussion about B. L.'s speech was too short to be considered disruption that could be regulable under *Tinker*.[46] Therefore, Justice Breyer concluded that the school lacked authority to regulate B. L.'s off-campus speech and violated B. L.'s First Amendment rights by suspending her from the cheerleading team.[47]

Justice Alito concurred.[48] He explained that under the Founding-era doctrine of *in loco parentis*, a father implicitly consented on behalf of his child to relinquish some of the child's free speech rights when enrolling the child in education.[49] Further, broader authority was delegated for more extensive undertakings like boarding school compared to at-home tutoring.[50] Determining whether a school can regulate certain forms of off-campus speech is thus a question of whether parents can reasonably be understood to have delegated such authority to the

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[39] *Mahanoy*, 141 S. Ct. at 2045.

[40] *Id.*

[41] *Id.* at 2046.

[42] *Id.* Under the doctrine of *in loco parentis*, school administrators stand in for a student's parents in circumstances where "parents cannot protect, guide, and discipline" the student. *Id.*

[43] *Id.* The Court added that schools carry a heavy burden to justify regulations of political or religious speech outside school or school-related activities. *Id.*

[44] *Id.*

[45] *Id.* at 2047.

[46] *Id.* at 2047–48.

[47] *Id.* at 2048.

[48] *Id.* (Alito, J., concurring). Justice Alito was joined by Justice Gorsuch.

[49] *Id.* at 2051 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *453).

[50] *Id.*

school.[51] Acknowledging the differences between today's public schools and those of the early United States, Justice Alito explained that applying *in loco parentis* to modern-day schools means that public schools are delegated the amount of parental authority equivalent to the amount necessary for them to "carry out their state-mandated educational mission[s]."[52] Examples of where parents have clearly delegated authority to schools involve online instruction, homework, and transportation to and from school.[53] The Court has also identified other circumstances allowing for regulation of students' off-campus speech, such as threats against teachers or students, criticism of teachers, and bullying of students.[54] But because B. L.'s off-campus speech was merely unflattering speech about a school extracurricular — that did not target a particular individual or cause significant disruption — it did not fall into any of the categories where the Court has allowed school authority to regulate off-campus speech.[55] Therefore, Justice Alito agreed with the Court that the school violated the First Amendment when it disciplined B. L. for protected off-campus speech.[56]

Justice Thomas filed a lone dissent.[57] Looking to the ordinary public meaning of the First Amendment at the time of the Fourteenth Amendment's ratification, Justice Thomas explained that schools at the time had authority to discipline students over off-campus speech that had a "proximate tendency to harm the school environment."[58] Justice Thomas emphasized that the Court's common law approach to student speech cases, including the instant case, was "untethered from any textual or historical foundation,"[59] and will leave future lower courts confused about how to apply the rule.[60]

In *Mahanoy*, neither history nor case law could entirely resolve the question of whether today's public schools have the authority to regulate students' off-campus speech. The modern state-sanctioned public school system did not exist in the nineteenth century, early case law

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[51] *Id.* at 2054.
[52] *Id.* at 2052.
[53] *Id.* at 2054.
[54] *Id.* at 2056–57.
[55] *Id.* at 2057–58.
[56] *Id.* at 2049.
[57] *Id.* at 2059 (Thomas, J., dissenting).
[58] *Id.* For instance, he argued that the regulation of truancy — conduct that, by definition, occurs outside of school — was well accepted at the time due to truancy's subversive effects on "good order and discipline of the school." *Id.* at 2060 (quoting Deskins v. Gose, 85 Mo. 485, 488–89 (1885)).
[59] *Id.* at 2061.
[60] *Id.* at 2063. Justice Thomas critiqued the majority's failure to define the scope of a school's *in loco parentis* authority off campus and to provide any textual or historical support for why federal courts even have authority to use the First Amendment to determine the extent of a school's disciplinary power. *Id.* at 2061–62.

about off-campus speech is inconclusive, and the First Amendment's original public meaning is itself unclear. Looking to the Court's prior jurisprudence on free speech in public schools and modern applications of the common law doctrine of *in loco parentis* similarly fails to provide an answer. Faced with this novel, ahistorical question, the concurrence relied on the early conceptions of the *in loco parentis* doctrine to strike a middle ground between the dissent's historical and the majority's doctrinal approaches. In doing so, the concurrence articulated a useful and historically grounded guiding principle that can evolve to accommodate practical changes over time.

