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"PROTECTING THE SUPERFLUOUS…TO PRESERVE THE NECESSARY": WHOSE IS THE POWER? THE CASE OF THE CURSING CHEERLEADER: MAHANOY AREA SCHOOL DISTRICT V. B.L.

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"PROTECTING THE SUPERFLUOUS…TO PRESERVE THE NECESSARY": WHOSE IS THE POWER? THE CASE OF THE CURSING CHEERLEADER: MAHANOY AREA SCHOOL DISTRICT V. B.L.

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Abstract

This article explores the free speech rights of students in the public school setting while off-campus in the recently decided Supreme Court of the United States case of *Mahanoy Area School District v. B.L.* It examines the history of school discipline from the American colonial period to the present, and briefly explores the First Amendment doctrine regarding content regulation. Next, it reviews the line of Supreme Court decisions from *Tinker* onwards regarding students' First Amendment rights in the public school setting and then studies decisions from circuit courts. It then considers the various rules proposed by all of the litigants before the Court, including the acting Solicitor General in *Mahanoy*. It selects the most feasible rule and applies it to the facts of the case.

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Introduction

Mahanoy Area School District v. B.L.: The Facts

"Fuck school fuck softball fuck cheer fuck everything," began B.L.'s rant against life on a Saturday afternoon with a high school friend.[1]

B.L. was a rising sophomore at Mahanoy High School in Mahanoy, Pennsylvania.[2] During her freshman year, she was a cheerleader on the school's junior varsity team.[3] She tried out for a position on the school's varsity cheer team at the end of her freshman year but failed to make the team.[4] Instead, B.L. was again relegated to the junior varsity cheer squad; even more upsetting to B.L. was learning that an incoming freshman made the varsity cheer squad without being required to spend a year on the junior varsity cheer squad.[5] B.L. was "visibly upset" when the cheer coaches announced the results.[6]

Disappointed in the cheerleading squad results and the softball team selections, B.L. was unhappy with cheerleading, softball, school, and life in general on Saturday, May 28, 2017.[7] She went to the local convenience store, the Cocoa Hut, with a friend from school.[8] While there, B.L. expressed her frustration with school, cheerleading, softball, and life.[9] B.L. took a selfie of herself and her friend, with middle fingers thrust forward, and then added the following text to the photo: "*fuck school fuck softball fuck cheer fuck everything."*[10] B.L. posted the photo to her Snapchat account which was shared with 250 of her "friends."[11] Included within the 250 friends were members of the cheerleading squad and classmates at Mahanoy High School.[12] One of B.L.'s classmates took a screenshot of B.L.'s posts and shared it with the cheerleading squad.[13] One of the cheerleaders then shared the screenshot with her mother who was also a cheer coach.[14] From there, many people viewed the posts.[15]

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[1] J.A. at 40-41, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255).
[2] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043 (2021).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 610 (M.D. Pa. 2017). This is the first opinion from the Middle District of Pennsylvania which granted B.L. a preliminary injunction.
[8] *Id*.
[9] J.A., *supra* note 1.
[10] *Id.*
[11] Mahanoy Area Sch. Dist., 141 S. Ct. at 2043 (The Court described Snapchat as "…a social media application that allows users to post photos and videos that disappear after a set period of time.").
[12] *Id.*
[13] *Id.*
[14] *See* J.A., s*upra* note 1, at 31-35. Nicole Luchetta Rump testified at the preliminary injunction hearing that she was both a cheer coach and an algebra teacher. She said that students approached her throughout the week after B.L.'s post to talk about it. Luchetta-Rump said that she received a copy of the post from April Gnall the second cheer coach. April stated in her October 20, 2018, deposition that her daughter, also a cheerleader, shared the post with her. *Id.* at 90-91.
[15] Mahanoy Area Sch. Dist., 141 S. Ct. at 2043.

As teachers and students returned to school on Monday, the cheer coaches reported that several cheerleaders and other students approached them, obviously, upset about B.L.'s posts.[16] A brief discussion about the posts ensued in Ms. Luchetta-Rump's math class.[17]

Coaches Luchetta-Rump and Gnall conferred and concluded that B.L. had violated the *Respect* and *Negative Information* rules of the cheerleading rule book that B.L. had signed when she joined the junior varsity cheerleading squad.[18] They decided to suspend B.L. from the cheerleading squad for a year for her behavior.[19]

B.L.'s apologies and attempts at reinstatement were unsuccessful, so she filed suit in September 2017, alleging that the school's punishment[20] violated her First Amendment[21] rights. B.L. requested a temporary restraining order (TRO) and a preliminary injunction.[22] As initially posed, the issue before the United States District Court, Middle District of Pennsylvania in September 2017 was whether B.L. was likely to prevail in her motions for a TRO and preliminary injunction.[23] As the court reviewed the injunction factors[24] and applied them to the facts, it concluded that B.L. was likely to prevail so it granted her a TRO.[25] On October 5, 2017, the district court then granted B.L.'s preliminary injunction.[26]

As both parties prepared for trial, B.L.'s attorney framed the issue as:

> Whether the Mahanoy Area School District violated the plaintiff's First Amendment rights when it suspended her, a cheerleader, from the cheerleading squad because of a Snap Chat post that said "fuck cheer fuck softball fuck school fuck everything" which B.L. created and shared with her friends on a weekend, while off-campus, using her personal phone while she was not participating in any school activities.[27]

In response, the school district framed the issues confronting the Court as four.[28] They were:

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[16] J.A., *supra* note 1, at 31, 91.

[17] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 443-444 (M.D. Pa. 2019). This is the second opinion published by the Middle District of Pennsylvania in this case. In it, B.L. was granted her Motion for a Summary Judgment against the school, Mahanoy Area School District. The Court concluded that the school had violated B.L.'s First Amendment rights with the discipline of her speech.

[18] *Id.* at 433. *See also* J.A., *supra* note 1, at 16-18.

[19] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d at 610-11.

[20] *Id.*

[21] U.S. CONST. amend. I. B.L. also raised other constitutional issues at this time, including whether she voluntarily waived her First Amendment rights when she signed the Cheer Rule, whether such a right could be voluntarily waived, and whether the rules were void for vagueness. These issues will not be addressed in this article.

[22] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d at 611-12.

[23] *Id.* at 611-13.

[24] *Id.* The district court noted that a plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) that an injunction is in the public interest.

[25] *Id.* at 616.

[26] *Id.*

[27] Memorandum of Law in Support of Plaintiff B.L's Motion for Summary Judgment at 1, B.L. v. Mahanoy Area School District, 376 F. Supp. 3d 429 (M.D. Pa. 2019), 2018 WL 11273467.

[28] Memorandum Of Law In Support Of Defendant's Motion For Summary Judgment at 3-4, B.L. v. Mahanoy Area School District, 376 F. Supp. 3d 429 (M.D. Pa. 2019), 2018 WL 8059444.

1. Is a school district permitted to suspend a student from a voluntary extracurricular activity for conduct that admittedly violates agreed-upon rules and that is contrary to the educational mission of the extracurricular activity under the First Amendment analysis in *Tinker*? Suggested answer: Yes.

2. Does a school district violate the First Amendment by removing a student from an extracurricular team for using profanity about the extracurricular activity? Suggested answer: No.

3. Do the Mahanoy Area High School Cheerleading Rules violate the First Amendment? Suggested answer: No.

4. Do the Mahanoy Area High School Cheerleading Rules violate the Due Process Clause of the Fourteenth Amendment? Suggested answer: No.[29]

The district court granted B.L.'s Motion for Summary Judgment, concluding that "[c]oaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards…. Even then, whether *Tinker* applies to speech uttered beyond the schoolhouse gate is an open question …."[30]

The school district then appealed the decision to the United States Court of Appeals, Third Circuit.[31] Writing for the majority, Judge Cheryl Ann Krause noted that the appeal required the court to answer only two questions: "The first is whether B.L.'s snap was protected speech. If it was not, our inquiry is at an end. But if it was, we must then decide whether B.L. waived that protection."[32] The majority affirmed the decision for B.L., holding that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing a school's imprimatur."[33] While Judge Thomas L. Ambro concurred with the judgment, he dissented[34] from the majority's holding that *Tinker* "does not apply to off-campus speech." Judge Ambro noted that "ours is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech. A few circuits have flirted with such a holding and have declined to apply *Tinker* to off-campus speech on a case-by-case basis."[35]

The school district then filed a Petition for a Writ of Certiorari to the Supreme Court of the United States on August 28, 2020.[36] According to the petitioners, the question presented to the Court was:

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[29] *Id.*
[30] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d at 444.
[31] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020). This is the opinion published by the Court of Appeals, Third Circuit.
[32] *Id.* at 176-77.
[33] *Id.* at 189.
[34] *Id.* at 194-97.
[35] *Id.* at 196.
[36] Petition for Writ of Certiorari, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 976 (2021) (No. 20-255), 2020 WL 5234951.

> Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.[37]

On January 8, 2021, the Court granted certiorari.[38] In addition to briefs filed by the parties and the United States Solicitor General, thirty-three organizations[39] filed amici curiae briefs, supporting the school; B.L.; or in one case, neither party.[40] The Solicitor General filed a Motion to Participate in Oral Argument as Amicus Curiae.[41] This motion was granted, and attorneys for the school, B.L., and the Department of Justice participated in an oral argument before the Court on April 28, 2021.[42] On June 23, 2021, the Court handed down a decision affirming the result for the respondent, B.L., while disagreeing with the reasoning of the majority panel of the United States Court of Appeals, Third Circuit.[43] Writing for the majority, Justice Breyer handed down a ten-page decision that included a concurring opinion by Justice Alito which Justice Gorsuch joined.[44] Justice Thomas was the sole dissenter.[45]

Off-Campus Regulation of Student Speech: The Arguments

By the time the attorneys, Blatt, Stewart, and Cole, faced the Justices on April 28, the issues and arguments between the parties had been formulated several different ways as the case worked its way through the federal court system.[46] B.L.'s attorneys noted in her Motion for Summary Judgment at the district court level[47] and again in her brief [48] to the United States Court of Appeals, Third Circuit, that the parties essentially agreed upon the facts of the case but disagreed as to the

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[37] *Id.* at I.
[38] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
[39] Among the groups filing amici curiae briefs were Mary Beth and John Tinker, associations for teachers, school boards, and college athletics, and groups such as Professor of Law and Education and the First Amendment and Education Law Society. *See* Docket Sheet at 1, Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021), (No. 20-255).
[40] *Id.*
[41] *Id.*
[42] Oral Argument at 1, Mahanoy Area Sch. Dist. v. B.L, 2021 WL 1692010 (April 28, 2021) (No. 20-255) https://www.supremecourt.gov/oral_arguments/audio/2020/20-255 [https://perma.cc/SZ3Q-LDLS]. Lisa S. Blatt was the attorney for the petitioner, Mahanoy Area School District. David D. Cole argued for the respondent, B.L. Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, argued as amicus curiae, supporting the petitioner, Mahanoy Area School District.
[43] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 , 2048 (2021).
[44] Marcia Coyle, *1st Amendment Protects Cursing Cheerleader's Off-Campus Speech, Justices Say*, NAT'L. L. J., June 23, 2021, https://www.law.com/nationallawjournal/2021/06/23/1st-amendment-protects-cursing-cheerleaders-off-campus-speech-justices-say/ [https://perma.cc/PTR6-RBUV].
[45] *Id.*
[46] B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 610-16 (M.D. Pa. 2017); B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 445-37 (M.D. Pa. 2019); B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 178-88, 175 (3d Cir. 2020); *See also* the discussion *supra* pp. 4-8.
[47] Memorandum of Law in Support of Plaintiff B.L.'s Motion for Summary Judgement, *supra* note 27, at 1-2.
[48] Brief of Appellant to the Court of Appeals, Third Circuit, B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020), 2019 WL 2745439.

application of the law to the facts.[49] After reading the materials, it was obvious that the parties disagreed fiercely as to the application of the law to these particular facts.[50]

At the oral argument before the Supreme Court of the United States, Lisa Blatt, attorney for the school district, opened with the statement that *Tinker* should apply to off-campus speech for three reasons: (1) such speech could cause on-campus disruptions; (2) using the test suggested by the Respondent, B.L., would create chaos and confusion in the public schools; and (3) because a school nexus requirement and *Tinker's* substantial disruption prong existed, there were sufficient guardrails to protect students' off-campus First Amendment rights.[51] She concluded her argument by referring to the Respondent's new test as a "Frankenstein's monster of First Amendment doctrine all mashed together."[52]

Mr. Stewart ("Stewart"), Deputy Solicitor General, then introduced the position of the United States government, indicating that: "The Third Circuit's rigid geographic approach is particularly unsound in the context of online speech since there is no meaningful causal link between the place from which an online communication is sent and the likelihood that it will disrupt school operations."[53]

Questioned by Justice Breyer, Stewart stated that there should be "no per se rule that off-campus speech is categorically exempt from school regulation."[54] Stewart next noted that the location from which the online speech was sent was irrelevant as to whether it would cause or not cause disruption.[55] Rather, he argued that the questions to ask were whether this particular speech would disrupt the operations of a particular school program and what the purposes of the program were in order to determine whether a substantial disruption occurred.[56]

Mr. Cole ("Cole") was the last litigant before the Court.[57] His opening remarks pertained to the First Amendment, stating that it prohibited content discrimination, i.e., the "bedrock principle is that a speaker cannot be punished because listeners object to his message."[58] He further explained that "*Tinker* allows a very narrow exception to the above principle. Speech can be punished if the listeners object to the speech in a disruptive fashion in a school-supervised or school-sanctioned setting."[59] Cole further elaborated that expanding *Tinker* would mean 24/7 regulation of student speech, and it would also interfere with a parent's fundamental right to raise their child as they saw fit.[60]

Cole advised Justice Roberts that this was the Respondent's test:

> [I]f you are under the school's supervision [or sanction], the school has the authority[, conferred in accordance with *Tinker*…to regulate such student speech in accordance with the above case law principles]. … [I]f you[] [are] outside of the

[49] *Id.* at 10.
[50] *Id.*
[51] Oral Argument, *supra* note 42, at 4-7.
[52] *Id.* at 37.
[53] *Id.* at 38.
[54] *Id.* at 44.
[55] *Id.*
[56] *Id.*
[57] Oral Argument, *supra* note 42, at 3.
[58] *Id.* at 61.
[59] *Id.* at 61-62.
[60] *Id.* at 62.

> school's supervision or sanction,… the same First Amendment rights apply to you as they apply to everybody else.[61]

Cole dismissed the school's and government's concerns about the needed regulation of some off-campus speech by noting that *Tinker* did not prevent a school from regulating off-campus speech that involved threats, bullying, harassment, or cheating.[62]

Regulation of Off-Campus Student Speech

During oral arguments, Justice Breyer, while questioning Stewart, stated "I can't write a treatise on the First Amendment in this case …."[63] Writing for the majority of the Court,[64] Justice Breyer did not write a First Amendment treatise but was concise[65] as he acknowledged the frivolousness of the case, stating that "[i]t might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous, in order to preserve the necessary."[66]

Given that Justice Breyer drafted the majority opinion, his questioning during the oral argument was illuminating.[67] When talking with the Deputy Solicitor General, Justice Breyer announced that, from his perspective, there were really only one of two ways to handle the case.[68] He said:

> One, treat it as an example. We can't go beyond that. Look at the record and then decide. Or the other is everyone seems to want some rule, and the rule, I think, might be take Tinker as if it said, which it doesn't, as if it said: School, you do have some authority where there's a substantial injury to -- disruption in the class or somebody's going to be hurt in that school, et cetera. And I would add: But, remember, it's outside the school. And that's primarily the domain of the parents….[69]

It appears that the majority of Justices adopted the first approach, looking at the record and making their decision on that basis. The Court affirmed the judgment of the United States Court of Appeals, Third Circuit, concluding that the school district had violated B.L.'s First Amendment rights, but it did not agree with the reasoning of the majority panel of the Third Circuit.[70]

Instead, Justice Breyer's opinion reaffirmed the existing student speech doctrine as announced in the quartet of student speech cases of *Tinker*,[71] *Bethel*,[72] *Hazelwood*,[73] and *Morse*.[74]

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[61] *Id.* at 63, 66-68.
[62] *Id.* at 66.
[63] Oral Argument, *supra* note 42, at 43.
[64] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2038-48 (2021). Justice Breyer's majority opinion was joined by Chief Justice Roberts, Justice Barrett, Justice Kagan, Justice Kavanaugh, and Justice Sotomayor. *Id.*
[65] *Id.* The majority opinion was ten pages.
[66] *Id.* at 2048.
[67] *Id.* at 2041.
[68] Oral Argument, *supra* note 42, at 43.
[69] *Id.* at 43-44.
[70] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021).
[71] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[72] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[73] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[74] Morse v. Frederick, 551 U.S. 393 (2007).

The majority acknowledged that three categories of student speech existed that schools could regulate in certain circumstances, including: (1) indecent, lewd, or vulgar speech that is uttered during a school assembly or on school grounds; (2) speech uttered during a class trip that promotes illegal drug use; and (3) speech that can be reasonably viewed as bearing the imprimatur of the school such as that which appears in school newspapers, blogs, or plays.[75] Lastly, the majority said, "schools have a special interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'"[76]

Justice Alito wrote a concurring opinion in which he was joined by Justice Gorsuch.[77] While concurring in the result, both Justices approached the reasoning differently, concluding with the statement, "If today's decision teaches any lesson, it must be that the regulation of many types of off-campus student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."[78]

Justice Thomas dissented, beginning his comments by saying that the majority overrode "150 years of history supporting the coach."[79] In his dissent, [80] Justice Thomas argued that the majority posits "three vague considerations and reaches an outcome."[81]

Did the Court get it right in this opinion? Did their decision clarify the ability of the public schools to regulate off-campus student speech? Did it inform students as to what off-campus student speech is protected and what is not?

To answer these questions, this article will first examine the history of discipline and speech in schools from the time of Justice Blackstone to the present. It will do a limited review of the First Amendment doctrine and its content regulation exceptions. It will explore the Supreme Court of the United States' doctrine regarding student speech within the public school setting as well as selected Circuit Court decisions. It will look at the various "tests" suggested by the parties and apply the one that seems to provide the most clarity to students and school administrators about student speech rights, both on-campus and off-campus, with the fewest restrictions. It will then examine who has the power to discipline off-campus student speech and when this power can be exercised.

[75] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).
[76] *Id.*
[77] *Id.* at 2048 (Alito, J., concurring).
[78] *Id.* at 2059 (Alito, J., concurring).
[79] *Id.* (Thomas, J., dissenting). Given his comments in his concurrence in *Morse*, 551 U.S. at 410-11, Justice Thomas' dissent in Mahanoy is not surprising. In Morse, Justice Thomas noted that "…the standard set forth in *Tinker*…is without basis in the Constitution…. In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."
[80] *Id.* (Thomas, J., dissenting).
[81] *Id.*

Background: What Is the Context?

The History of Speech and Discipline in the American Public Schools

How did early schoolmasters handle unruly students? Sir William Blackstone, the best-known common law English jurist,[82] articulated the doctrine of *in loco parentis* for schoolmasters in his *Commentaries*, noting that a parent:

> May also delegate part of his parental authority during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his child, *vis.,* that of restraint and correction as may be necessary to answer the purposes for which he is employed.[83]

Justice Blackstone acknowledged that schoolmasters stood in for parents and could apply "correction" as needed for unruly students.[84] While this approach was primarily applicable to what was then private education, the doctrine took root in England and America.[85]

A review of the literature[86] regarding education during the American Colonial Period revealed that education, at that time, was primarily about private education as compulsory education had not yet been required by the states.[87] Noah Webster, a lawyer, a writer, and brother to Daniel Webster,[88] agreed with Justice Blackstone that education was critical for nations.[89] Like Justice Blackstone, Webster too viewed the teacher as being the "parent" in charge at school, writing:

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[82] Sir William Blackstone began his career as a lawyer. In 1758, he became the first Vinerian professor at Oxford. In this position, he began a series of lectures which eventually came to be the basis for his four-volume treatise of English law known as *Commentaries on the Laws of England* (1765). *See William Blackstone*, 3 CHI. L. TIMES 109, 114-15 (1889).

[83] 1William Blackstone & George Chase, *American Students' Blackstone, Commentaries on the Laws of England, in Four Books*, BANKS & BROTHERS 160, 168 (1882).

[84] *Id.*

[85] John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HIST. 260, 261-62 (1987).

[86] Newton Edwards & Herman G. Richey, *The School in the American Social Order* (2d ed., BOSTON, HOUGHTON MIFFLIN CO., 1963) 3-28, 87-97.