Early United States history alone is incapable of resolving the question of whether today's public schools have the authority to regulate students' off-campus speech. A comparable system of public schools did not exist at the Founding.[61] At the time of the Fourteenth Amendment's ratification, "public high schools were virtually nonexistent," few students attended more than five years of school, and education had not yet become mandated by the state.[62] The small number of public schools that existed at the time of the Fourteenth Amendment's ratification were vastly different from today's public schools, typically operating as one-room schools with no age-specific grades.[63] Therefore, a school's or teacher's authority to discipline students for their off-campus speech at the time of the Fourteenth Amendment's ratification would not provide an accurate analogical account of school authority in modern public schools in the twenty-first century.[64]

Similarly, early case law alone cannot reveal the original public understanding of students' off-campus freedom of speech. Parental involvement in matters related to school governance was much greater in the decentralized public education system of the nineteenth century.[65] As a result, controversies between parents and schools were primarily

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[61] Susan Stuart, In Loco Parentis *in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 989 (2010) (explaining that during the mid-eighteenth century, "English schools were not creatures of the state," the wealthy "voluntarily exercised" their "natural" duty to educate, and voluntary schools often relied upon either "in-house or residential instruction"). In 2019, of the 56.4 million children attending school, 50.6 million, or nearly 90%, were attending public schools. Melanie Hanson, K-12 School Enrollment & Student Population Statistics, EDUCATIONDATA.ORG (Sept. 19. 2021), https://educationdata.org/k12-enrollment-statistics [https://perma.cc/XR2H-S5U3].

[62] Doug Kendall & Jim Ryan, *Originalist Sins*, SLATE (Aug. 1, 2007, 5:16 PM), http://www.slate.com/id/2171508 [https://perma.cc/9RM5-393B].

[63] William A. Fischel, *Neither "Creatures of the State" or "Accidents of Geography": The Creation of American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177, 177 (2010).

[64] Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 344–45 (2010).

[65] *See* Maris A. Vinovskis, *Family and Schooling in Colonial and Nineteenth-Century America*, 12 J. FAM. HIST. 19, 31 (1987).

adjudicated informally,[66] and money damages were the primary motivation underlying the few instances of school-related litigation.[67] In such claims, First Amendment issues were inapposite and thus not raised or discussed.[68] Given the rarity of school-related litigation, case law cannot stand in for the original public understanding or practice of this issue. The limited nineteenth-century case law relied on in Justice Thomas's dissent therefore fails to provide a complete picture of the contours of minors' off-campus freedom of speech.[69]

The lack of clarity over the history of minors' free speech rights is further amplified by the lack of clarity about the original public meaning of the First Amendment more generally. While most legal scholars and historians agree that the modern understanding of the Free Speech Clause is much more expansive and protective than it was originally understood to be by the Founders,[70] there is virtually no consensus over the exact historical contours of free speech rights.[71] For example, some scholars have argued that the First Amendment was historically understood to grant "speakers almost-absolute protection against the prior restraint of speech or writing but only limited protection against after-the-act punishment for what they uttered or wrote"[72] — an historical interpretation inconsistent with today's law.[73] Others continue to debate whether the original public meaning of the Fourteenth Amendment intended to incorporate the First Amendment against the states at all.[74] The heated debates between the supporters and opponents of the

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[66] *See* David Tyack & Aaron Benavot, *Courts and Public Schools: Educational Litigation in Historical Perspective*, 19 LAW & SOC'Y REV. 339, 351 (1985).

[67] *See id.* at 352–53 (describing the educational cases that were litigated in the nineteenth century).

[68] *See* Bunker & Calvert, *supra* note 64, at 344–45 ("[I]f 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." *Id.* at 345.).

[69] Justice Thomas's dissent relies heavily on the Vermont Supreme Court's decision in *Lander v. Seaver*, 32 Vt. 114 (1859), for the proposition that school boards historically had broad authority to regulate off-campus speech. *Mahanoy*, 141 S. Ct. at 2059–60 (Thomas, J., dissenting).

[70] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("[T]he men who adopted the first amendment did not display a strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition."); Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 793 (2008).

[71] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 249, 308–12 (2017); *see* Bork, *supra* note 70, at 22 ("The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.").

[72] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2179 (2015).

[73] *See id.* at 2179–81; Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMMC'N L. & POL'Y 329, 334 (2012).

[74] *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 983 (2012).

Sedition Act of 1798 over the contours of the First Amendment is another example of the historical lack of clarity about the First Amendment's meaning.[75] Continuous historical disagreements surrounding the original meaning of the First Amendment make reliance on a strict application of original public meaning especially difficult. Moreover, adherence to strict originalism under some of these historical accounts can create unpalatable results and overturn decades of settled First Amendment precedent.[76]

Just as history alone fails to resolve the question in *Mahanoy*, so does the more recent constitutional doctrine addressing students' speech rights. *Tinker*, the 1969 landmark Supreme Court decision that defined students' free speech rights in public schools, was explicitly directed toward on-campus speech.[77] Further, the advent of social media has made the on- and off-campus distinction more challenging and confusing, as off-campus speech can travel to and easily be replicated on campus. Under these circumstances, a simple extension of *Tinker* to off-campus student speech could have significant and unpredictable implications for students' speech rights.

If modern judicial interpretations of *in loco parentis* are applied to student speech, the effects could be similarly devastating. As defined in the eighteenth-century writings of William Blackstone, a school's *in loco parentis* authority arises implicitly out of a consensual contract with a parent for a child's private education.[78] Under this framework, *in loco parentis* authority derives from and is commensurate with the authority implicitly delegated by the parent to the teacher or school.[79] But modern courts applying *in loco parentis* have failed to capture this important limitation in its historical meaning and have instead construed it as a

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[75] Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 115, 124–25 (new ed. 2018).