[87] Blackstone, *infra* note 123, at 165, n.5. English courts too adopted Blackstone's perspective. *See* Regina v. Hopley, 2 F. & F. 202 (1860) in which Chief Justice Cockburn explained to the jury that "By the law of England, a parent or a school-master (who for this purpose represents the parent and has parental authority delegated to him) may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable." *Id*. at 206. Later cases also grappled with off-campus conduct. *See also* Cleary v. Booth, 1 Q.B. 465 (1893) in which Justice Lawrance framed the issue before it as "…whether the headmaster of a board school is justified in inflicting corporal punishment on a pupil who has misconducted himself outside the school, on his way to school, and out of school hours?" Concluding that the schoolmaster had the authority, in these circumstances, to punish the student, Judge Lawrance further stated: "I am of opinion that in such cases the power of the father, as it was exercised by the appellant is this case, is delegated to the schoolmaster. The regulations of the Education Department of 1892 contain a clause allowing a grant for discipline and organization…. Should a boy misbehave himself immediately after leaving the school premises, I am clearly of opinion that in such a case the schoolmaster would have authority to punish the boy so misconducting himself." *Id.* at 468-69.

[88] George R. Farnum, *Historic New England Shrines of the Law - III. Litchfield, Connecticut, and Its Claims to Fame - Noah Webster, Hartford Lawyer - New Haven and Windsor - Providence and Newport*, 22 A.B.A. J. 238, 240 (1936).

[89] Noah Webster, *On the Education of Youth In American, in Collection of Essays and Fugitive Writings on Moral, Historical, Political and Literary Subjects*, 22 (1790) (photo) (digitized by Google Books, 2015).

> The rod is often necessary in school; especially after the children have been accustomed to disobedience and licentious behavior at home …. In schools the master should be absolute in command; for it is utterly impossible for any man to support order and discipline among children who are indulged with an appeal to their parents.[90]

As the colonies grew and later declared their independence, states began to enact compulsory education for white males during the Federal Period.[91] James Kent, in his *Commentaries on American Law*, noted that:

> It has been uniformly a part of the *land system* of the United States to provide for public schools. By the ordinances of Congress, under the articles of confederation…it was made a specific condition [for admission to the union] that a section of each township should be permanently applied for the use of public schools.[92]

As compulsory public education of all students became commonplace in the twentieth century,[93] selected decisions regarding public schools and students between 1837 and 1915 reflect American courts' acceptance of the doctrine of *in loco parentis* and confusion as to the extent of the schoolmaster's authority towards children while off-campus.[94] In 1837, in North Carolina, Judge Gaston acknowledged the doctrine of *in loco parentis* when he reversed the judgment of the lower court regarding the indictment and conviction of a schoolmaster for assault and battery.[95] He noted the confusion that juries, teachers, students, and societies faced regarding the power of schoolmasters over students, stating:

> It is not easy to state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. It is analogous to that which belong to the parents, and the authority of the teacher is regarded as a delegation of parental authority.[96]

In 1859, the Supreme Court of Vermont in *Lander v. Seaver*[97] faced an issue similar to that faced by the courts in *Mahanoy*: Can off-campus student speech/conduct be punished?[98] The court phrased the issue before it as: "Has a schoolmaster the right to punish his pupil for acts of misbehavior committed after the school has been dismissed, and the pupil has returned home and

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[90] *Id.* at 16.
[91] James Kent, *Lecture XXIX*, *On the Rights of Persons On Parent and Child*, *in* 2 COMMENTARIES ON AMERICAN LAW, 159, 209-225 (1827).
[92] *Id.*
[93] Samuel M. David, et al., *Children in the Legal System*, 35 (6th ed., FOUNDATION PRESS, 2020); *See* William J. Reese, *America's Public Schools: From the Common School to "No Child Left Behind"* (Baltimore, MD, THE JOHN HOPKINS UNIVERSITY PRESS, Updated 2011 ed.), 79-117; *See also* R. Freeman Butts & Lawrence A. Cremin, *A History of Education in American Culture* (New York: Henry Holt & Co., 1953) 108-15.
[94] *See* State v. Pendergrass, 19 N.C. 365 (1837); Lander v. Seaver, 32 Vt. 114 (1859); Patterson v. Nutter, 78 Me. 509 (1886); Burdick v. Babcock, 31 Iowa 562 (1871); Deskins v. Gose, 85 Mo. 485 (1885); Wooster v. Sunderland, 27 Cal. App. 51 (1915).
[95] State v. Pendergrass, 19 N.C. 365, 367 (1837).
[96] *Id.* at 365-66.
[97] Lander v. Seaver, 32 Vt. 114 (1859).
[98] *Id.* at 119-20.

is engaged in his father's service."[99] According to the synopsis; the student, Peter Lander, was driving his father's cow by the schoolmaster's house in front of the schoolmaster and fellow pupils when he referred to the schoolmaster as "Old Jack Seaver."[100] When Lander came to the school the next morning, Seaver reprimanded him for his "insulting language the evening before"[101] and proceeded to whip him. Lander filed suit, alleging trespass for assault and battery, but Seaver prevailed.[102] Lander then appealed.[103] Judge Aldis stated:

> When the child has returned home or to his parent's control, then the parental authority is resumed and the control of the teacher ceases, and then for all ordinary acts of misbehavior the parent alone has the power to punish….
>
> 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 if he comes again to school.
>
> The misbehavior must not have a merely remote and indirect tendency to injure the school…. But the tendency of the acts so done out of the teacher's supervision for which he may punish, must be direct and immediate in their bearing upon the welfare of the school, or the authority of the master and the respect due to him.[104]

A later Missouri case, *Deskins v. Gose,*[105] reiterated the principle that schoolmasters generally lost their authority once the student returned home. Citing *Dritt v. Snodgrass,*[106] the Supreme Court of Missouri in *Deskins* noted that "when the pupil of a public school is released and sent back to his home, … the teacher … had … [no] authority to follow him to his home and govern his conduct while under the parental eye."[107]

In 1955, M.R. Sumption ("Sumption") attempted to summarize the existing law regarding the control of "pupil conduct by the school."[108] Sumption said that the control of student conduct was logically divided into two phases: control of student conduct while on the school premises during school hours and control of student conduct off the school premises after school.[109] Foreshadowing *Tinker*, Sumption noted that the dividing line between parental and school control of students off the school's campus and after hours was not clear.[110] However, he noted two principles which are consistently followed by the court:

> The first is that any act of a pupil detrimental to the orderly discipline of well-being of the school, regardless of where committed, is of legitimate concern to the school. The second is that the school has prohibitory and punitive power over the acts of

[99] *Id.*
[100] *Id.* at 115.
[101] *Id.*
[102] *Id.* at 115, 119.
[103] *Id.*
[104] *Id.* at 120.
[105] Deskins v. Gose, 85 Mo. 485 (1877).
[106] Dritt v. Snodgrass, 66 Mo. 286 (1877).
[107] *Deskins*, 85 Mo. at 488.
[108] M.R. Sumption, *The Control of Pupil Conduct by the School*, 20 LAW & CONTEMP. PROBS. 80 (1955).
[109] *Id.*
[110] *Id.* at 85.

> pupils which interfere with their school work or with other pupils, or reflect on the reputation of the school.[111]

As schools, teachers, students, and courts struggled with the decision as to who had the power to control student behavior at the beginning of the twentieth century, the Supreme Court of the United States also began to grapple with the allocation of power between parents and the state.[112] In a series of cases,[113] beginning in 1923, the Court began to define the allocation of power of parents and the state over children. The first case to be decided, *Meyer v. Nebraska*,[114] concluded that individuals had the "right to … marry, establish a home and bring up children"[115] and struck down the offending statute as failing the "reasonable relation" test required by the Court.[116]

Two years later, another school case came along: *Pierce v. Society of Sisters*.[117] In *Pierce*, the state of Oregon enacted legislation that required parents to send their minor children to the local public school rather than a private school.[118] Parents appealed, and the Court again decided in their favor, limiting the power of the State.[119] In *Pierce*, the Court stated:

> The Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[120]

Yet, this expansion of parental rights was halted in 1944 with the Court's decision in *Prince v. Massachusetts,*[121] which upheld a Massachusetts labor statute, forbidding girls under the age of eighteenth from engaging in selling materials on the street against a parent's claim that such legislation interfered with their religious beliefs.[122] Upholding the legislation against the plaintiff's First Amendment Freedom of Religion claims, the Court said:

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[111] *Id.*
[112] *See* Meyer v. Nebraska, 266 U.S. 390, 402-03 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925); Prince v. Massachusetts, 321 U.S. 158, 165-68 (1944); and Wisconsin v. Yoder, 406 U.S. 205, 228-35 (1972).
[113] *Id.*
[114] Meyer v. Nebraska, 266 U.S. 390 (1923). In Meyer, the Nebraska Legislature had enacted legislation prohibiting schoolteachers from teaching a foreign language, other than a dead language such as Latin, to a child who had not completed the Eighth grade. The purpose of the legislation, according to the state, was to "promote civil development." Mr. Meyer was arrested, tried and convicted of violating the statute. He appealed to the Supreme Court of the United States, and his conviction was reversed. The Court concluded that the statute as applied was without "reasonable relation." *Id.* at 399-403.
[115] *Id.* at 399.
[116] *Id.* at 399-400.
[117] Pierce v. Soc'y of Sisters, 268 U.S. 534 (1925).
[118] *Id*. at 539-41.
[119] *Id.* at 536.
[120] *Id.* at 534-35.
[121] Prince v. Massachusetts, 321 U.S. 158 (1944).
[122] *Id.* at 160-62, 177.

> [T]he family itself is not beyond regulation in the public interest….neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parents patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. [123]

In 1972, in *Wisconsin v. Yoder*, the Court returned to its expansion, allowing Amish parents an exemption from the state's compulsory education laws as applied to high school.[124] The Court reasoned:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education …. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their off-spring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society …. Thus a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare (them) for additional obligations."[125]

These four cases demonstrate the inherent tension in the allocation of power between the state and parents over control of children. Adding schools, teachers, and speech into this mixture makes it more complicated.

With this lack of clarity, the Supreme Court of the United States was finally called upon in 1968, in *Tinker v. Des Moines*, to decide what, if any, First Amendment rights students in the public school system had.[126] After *Tinker*, a line of student speech cases followed[127] with the Supreme Court of the United States delineating the rules regarding student speech. *Mahanoy Area School District v. B.L.* is the latest decision on the topic since the Court first visited it in 1968.[128]

The First Amendment: The Free Speech Doctrine and the "Special Characteristics" of the Public School

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[123] *Id.* at 166.
[124] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).
[125] *Id.* at 213-14.
[126] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969).
[127] *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).
[128] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (decided June 23, 2021).

The First Amendment and the Free Speech Doctrine

On June 8, 1789, James Madison introduced the free speech language, that would later become the First Amendment, in the House of Representatives.[129] Madison's document stated, "The people shall not be deprived or abridged of their right to speak, to write or to publish their sentiments; and freedom of the press, as one of the great bulwarks of liberty shall be inviolate."[130] When referred to the Senate, a committee altered the language to say, "Congress shall make no law abridging the freedom of speech, or of the press, or the right of people to peaceably assemble and consult for their common good, and to petition the government for a redress of their grievances."[131] It passed and became the First Amendment in the Bill of Rights.[132] While there is no debate that illuminates the Founders' intentions,[133] it is thought that it reflected Justice Blackstone's common law view, which said:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.[134]

As passed, the Bill of Rights prohibited action that interfered with an individual's freedom of speech by the federal government.[135] Eventually, the Bill of Rights was deemed to be "incorporated" into the Fourteenth Amendment[136] and became applicable to state government action.[137]

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[129] *1 Annals of Cong. 434* (1789), https://memory.loc.gov/ll/llac/001/0200/02230441.tif [https://perma.cc/GRY6-YX5U].
[130] *Id.*
[131] Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, 1148-49 (1971).
[132] *Id.* at 1167.
[133] U.S. CONST. ANN. amend. 1.2.1. *Essay Freedom of Speech: Historical Background*, https://constitution.congress.gov/browse/essay/amdt1_2_1/#ALDF_00006038 [https://perma.cc/2GTU-3Y94].
[134] 1 William Blackstone, *Commentaries on the Law of England*, 151-52 (UNIV. OF CHICAGO PRESS, 1979).
[135] Schwartz, *supra* note 131, at 1160-64.
[136] U.S. CONST. amend IXV.
[137] U.S. CONST. ANN. amend. 14.2. *Essay on State Action Doctrine*, https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810/ [https://perma.cc/L33A-ASHQ].

What did it mean that the government could make no law "abridging the freedom of speech?"[138] Did that mean that an individual was allowed to say anything without any consequences? Were there any exceptions? If so, what were these exceptions?

The First Amendment Doctrine of Free Speech and Its Exceptions: Content Regulation

While the Court initially viewed Justice Blackstone's prohibition against prior restraints as the primary principle of the First Amendment,[139] this view began to change in the early twentieth century as the Supreme Court's Justices began to examine and determine the role of the First Amendment in American life.[140] In *Konisgsberg v. State Bar of California,*[141] Justice Harlan, writing for the majority, rejected the absolutist position regarding the First Amendment.[142] Justice Harlan said:

> At the outset we reject the view that freedom of speech and association … as protected by the First and Fourteenth Amendments, are "absolutes", not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.[143]

The free speech doctrine as it has evolved in the Court throughout the twentieth century is complex and numerous tests have developed under which First Amendment issues can be analyzed.[144] There are a few categories of content-based regulation that are recognized by the Court including defamation, clear and present danger, inciting violence, and obscenity.[145] During the oral arguments in *Mahonoy*, specifically during an exchange between Justice Sotomayor and B.L.'s attorney, Mr. Cole, Justice Sotomayor noted that:

> [W]e have traditional categories: fighting words, obscenity, true threats. We even have definitions of what constitutes sexual harassment. The level at which speech has to arrive to meet those standards is very, very high, and I'm dubious that most of the conduct that teenagers engage in would fit any of our traditional categories.[146]

Because of the "special characteristics"[147] of public schools, the Court eventually faced the issue of student speech, student conduct, and First Amendment protections in the public school setting.[148]

Student Speech and the First Amendment

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[138] Bernard Schwartz, ed., THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, 1148-49 (1971).
[139] Rodney Smolla, 1 *Smolla & Nimmer on Freedom of Speech*, § 1.12 (2021).
[140] *Id.*
[141] Konisgsberg v. State Bar of California, 366 U.S. 36 (1961).
[142] John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, § 16.7(c), 1273-74 (8th ed. 2010).
[143] Konigsberg, *supra* note 141, at 49.
[144] Smolla, *supra* note 139 at § 2.13. Most of these tests and formulations are beyond the scope of this article.
[145] *Id.* at § 2.54. *See also* Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991). (Kennedy, J., concurring).
[146] Oral Argument, *supra* note 42, at 81 (Sotomayor, J. questioning).
[147] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
[148] *Id.* at 505.

The Supreme Court of the United States

Until 1968, the Court had not directly addressed the issue of speech, the First Amendment, and students' rights in the public school setting.[149] At that time, the Court heard oral arguments in *Tinker v. Des Moines Independent Community School District*,[150] and the Court issued an opinion in 1969. *Tinker*, at fifty-two, is the landmark student speech case.[151] It was followed by *Bethel*, *Hazelwood*, and *Morse*, all of which limited *Tinker's* holdings.[152]

In *Tinker*, John and Mary Beth Tinker and Christopher Eckhardt attended high school in Des Moines, Iowa.[153] They, along with their parents, were opposed to the Vietnam War and decided to publicize their feelings by wearing black arm bands to school.[154] The high school principal learned of their plan and adopted a policy which prohibited the wearing of arm bands to school.[155] If a student wore an armband to school, she would be asked to remove it.[156] If the student refused to remove the armband, the student would be suspended until agreeing to return to school without it.[157]

On December 16, 1965, Mary Beth Tinker and Christopher Eckhardt wore their black armbands to school.[158] John Tinker joined them on December 17.[159] All three students were suspended and sent home.[160] They did not return to school until the new year, after the December holidays had ended.[161] Their parents then filed suit in the United States District Court Southern District. Iowa, Central Division[162], alleging a violation of their children's First Amendment rights and a cause of action under 42 U.S.C. § 1983.[163] The district court dismissed the complaint, and the students appealed to the United States Court of Appeals, Eighth Circuit.[164] The Eighth Circuit affirmed the district court's decision by an equally divided court.[165] The Supreme Court of the United States then granted certiorari.[166]

As developed by the school district's attorney, the question before the Court was stated as:

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[149] *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) which might arguably be the "first" student speech case. In this case, the local school board required students to salute the American flag. Barnett and her parents objected to this conduct on the basis of their religion, Jehovah's Witness, which did not allow salutation of "graven images." Barnett was punished and sued. Ultimately the U.S. Supreme Court agreed with Barnett, affirming the district's court's decision and saying "[w]e think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*
[150] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[151] R. George Wright, *The Basic Logic of Post Tinker Jurisprudence*, 2014 CARDOZO L. REV. DE NOVO 138 (2014.).
[152] *Id.* at 139.
[153] *Tinker*, 393 U.S. at 504.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Tinker*, 393 U.S. at 504.
[160] *Id.*
[161] *Id.*
[162] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa, 1966).
[163] *Id.* at 972.
[164] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503,504-05 (1969).
[165] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 983 F. 2d 988 (8th Cir. 1967).
[166] Tinker v Des Moines Indep. Cmty. Sch. Dist., 390 U.S. 942 (1968).

> [W]hether the action of officials of defendant school district forbidding the wearing of arm bands on school facilities as a means of protesting the Viet Nam War deprived petitioners of Constitutional rights secured by the First and Fourteenth Amendments of the United States Constitution.[167]

Justice Fortas drafted the majority's opinion, explaining the conflict facing the Court.[168] He began by acknowledging that teachers and students have First Amendment rights even in light of the "special characteristics of the school environment."[169] He uttered the now famous phrase, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[170] Yet he also noted that "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[171]

The majority reversed and remanded the decision, holding that:

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupt classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[172]

This became the *Tinker* test, a two-prong test, applied to student speech cases.[173] Additional guidance could be gleaned from the Court with several statements, including:

> [T]he State…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.[174]
>
> [S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.[175]
>
> We properly read [the First Amendment] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.[176]

[167] Brief for Respondents at 2, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[168] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
[169] *Id.* at 506.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 513.
[173] Lindsay Foley, *Tinkering with Student Speech: Balancing the Protection of Student's First Amendment Rights with the School's Duty to Protect*, 52 SUFFOLK U. L. REV. 459, 463 (2019).
[174] *Id.* at 509.
[175] *Id.* at 511.
[176] *Id.* at 513.

While Justices Stewart and White concurred with Justice Fortas' majority opinion,[177] Justices Black and Harlan dissented.[178] Justice Black was scathing in his denunciation of the majority's opinion.[179] He stated:

> In my view, teachers in state-controlled public schools are hired to teach there …. [A] teacher is not paid to go into school and teach subjects the State does not hire him to teach as part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or not of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders…. I hope, [to] be permitted to harbor the thought that taxpayers send children to school on the premise that at their age the need to learn, not teach.[180]

Tinker stood alone as the only Supreme Court student speech case until the Court again faced the issue of a suspended student who was removed as a graduation speaker in *Bethel School District v. Fraser*.[181] In *Bethel*, student, Matthew Fraser ("Fraser"), gave a speech supporting a classmate for elective office before the entire student body which consisted of 600 students.[182] The speech was full of "elaborate, graphic, and explicit sexual metaphor"[183] which titillated some of the older students while bewildering some of the younger ones.[184] Fraser had earlier shared his speech with some of his teachers who told him that the speech was not appropriate and that it should not be delivered.[185] In spite of this warning, Fraser delivered his speech.[186]

The day after he delivered his speech, Fraser was summoned to the principal's office where he was told that his conduct had violated the school's disciplinary policy which provided that "[c]onduct which materially and substantially interferes with the education process is prohibited, including the use of obscene, profane language and gestures."[187] Fraser was suspended for three days, and his name was removed from the list of eligible students to be graduation speakers.[188] Fraser appealed his punishment through the school district's grievance process but was not successful.[189]

Fraser, through his father, then sued the school in the United States District Court for the Western District of Washington, alleging that Bethel School District had violated his First Amendment rights as well as given rise to a 42 U.S.C. § 1983 action.[190] The district court concluded that the school had violated Fraser's First and Fourteenth Amendment rights, awarding