[76] *See, e.g.*, Bork, *supra* note 70, at 27 (arguing that the First Amendment should protect only political speech "concerned with governmental behavior, policy[,] or personnel" — a position that differs starkly from current First Amendment law).

[77] Rory Allen Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials' Authority over Off-Campus Student Speech*, 46 GA. L. REV. 1157, 1166–67 (2012); *see also id.* at 1174–79 (analyzing the circuit split between the Third and Fourth Circuits on the scope of off-campus speech and whether existing precedent on free speech applied at all off campus).

[78] *Mahanoy*, 141 S. Ct. at 2051 (Alito, J., concurring). Blackstone explains that the delegation of authority includes "that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*." *Id.* (emphasis added) (quoting BLACKSTONE, *supra* note 49, at *453).

[79] *Id.* at 2052.

source of plenary power for schools.[80] For example, the Court has referred to *in loco parentis* in justifying invasive searches[81] and corporal punishment[82] without considering what a parent would have implicitly consented to. This omission is particularly inappropriate because parents in today's state-mandated education system enjoy far less choice to decide between schools than did parents schooling their children centuries ago when private, contractual arrangements were the norm.[83]

Recognizing these historical and doctrinal complexities, Justice Alito's concurrence found a different way to provide a historically grounded resolution to the question in *Mahanoy*. The concurrence defined students' speech rights by looking to the *rule* underlying the early conception of *in loco parentis*, rather than the *outcome* of earlier *in loco parentis* case law.[84] In this way, the concurrence departed from the Court's misguided precedent and helped shape a more accurate and workable doctrine for students' free speech rights that accounts for disruptive student behavior without providing undue deference to school authority.

Moreover, the concurrence's fuller and more accurate framework can allow *in loco parentis* to become a helpful proxy for assessing a school's authority to regulate students' off-campus speech, even as circumstances evolve over time. The concurrence's conception of *in loco parentis* is not only a clear and administrable way for courts to adjudicate students' rights in the public school context, but it also provides a way for courts to account for future changes and practical considerations. Lower courts confronted with free speech claims can rely on the concurrence's discussion of *in loco parentis* to ask whether it is reasonable to assume that a parent has implicitly consented to a school board's regulation of their child's constitutional rights in a particular manner. The framework helps guide future decisionmaking even as the role of parents, schools, students, and technology changes over time. Because *in loco*

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[80] *See* Stuart, *supra* note 61, at 991 (arguing that courts in the United States have "never really adopted *in loco parentis* as a usable doctrine of behavior for professional educators but merely as a convenient legal Latinism for something distinct from Blackstone's meaning").

[81] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (upholding mandatory random drug testing for student athletes); New Jersey v. T. L. O., 469 U.S. 325, 327–28, 347–48 (1985) (upholding warrantless searches for cigarettes and drugs).

[82] *See* Ingraham v. Wright, 430 U.S. 651, 682 (1977) (upholding disciplinary corporal punishment of public school children); William C. Nevin, *In the Weeds with Thomas:* Morse*,* In Loco Parentis*, Corporal Punishment, and the Narrowest View of Student Speech Rights*, 2014 B.Y.U. EDUC. & L.J. 249, 251 (arguing that Justice Thomas uses *in loco parentis* in easily excusing "brutal forms of corporal punishment").

[83] *See* Stuart, *supra* note 61, at 990, 992.

[84] *Compare Mahanoy*, 141 S. Ct. at 2051 (Alito, J., concurring) ("[C]ourts in this country have analyzed the issue of consent by adapting the common-law doctrine of *in loco parentis*."), *with id.* at 2059 (Thomas, J., dissenting) ("Cases and treatises from that era reveal that public schools retained substantial authority to discipline students.").

parentis has been applied in other contexts of students' rights, future courts might even ask a similar question when evaluating a student's Fourth Amendment or Eighth Amendment claim.

In loco parentis has long been condemned as a principle used to rationalize oppression and even violence against public school students.[85] However, Justice Alito's concurrence in *Mahanoy* shows how an historical understanding of a common law doctrine like *in loco parentis* can establish clear legal principles while allowing for pragmatic changes throughout history. Given that neither history nor case law alone provided the answer, Justice Alito's reliance on Blackstone's account of *in loco parentis* established a principled and well-reasoned doctrine to bridge the gap between *Tinker* and *Mahanoy*. By relying on Blackstone's historical understanding, Justice Alito's concurrence in *Mahanoy* illuminated some potential for the doctrine of *in loco parentis* to become a vehicle for promoting the constitutional rights of minors in public schools.

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[85] *See, e.g.*, Nevin, *supra* note 82, at 251 (criticizing Justice Thomas's use of *in loco parentis*); Stuart, *supra* note 61, at 991 (noting that courts have abused *in loco parentis* to justify corporal punishment and warrantless searches of public school students).