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[177] *Id.* at 514-15.
[178] *Id.* at 515-26.
[179] *Foley*, at 515-26.
[180] *Id.* at 522. (Black, J., dissenting).
[181] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).
[182] *Id.* at 677.
[183] *Id.*
[184] *Id.* at 677-78.
[185] *Id.* at 678.
[186] *Id.* at 677.
[187] *Bethel Sch. Dist. No. 403*, 478 U.S. at 677.
[188] *Id.*
[189] *Id.* at 678-79.
[190] *Id.* at 679.

him nominal damages, litigation costs, and attorneys' fees.[191] An appeal to the United States Court of Appeals, Ninth Circuit followed.[192] This court affirmed the district court's judgment, "holding that respondent's speech was indistinguishable from the protest armband in Tinker …."[193] An appeal to the Supreme Court of the United States then followed where the Court was faced with deciding whether a student's discipline for using lewd speech at high school assembly is prohibited by the First Amendment.[194]

Chief Justice Burger drafted the majority opinion for the Court.[195] He began his analysis by noting that adults may have protected First Amendment rights that do not permit punishment for the use of an offensive phrase, but those same rights do not necessarily extend to children in a public school setting.[196] Citing *New Jersey v. TLO*,[197] Justice Burger reminded his audience that the "constitutional rights of students in public schools are not automatically co-extensive with the rights of adults in other settings."[198] Justice Burger's opinion reversed the United States Court of Appeals, Ninth Circuit, holding that "[T]he First Amendment does not prevent school officials from determining that to permit vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[199] While Justice Blackman concurred in the result, Justice Brennan wrote a separate concurring opinion.[200] Justices Marshall and Stevens wrote separate dissenting opinions.[201]

A year later, the Court confronted another First Amendment student speech case in *Hazelwood School District v. Kuhlmeier*.[202] Here, students on the high school newspaper filed suit, alleging that their First Amendment rights were violated when the high school principal censored certain articles from an edition of the newspaper.[203] The school newspaper, *The Spectrum*, was written and edited by the school's Journalism II class at the high school.[204] The journalism teacher typically submitted page proofs to the principal for review before the issue was published.[205] Because the usual journalism teacher was not available and a quick turnaround time was needed, the principal reviewed the proofs and was concerned about two articles: one concerned with student pregnancies while the other was concerned with parental divorce.[206] The principal said that he was concerned that all parties in both articles were identifiable and might expose the school to liability if published.[207] Thus, he withheld the articles from publication.[208] The students involved in the publication of the disputed issue then filed suit in the United States District Court for the Eastern District of Missouri, seeking an injunction and monetary damages for the school's

[191] *Id.*
[192] *Id.*
[193] *Bethel Sch. Dist. No. 403*, 478 U.S. at 679.
[194] *Id.* at 681-82.
[195] *Id.* at 677.
[196] *Id.* at 682.
[197] New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985).
[198] *Bethel Sch. Dist. No. 403*, 478 U.S. at 682.
[199] *Id*. at 685, 687.
[200] *Id*. at 687.
[201] *Id*. at 690-691.
[202] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[203] *Id*. at 262-64.
[204] *Id*. at 262.
[205] *Id*. at 263.
[206] *Id*.
[207] *Id*. at 263-64.
[208] *Hazelwood Sch. Dist.*, 484 U.S. at 264.

violation of their First Amendment rights.[209] The district court held that the school could impose restraints on the students' speech that was an integral part of the school's educational function.[210] The United States Court of Appeals, Eighth Circuit, then reversed, holding that the record held no evidence that the articles would have materially disrupted class or given rise to substantial disorder as *Tinker* required.[211]

The Supreme Court of the United States then granted certiorari.[212] The Court saw the issue before it as to what extent may educators "exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."[213] Writing for the majority, Justice White reversed the Eighth Circuit and held that:

> [T]he standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression …. Instead, we hold 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 to legitimate pedagogical concernts.[214]

Again, there was no unanimous opinion as Justice Brennan drafted a dissent that was joined by Justices Marshall and Blackmun.[215]

The Court was silent on this issue for twenty years until it agreed to hear *Morse v. Frederick* in 2007.[216] In *Morse*, Joseph Frederick was a high school student at Juneau-Douglas High School in Juneau, Alaska.[217] In 2002, the Olympic Torch Relay was scheduled to pass through Juneau on its way to the winter games in Salt Lake City, Utah.[218] The relay would pass in front of the high school while school was in session, so students were allowed to leave the school and stand across the street to observe the relay.[219] This was considered to be a "class trip" at which "school rules" applied.[220]

As the students stood outside observing the relay and camera crews passed, Joseph Frederick unfurled a fourteen-foot banner with the words "BONG HiTS 4 JESUS."[221] Because the banner was so large, it was easily readable by others.[222] The high school principal, Deborah Morse, noticed the banner and immediately headed over to Joseph.[223] She demanded that all students take down their banners immediately.[224] Everyone complied except Frederick, so Morse confiscated

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[209] *Id*.
[210] *Id.*
[211] *Id*. at 265.
[212] Hazelwood Sch. Dist. v. Kuhlmeier, 479 U.S. 1053 (1987).
[213] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
[214] *Id*. at 272-73.
[215] *Id*. at 277.
[216] Morse v. Frederick, 551 U.S. 393 (2007).
[217] *Id*. at 397.
[218] *Id*.
[219] *Id*.
[220] *Id*.
[221] *Id*.
[222] *Morse*, 551 U.S. at 397.
[223] *Id*.
[224] *Id*. at 398.

his banner and ordered him to report to her office.[225] In the office, Morse suspended Frederick for ten days because she believed his banner promoted illegal drug use which was a violation of a school board policy.[226]

Frederick appealed his suspension through the school board procedure but lost.[227] He then filed suit in the United States District Court for the District of Alaska, alleging that his First Amendment rights were violated and argued the school's actions gave rise to a 42 U.S.C. § 1983 action.[228] While the district court granted the school's motion for summary judgment, the United States Court of Appeals, Ninth Circuit, reversed.[229] The Supreme Court of the United States granted certiorari[230] to determine whether Morse had a First Amendment right to wield his banner.[231]

Chief Justice Roberts delivered the majority opinion for the Court, noting that this was a school speech case even if it technically occurred off-campus.[232] Justice Roberts stated that "social events and class trips are subject to district rules for student conduct …. Frederick cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'"[233] The issue faced by the Court in this case was "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[234] The Court answered this question with a "yes"[235] and reversed the opinion of the Ninth Circuit.[236]

Justice Roberts reviewed the holdings of *Tinker*, *Bethel*, and *Hazelwood*, trying to clarify the student speech doctrine in the public school setting.[237] He stated that *Tinker* said that student speech could not be suppressed "unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school….'"[238] *Bethel* was the "next student speech case" in which the Court "marked [a] distinction between the political message of the armbands in *Tinker* and the sexual content of Fraser's speech."[239] *Bethel's* holding said that "school boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate.'"[240] *Hazelwood* held that "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school[241] OBJ

[225] *Id*.
[226] *Id*. Frederick contended that the banner was not promoting illegal drug use. Rather he insisted that it was nonsense, designed to catch the eye of the camera. *Id.* at 401.
[227] *Id*.
[228] *Id*. at 399.
[229] *Id.*
[230] Morse v. Frederick, 549 U.S. 1075 (2006).
[231] Morse v. Frederick, 551 U.S. 393, 400 (2007). The Court also said that it must answer the question of whether Morse's First Amendment right was so clearly established that the principal could be held liable for damages. This issue is beyond the scope of this article.
[232] *Id*.
[233] *Id*. at 400-01.
[234] *Id*. at 403.
[235] *Id*.
[236] *Id*. at 410.
[237] *Morse*, 551 U.S. at 403-04.
[238] *Id*. at 403.
[239] *Id*. at 404.
[240] *Id*. Justice Roberts again notes that the constitutional rights of students in the public schools re not co-extensive with the rights of adults. He then makes the now infamous statement, after Mahanoy, that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id*. at 405.
[241] *Id.*

could be regulated by a school as long as the " … are reasonably related to legitimate pedagogical concerns."[242] With *Morse,* Justice Roberts concluded that the "special characteristics of the school environment" "to restrict student expression that they reasonably regard as promoting illegal drug use."[243] As with all of the student speech cases thus far, there was no unanimity. [244] Justice Thomas concurred[245] as did Justice Breyer who also dissented in part.[246] Justice Stephens dissented, and his dissent was joined by Justices Souter and Ginsburg.[247]

After this quartet of cases, it seemed that the analysis to be used to determine whether a school's discipline of student speech violated the First Amendment was:

1. Did the speech create a substantial or material disruption of the school or invade the rights of others?

If not, did the speech fit within one of the three categories below?

a. Did the speech involve lewd and vulgar speech at the school?
b. Did the speech carry the imprimatur of the school?
c. Lastly, did the speech promote illegal drug use at school or at a school-sanctioned event?[248]

If a school could answer "yes" to any of the above questions, it seemed likely that under the existing school law, as articulated by the Supreme Court of the United States, that school's discipline of the student would be permitted.

For twenty-two years, from 2007 until 2020, the Supreme Court of the United States heard no student speech cases.[249] During this time, home computers and eventually student cell phones became ubiquitous and made it possible for students to use social media to "speak instantaneously to an audience of the whole school, forcing school administrators"[250] to decide whether to respond to or discipline off-campus student speech. Bullying, harassment, and other forms of misbehavior became commonplace on the Internet and via social media.[251] Children and their parents came to school crying.[252]

As Daniel Solove noted in his 2007 book, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet*,[253] "People need to remember that words can hurt, quoting a professor on a college campus.[254] Solove responds to this comment, saying: "Words can certainly sting, but

[242] *Id*.
[243] *Morse*, 551 U.S. at 408.
[244] *Id*. at 395.
[245] *Id*. at 410.
[246] *Id*. at 412.
[247] *Id*. at 433.
[248] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).
[249] Justine Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind 73* (New York 2018); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
[250] Petition for Writ of Certiorari, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 976 (2021) (No. 20-255), 2020 WL 5234951 at *4.
[251] *Driver*, *supra* note 249, at 134-39.
[252] J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098-99 (C.D. Cal. 2010).
[253] Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 58 (Yale University Press, 2007).
[254] *Id.*

what about free speech? What about privacy?" [255] As communication became instantaneous with these new technologies, schools muddled through with the *Tinker* quartet analysis, trying to balance students' free speech rights with their rights to be free from bullying and harassment. Administrative decisions regarding students and speech were disputed, and lawsuits were filed.[256] Courts from different circuits and states often reached different results from one another.[257]

Mahanoy Area School District, in both their Petition for a Writ of Certiorari[258] and Brief to the Court,[259] argued that a circuit split existed regarding whether school officials could discipline students for off-campus speech.[260] B.L., through her attorneys, denied such a split existed in both her Brief in Opposition to Certiorari[261] and her Brief[262] to the Court. Instead, B.L. focused on distinguishing the cases.[263]

Circuit and State Court Cases

Mahanoy Area School District argued that a split existed within the circuit courts as to whether *Tinker* permitted school officials to discipline students for off-campus speech and conduct.[264] According to Mahanoy's brief, the United States Courts of Appeal for the Second, Fourth, Fifth, Eighth, and Ninth Circuits had allowed school officials to punish students for off-campus speech while the United States Court of Appeals, Third Circuit, had come to the opposite conclusion.[265] The school's brief began by discussing *Wisniewski v. Board of Education*[266] and *Doninger v. Niehoff,*[267] both cases decided by the United States Court of Appeals, Second Circuit.

The United States Court of Appeals, Second Circuit, first dealt with the suspension of a middle school student for off-campus speech in *Wisniewski*.[268] Aaron Wisniewski was suspended because of a message that he sent to his classmates from his parents' home computer.[269] He sent an icon that was "… a small drawing of a pistol firing a bullet at a person's head, above which were dots representing spattered blood …. Beneath the drawing appeared the words 'Kill Mr.

[255] *Id*.
[256] Petition for Writ of Certiorari, Mahanoy Area Sch. Dist.v. B.L., 141 S. Ct. 976 (2021) (No. 20-255), 2020 WL 5234951 at *11.
[257] *Id.*
[258] Petition for Writ of Certiorari, *supra* note 42.
[259] Brief for Petitioner, Mahanoy Area Sch. Dist. v. B.L., 964 F. 3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976, (Feb. 22, 2021), (No. 20-255).E**rror! Hyperlink reference not valid.**
[260] Petition for Writ of Certiorari, *supra* note 42, at 10.
[261] Brief in Opposition to Petition for Writ of Certiorari, Mahanoy Area Sch. Dist. v. B.L., 964 F. 3d 170 (3d Cir. 2020), (Nov. 30, 2020), (No. 20-255), 2020 WL 7121785.
[262] Brief for Respondent, Mahanoy Area Sch. Dist. v. B.L., 964 F. 3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976 (March 24, 2021), (No. 20-255).E**rror! Hyperlink reference not valid.**
[263] Brief in Opposition, *supra* note 261, at 8-14.
[264] Petition for Writ of Certiorari at 11-17, *supra* note 42.
[265] *Id*. This article will examine some of these cases cited in Petitioner's Writ, including Wisniewski v. Bd. of Educ., 494 F. 3d 34 (2d Cir. 2007); Doninger v. Niehoff, 642 F. 3d 344 (2d Cir. 2008*);* Layshock v. Hermitage Sch. Dist., 650 F. 3d 205 (3d Cir. 2011) (*en banc*); Snyder v. Blue Mountain, 593 F. 3d 286 (3d Cir. 2011); Kowalski v. Berkeley City Sch., 652 F. 3d 565 (4th Cir. 2011); Bell v. Itawamaba City Sch. Bd., 799 F. 3d 379 (5th Cir. 2015); S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F. 3d 771 (8th Cir. 2012); D.J.M. v. Hannibal Pub. Sch. Dist., 647 F. 3d 754 (8th Cir. 2011); Wyner v. Douglas City Sch. Dist., 728 F. 3d 1062 (9th Cir. 2013); J.S. v. Bethlehem Area Sch. Dist., 807 A. 2d 847 (Pa. 2002).
[266] Wisniewski v. Bd. of Educ., 494 F. 3d 34 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).
[267] Doninger v. Niehoff, 642 F. 3d 344 (2d Cir. 2008), *cert. denied*, 565 U.S. 976 (2011).
[268] *Wisniewski*, 494 F. 3d at 35-36.
[269] *Id*.

VanderMolen.' Philip VanderMolen was Aaron's English teacher at the time."[270] Classmates receiving the message shared it with Mr. VanderMolen who was distressed.[271] VanderMolen then shared it with school authorities.[272] From there, it was shared with the local superintendent's office which later shared it with the police department.[273] Aaron was confronted and acknowledged that he had created the icon but insisted it was intended only as a joke.[274]

The police department then investigated and questioned Aaron, [275] and he was referred to a psychologist for testing.[276] After a brief stay in a local mental hospital, Aaron was sent to a hearing before the school superintendent.[277] The superintendent found that "Substantial and competent evidence exists that Aaron engaged in the act of sending a threatening message to his buddies, the subject of which was a teacher. The superintendent admitted it …. I conclude Aaron did commit the act of threatening a teacher … creating an environment threatening the health, safety and welfare of others …."[278] Aaron was suspended for a semester.[279]

Aaron sued, arguing his icon was speech that was protected under the First Amendment.[280] The court upheld the school's punishment of Aaron, concluding that the fact that his conduct occurred off-campus did not "necessarily insulate him from school discipline."[281] Instead, the court applied *Tinker's* "reasonably foreseeable risk" test to the facts and concluded that it was foreseeable that school authorities would learn of Aaron's pistol icon.[282] It was also foreseeable that the threatening icon would "materially and substantially" disrupt the school's work.[283] The requirements of *Tinker* were satisfied, and the court upheld the school's decision.[284]

A year later, the United States Court of Appeals, Second Circuit, reaffirmed its commitment to *Wisniewski* with its decision in *Doninger v. Niehoff*.[285] Avery Doninger ("Doninger"), a student, was involved in a dispute with school officials about the scheduling of a group of bands known as JamFest.[286] Doninger and the Student Council were advised that JamFest would either have to be rescheduled or relocated unless students agreed to flexibility regarding JamFest.[287] The Student Council was infuriated by these choices, met in the school's computer lab, accessed a parent's email account,[288] and sent a mass email to students, teachers, and parents, advising them to contact Paula Schwartz, the district superintendent, regarding JamFest.[289] Avery continued to be angry about the topic, so she posted an entry on her blog from her home that said:

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[270] *Id*. at 36.
[271] *Id*.
[272] *Id*.
[273] *Id*.
[274] *Wisniewski*, 494 F. 3d at 36.
[275] *Id*.
[276] *Id*.
[277] *Id*.
[278] *Id*. at 36-37.
[279] *Id*. at 37.
[280] *Wisniewski*, 494 F. 3d at 37.
[281] *Id*. at 38.
[282] *Id*. at 38-39.
[283] *Id*.
[284] *Id*.
[285] Doninger v. Niehoff, 642 F. 3d 344, 353 (2nd Cir. 2008), *cert. denied*, 565 U.S. 976 (2011).
[286] *Id*. at 339.
[287] *Id*.
[288] *Id*.
[289] *Id*. at 340.

> Jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing altogether ….[290]

Because of the blog posting, the school decided that Avery could not run for Senior Class Secretary because her conduct "failed to display the civility and good citizenship expected of class officers."[291] Doninger sued, arguing that the school's actions violated her First Amendment rights.[292]

As the Second Circuit analyzed Doninger's First Amendment claims, the court cited *Tinker,* noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate …."[293] Utilizing the "foreseeable disruption test" articulated by *Tinker*, the court stated:

> [T]he Supreme Court has yet to speak on the scope of the school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct "would foreseeably create a risk of substantial disruption within the school environment," at least when it was similarly foreseeable that the off-campus expression might also reach campus.[294]

The following year, the United States Court of Appeals, Third Circuit, addressed a similar issue, i.e., whether schools could punish students for speech and conduct that took place off-campus, outside of school when it decided two cases, *Snyder v. Blue Mountain* and *Layshock v. Hermitage*.[295] *Snyder* came from the Eastern District of Pennsylvania[296] while *Hermitage* arose in the Western District of Pennsylvania.[297] Both cases involved similar facts; yet two different panels from the Third Circuit appeared to reach opposite results.[298]

In *Layshock,* the initial Third Circuit panel framed the issue before it as whether "a school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event."[299] Justin Layshock ("Layshock"), a high school senior, posted a parody profile of his high school principal, Eric Trosch, at his grandmother's home, using her computer.[300] Layshock used

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[290] *Id*. at 340-41.
[291] *Doninger*, 642 F. 3d at 342.
[292] *Id*. at 343-44.
[293] *Id*. at 344.
[294] *Id*.
[295] J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F. 3d 286, 291 (3d Cir. 2010), *vacated*; Layshock ex rel. Layshock v. Hermitage Sch. Dist., 593 F. 3d 249 (3d Cir. 2010), *vacated*.
[296] *J.S. ex rel. Snyder*, 593 F.3d at 291.
[297] Layshock ex rel. Layshock v. Hermitage Sch. Dist., 593 F. 3d 249 (3d Cir. 2010), *vacated*.
[298] *See* Paul Easton, *Splitting the Difference: Layshock and J.S. Chart a Different Path on Student Speech Rights*, 53 B.C.L. REV. E-SUPP. 17, 1C8 (2012).
[299] *Layshock*, 593 F. 3d at 252.
[300] *Id.*

no school resources other than copying a picture of the principal from the school's website and pasting it to his parody.[301] Justin's parody about Mr. Trosch stated:

> Birthday: too drunk to remember
> Are you a health freak: big steroid freak
> In the past month have you smoked: big blunt
> In the past month have you been on pills: big pills
> In the past month have you gone Skinny Dipping: big lake, not big dick
> In the past month have you Stolen Anything: big keg
> Ever been drunk: big number of times
> Ever been called a Tease: big whore
> Ever been Beaten up: big fag
> Ever Shoplifted: big bag of kmart
> Number of Drugs I have taken: big[302]

Layshock shared the profile with his friends at school,[303] and Mr. Trosch's eleventh grade daughter saw the profile, and she then shared it with her father.[304] Mr. Trosch was appalled by the profile, finding it "degrading, demeaning, demoralizing, and shocking."[305] Because Justin's behavior was believed to violate the School District's *Discipline Code*, he was suspended for ten days.[306]

With his parents, Justin sued, arguing that the Hermitage School District had violated his First Amendment rights.[307] The Third Circuit panel published their opinion on February 4, 2010, and affirmed the decision of the district court.[308] The panel held that "schools may punish expressive conduct that occurs outside of school as if it occurred inside the 'schoolhouse gate' under certain very limited circumstances, none of which are present here."[309] Layshock prevailed over the school.[310]

On the same day, another Third Circuit panel published its opinion in *Snyder v. Blue Mountain School District*.[311] A middle school student, J.S., also created a profile parody of her high school principal, Mr. McGonigle ("McGonigle"), from her home computer.[312] J.S. too copied a picture of her principal from the school's website, pasted it online on her MySpace profile, but used no other school resources.[313] The profile did not identify McGonigle by name or location, but it included his school photograph.[314] It described him as saying:

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301 *Id.*
302 *Id*. at 252-53.
303 *Id.* at 253.
304 *Id.*
305 *Layshock*, 593 F. 3d at 253.
306 *Id*.
307 *Id.*
308 *Id*.
309 *Id*. at 263.
310 *Id.*
311 J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F. 3d 286, 290 (3d Cir. 2010), *vacated.*
312 *Id.*
313 *Id.* at 291.
314 *Id*. at 290.

> HELLO CHILDREN yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL I have come to myspace so i can pervert the minds of other principal's to be just like me. I know, I know, you're all thrilled…Another reason I came to my space is because–I am keeping an eye on you students (who i care for so much) For those who want to be my friend, and aren't in my school I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN so please, feel free to add me, message me whatever[315]

Students at Blue Mountain Middle School became aware of and discussed the profile.[316] Eventually it was shared with McGoingle[317] who viewed the profile and contacted the school superintendent.[318] School officials met and decided the profile "violated the School District's Acceptable Use Policy ("AUP")." [319] J.S. was then suspended.[320]

J.S., via her parents, sued, arguing the Blue Mountain School District had violated her First Amendment rights.[321] The United States District Court for the Middle District of Pennsylvania held that the school did not violate J.S.'s First Amendment rights when disciplining her because of the on-campus impact of her "lewd and vulgar" speech.[322] The Third Circuit's panel[323] affirmed the lower court's decision.[324] According to the panel, *Tinker's* "foreseeable" and "material and substantial disruption" test was the appropriate analysis to be applied to the facts.[325] In this situation, J.S.'s conduct had created a substantial disruption, thus satisfying *Tinker*.[326]

How did the Third Circuit resolve these two opinions that appeared to be directly in conflict with one another? The court sat, *en banc*, to rehear both cases.[327] *Layshock* was affirmed, and the *en banc* court held that the school had violated Justin Layshock's First Amendment rights.[328] The *en banc* court found that school officials had very limited authority, per *Tinker* and *Bethel*, to punish off-campus student speech.[329] Without a substantial disruption, *Tinker* was not applicable.[330] While *Bethel* allowed school authorities to discipline student speech that was "lewd"

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[315] *Id.* at 290.
[316] *Id.* at 292.
[317] J J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 593 F. 3d 286, 292 (3d Cir. 2010), *vacated.*
[318] *Id.*
[319] *Id*.
[320] *Id*.
[321] *Id*. at 294-95.
[322] *Id.* at 294.
[323] *Snyder*, 593 F.3d at 308. In this panel opinion, Judge Chagares concurred in part with the decision and also dissented in part.
[324] *Id.*
[325] *Id.* at 298.
[326] *Id*.
[327] Layshock v. Hermitage Sch. Dist., 650 F. 3d 205 (3d Cir. 2011). The Court vacated both earlier panel opinions. Shortly after this decision was issued, Daniel J. Solove addressed the issue in a blog post. *See* Daniel J. Solove, *School Discipline for Off-campus Speech and the First Amendment*, HUFFINGTON POST (July 19, 2012), http://www.huffingtonpost.com/daniel-j-solove/school-discipline-free-speech_b_877203.html [https://perma.cc/V46G-WL4G].
[328] *Layshock*, 650 F. 3d at 205.
[329] *Id.* at 219.
[330] *Id.* at 216.

or "vulgar," this authority was limited to on-campus lewd or vulgar speech.[331] The court stated, "*Fraser* does not allow the School District to punish Justin for expressive conduct that occurred outside of the school context."[332]

In *Snyder v. Blue Mountain*, the *en banc* court remanded the decision to the district court, reversing in part and affirming in part.[333] While the court concluded that the school's disciplinary policies were not facially unconstitutional,[334] it reversed the holding that the school could punish J.S.'s speech.[335] Noting that schools could suppress or punish student speech in certain situations, the court stated "[t]he authority of public school officials is not boundless …."[336] The court's analysis indicated that while the court acknowledged that a school could suppress or punish student speech in the public school setting, school officials must demonstrate the following in order to prevail in court:

1. Show that the forbidden speech or conduct; and

2. Would materially and substantially interfere with the appropriate discipline in the operation of the school.[337]

The court concluded that if *Tinker* was not applicable, then the *Bethel*, *Hazelwood*, or *Morse* exceptions applied.[338] *Bethel* allowed schools to discipline school speech, categorized as lewd or vulgar, when a captive audience was involved.[339] *Hazelwood* allowed discipline for pedagogical reasons of school sponsored speech.[340] *Morse* then established that speech, even if off-campus but at a school sponsored event, which advocated illegal drug use could also be punished.[341] Applying this analysis to the facts of the case, the court concluded that none of the exceptions articulated by *Bethel*, *Hazelwood* or *Morse* were applicable.[342] *Tinker* was the only standard by which the school could punish J.S.'s speech,[343] but the school was unable to meet *Tinker's* "substantial disruption" test.[344] In this manner, the *en banc* panel resolved and reconciled its earlier holdings in *Layshock* and *Snyder*.[345]

At approximately the same time, the United States Court of Appeals, Fourth Circuit, was handling a similar issue in *Kowalski v. Berkeley County Schools.*[346] Kara Kowalski, a student at Musselman High, created a MySpace page at home with her home computer, and named the page

[331] *Id.* at 217-19.
[332] *Id.* at 219.
[333] Snyder v. Blue Mountain, 650 F. 3d 915, 936 (3d Cir. 2011), *cert. denied,* 565 U.S. 1156 (2012). As with the *en banc* opinion published in *Layshock,* this opinion involved concurrences and a dissent.
[334] *Id.* at 936.
[335] *Id.* at 932-33.
[336] *Id.* at 926.
[337] *Id.* at 926.
[338] *Id*. at 926-27.
[339] *Snyder*, 650 F. 3d at 927.
[340] *Id.*
[341] *Id.*
[342] *Id.* at 932.
[343] *Id.* at 931-33.
[344] *Id*. at 930-32.
[345] *Snyder*, 650 F. 3d 930-32.
[346] Kowalski v. Berkeley City Sch., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012).

"S.A.S.H." which she said stood for "No Herpes. We don't want no herpes."[347] She invited her friends to join, and some of her friends were also students at Musselman High.[348] Another classmate, Ray Parsons, joined the group and then uploaded a picture of himself, holding his nose with a sign that said, "Shay Has Herpes."[349] This referred to another classmate, Shay N. Parsons, who uploaded two additional photos. [350] One of which Parson "had drawn red dots on Shay N.'s face to simulate herpes and added a sign near her pelvic region, that read, 'Warning: Enter at your own risk.' In the second photograph, he captioned Shay N.'s face with a sign that read, 'portrait of a whore.'"[351]

Shay N. learned of the page and was in tears.[352] Along with her parents, she went to the high school the next day to meet with school officials.[353] After the meeting, Shay filed a complaint of harassment with the school.[354] The central school board, after being contacted,[355] investigated and decided that Kowalski had created a "hate website" that was in violation of the Berkeley Board of Education's *Harassment, Bullying and Intimidation Policy* and its *Student Code of Conduct*.[356] The school suspended Kowalski for ten days.[357]

Kowalski sued, alleging a violation of her First Amendment free speech rights.[358] Her suit was based on the fact that the school disciplined her for "off-campus, non-school related speech"[359] for which it had neither the right nor the authority to punish her.[360] After losing at the district court, Kowalski appealed the ruling to the United States Court of Appeals, Fourth Circuit.[361]

The Fourth Circuit defined the issue facing it as "whether Kowalski's activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of students."[362] Concluding it did, the court affirmed the United States District Court for the Northern District of West Virginia's decision, upholding the school's punishment of Kowalski.[363] The fact that the student speech involved occurred off-campus did not determine the power of the school administrators to impose discipline.[364] Rather, *Tinker* allowed the school to discipline Kowalski because *Tinker* allowed schools to intervene where student speech invaded the rights of others to be "let alone."[365] Since Kowalski's speech targeted a classmate, the court proclaimed that it was "reasonably foreseeable" that the speech would impact students while at school and create substantial disruption.[366]

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[347] *Id*. at 567.
[348] *Id*.
[349] *Id*.
[350] *Id*.
[351] *Id.*
[352] *Kowalski*, 652 F.3d at 567.
[353] *Id*. at 568.
[354] *Id*.
[355] *Id.*
[356] *Id.*
[357] *Id.*
[358] *Kowalski*, 652 F.3d at 570.
[359] *Id*.
[360] *Id.*
[361] *Id.*
[362] *Id*.
[363] *Id.* at 574.
[364] *Kowalski*, 652 F.3d at 574.
[365] *Id.* at 573.
[366] *Id.* at 573-74.

Because of the inconsistent decisions in *Layshock*, *Snyder*, and *Kowalski,* the perspective was that a circuit split existed as to whether schools could discipline students for off-campus student speech.[367] All three cases petitioned the Supreme Court of the United States for certiorari, but the Court denied certiorari for all three.[368] As later cases indicate, the disagreement over the understanding and application of *Tinker's* text to off-campus speech continued.

The United States Court of Appeals, Fifth Circuit, faced another issue regarding the discipline of a student for off-campus speech in *Bell v. Itawamaba City School Board*.[369] Taylor Bell ("Bell") posted a video on the internet of a rap recording that he had created off-campus.[370] He made threats in this video against two teachers and coaches.[371] The school board believed this recording to contain "language [perceived] as threatening, harassing, and intimidating [to] the teachers …."[372] The language complained of was "betta watch your back / … I'm going to hit you with my rueger; you fucking with the wrong one / going to get a pistol down your mouth / …."[373] Bell was then disciplined and in response Bell sued alleging that the school had violated his First Amendment rights.[374] The United States District Court for the Northern District of Mississippi granted the school's Motion for Summary Judgment, and Bell appealed to the United States Court of Appeals, Fifth Circuit.[375] A panel of the Fifth Circuit held that the school had violated Bell's First Amendment rights.[376] *En banc* review was requested and granted.[377] The *en banc* panel said the issue it confronted was:

> [W]hether, consistent with the requirements of the First Amendment, off-campus speech directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating to a teacher satisfies the almost 50-year-old standard for restricting student speech, based on a reasonable forecast of a substantial disruption.[378]

The panel, applying *Tinker* to the facts, concluded that the school board could have perceived the threats as creating a substantial disruption.[379] The *en banc* panel then affirmed the district court's summary judgment for the school.[380]

The United States Court of Appeals, Eighth Circuit, also decided two cases[381] on the topic. In *D.J.M. v. Hannibal Public School District,* Dylan Mardis ("Mardis"), was chatting online with

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[367] Lisa Smith-Butler, *Walking the Regulatory Tightrope: Balancing Bullies' Free Speech Rights Against the Rights of Victims to Be Let Alone When Regulating Off-Campus K-12 Cyberspeech*, 37 NOVA L. REV. 1, 10-11 (2013).
[368] Snyder v. Blue Mountain, 650 F. 3d 915 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012); Layshock v. Hermitage Sch. Dist., 650 F. 3d 205 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012); *Kowalski*, 652 F. 3d at 565.
[369] Bell v. Itawamaba City Sch. Bd., 799 F. 3d 379 (5th Cir. 2015).
[370] *Id.* at 383.
[371] *Id*.
[372] *Id*.
[373] *Id*. at 384-85.
[374] *Id*. at 383.
[375] *Bell*, 799 F. 3d at 387-88.
[376] *Id*.
[377] *Id*. at 389.
[378] *Id*. at 383.
[379] *Id*. at 398-400.
[380] *Id*.
[381] D.J.M. v. Hannibal Pub. Sch. Dist., 647 F. 3d 754 (8th Cir. 2011); S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F. 3d 771 (8th Cir. 2012).

another classmate, C. M,[382] when Mardis told C.M. that he intended to get a gun and kill certain classmates. [383] In particular naming students that he would "get rid of."[384] C.M. forwarded Mardis's chats to school authorities which resulted in Mardis's arrest and detention in the local psychiatric ward.[385] When Mardis was released from the hospital, he tried to return to school only to be suspended for ten days for making threats.[386] Mardis was later suspended for the rest of the school year after a school board hearing.[387]

Mardis argued that the suspension violated his First Amendment free speech rights while the school countered that his speech constituted a threat which violated the school's conduct policy[388] and was not protected by the First Amendment. The United States District Court for the Eastern District of Missouri's decision for the school was upheld by the United States Court of Appeals, Eighth Circuit which held that "[t]rue threats are not protected under the First Amendment … here … [the school] was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school."[389]

In *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District,*[390] twin brothers, Steven and Sean Wilson, created a website called North Press which also contained a blog.[391] The purpose of the blog was to discuss "issues" at the school and to satirize and vent about these issues.[392] Between December 13 and 16, 2011, the students posted offensive racist and sexist comments, mentioning specific female students by name.[393]

There was a dispute as to whether the Wilsons used the school's computers to upload files to the website.[394] What was undisputed was that the school found out about the blog on December 16, and the reaction was swift.[395] The Wilson twins were immediately suspended for ten days on December 16.[396] At a second hearing, the twins were suspended for 180 days but were allowed to go to another school for the duration of their suspension.[397] The Wilsons sued in federal district court, alleging a violation of their First Amendment rights.[398] The district court granted the Wilsons a preliminary injunction which the school then appealed.[399]

As the United States Court of Appeals, Eighth Circuit reviewed decisions from other circuits, it vacated the district court's order for a preliminary injunction and reversed.[400] Citing the recent Eighth Circuit decision in *D.J.M.*,[401] the court said: ". . . Tinker applies to off-campus

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[382] *D.J.M.*, 647 F. 3d at 757-58.
[383] *Id.* at 758.
[384] *Id.*
[385] *Id.*
[386] *Id.*
[387] *Id.*
[388] *D.J.M.*, 647 F. 3d at 758.
[389] *Id.* at 764.
[390] S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F. 3d 771, 773 (8th Cir. 2012).
[391] *Id.*
[392] *Id*.
[393] *Id*. at 774.
[394] *Id*.
[395] *Id*.
[396] *S.J.W. ex rel. Wilson*, 696 F. 3d.
[397] *Id.* at 774.
[398] *Id*.
[399] *Id*. at 774-75.
[400] *Id*. at 776-79.
[401] D.J.M. v. Hannibal Pub. Sch. Dist., 647 F. 3d 754, 766 (8th Cir. 2011); S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F. 3d 771 (8th Cir. 2012).

student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.[402]

The United States Court of Appeals, Ninth Circuit, also faced a similar issue of off-campus speech and student safety.[403] In *Wynar v. Douglas County School District,*[404] Judge McKeown opened the opinion by noting the tightrope that school administrators walk. He said:

> [S]chool administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result. Courts have long dealt with the tension between students' First Amendment rights and "the special characteristics of the school environment…." But the challenge for administrators is made all the more difficult because, outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials must take care not to overreact and to take into account the creative juices and often startling writings of the students.[405]

Landon Wynar ("Wynar") was a student at Douglas High School.[406] He drafted violent and threatening instant messages from his home, sharing them with his high school classmates.[407] He bragged about the weapons that he possessed, he threatened to shoot specific classmates, and he then threatened to shoot classmates on a specific date.[408] During his sophomore year, Wynar said:

1. [in response to a statement that he would "kill everyone"] "no, just the blacks / and mexicans / halfbreeds / athiests / french / gays / liberals / david"
2. [referring to a classmate] "no im shooting her boobs off / then paul (hell take a 50rd clip) / then i reload and take out everybody else on the list / hmm paul should be last that way i can get more people before they run away..."
3. "i wish then i could kill more people / but i have to make due with what i got. / 1 sks & 150 rds / 1 semi-auto shot gun w/sawed off barrle / 1 pistle"[409]

Upon receiving these messages, Wynar's classmates became concerned about his state of mind and the safety of the students at school.[410] They spoke to a coach who took them to the school's principal.[411] After seeing these messages, the school administration contacted the police.[412] The police came to the school and interviewed Wynar on-campus before taking him into custody.[413]

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[402] S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F. 3d 771, 778 (8th Cir. 2012).
[403] Wynar v. Douglas City Sch. Dist., 728 F.3d 1062 (9th Cir. 2013).
[404] *Id.*
[405] *Id.* at 1064.
[406] *Id.*
[407] *Id.* at 1064-65.
[408] *Id.* at 1065-66.
[409] *Wynar*, 728 F.3d at 1066.
[410] *Id.*
[411] *Id.*
[412] *Id.*
[413] *Id.*

Wynar admitted to making the threats but denied that the threats were serious.[414] He insisted that the messages were a joke.[415] School officials then suspended Wynar for ten days.[416] The school board then held a formal hearing for Wynar, alleging that he violated Nev. Rev. Stat. § 392.4655.[417] This code provision permitted the ninety-day suspension of a student held to be a habitual discipline problem.[418] The board concluded that this was applicable to Wynar and suspended him for ninety days.[419]

Wynar, through his father, then sued the school district, alleging a violation of 42 U.S.C. § 1983, negligence, and negligent infliction of emotional distress.[420] The United States District Court of Nevada denied Wynar's Motion for Summary Judgment but granted the school district's same motion.[421] Wynar then appealed.[422]

As the United States Court of Appeals, Ninth Circuit, addressed the issue, it first noted that the material facts were not in dispute.[423] Thus, the court had to decide whether any of the Supreme Court of the United States' student speech decisions were applicable.[424] Concluding that *Bethel*, *Hazelwood*, and *Morse* were inapplicable, the court then focused on *Tinker*, having to decide whether it was applicable to these facts.[425] Focusing on the "substantial disruption" and the "invasion of the rights of others" prongs of *Tinker*, the court concluded that *Tinker's* tests had been satisfied in this situation even if the speech was made [426] OBJ The court said:

> The nature of the threats here was alarming and explosive. Confronted with a challenge to the safety of its students, Douglas County did not need to wait for an actual disruption to materialize before taking action. "*Tinker* does not require school officials to wait until disruption actually occurs before they may act .... 'In fact, they have a duty to prevent the occurrence of disturbances….'" We look to "all of the circumstances confronting the school officials that might reasonably portend disruption.[427]"

The Ninth Circuit affirmed the lower court's decision.[428]

The last case to be reviewed in this section is a state case rather than a federal case.[429] It was chosen because it was decided by the Supreme Court of Pennsylvania, i.e., the highest court of the state in which the *Mahanoy* case occurred.[430] Justice Cappy opened the opinion by stating the issue as:

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[414] *Id.*
[415] *Wynar*, 728 F.3d at 1066.
[416] *Id.*
[417] *Id.*
[418] *Id.*
[419] *Id.*
[420] *Id.*
[421] *Wynar*, 728 F.3d at 1066.
[422] *Id.*
[423] *Id.* at 1064.
[424] *Id.*
[425] *Id.* at 1066-72.
[426] *Id.*
[427] *Wynar*, 728 F.3d at 1070.
[428] *Id.* at 1075.
[429] J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).
[430] *Id.*

> [W]hether a school district may, consistent with the First Amendment to the United States Constitution, discipline a student for creating at home, and posting on the Internet, a web site that, *inter alia,* contained derogatory, profane, offensive and threatening statements directed toward one of the student's teachers and his principal.[431]

J.S. was a middle school student at Nitschmann Middle School, which was part of the Bethlehem Area School District.[432] J.S., using his home computer, created a web site that he named *Teacher Sux*.[433] Before entering the site, users had to click on a disclaimer which said that the user agreed not to notify the school about the site.[434] The site accused teachers of engaging in sex with one another, but the most troublesome area concerned a teacher, Mrs. Fulmer.[435] The web site said:

> "Why Fulmer Should be Fired." This page set forth, again in degrading terms, that because of her physique and her disposition, Mrs. Fulmer should be terminated from her employment.… [A]nother web page morphed a picture of Mrs. Fulmer's face into that of Adolph Hitler and stated "The new Fulmer Hitler movie. The similarities astound me." Finally, along with the criticism of Mrs. Fulmer, a web page provided answers for certain math lessons.
>
> The most striking web page regarding Mrs. Fulmer, however, was captioned, "Why Should She Die?" Immediately below this heading, the page requested the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman." The diagram consisted of a photograph of Mrs. Fulmer with various physical attributes highlighted to attract the viewers' attention. Below the statement questioning why Mrs. Fulmer should die, the page offered "Some Words from the writer" and listed 136 times "F ___ You Mrs. Fulmer. You Are A B ____. You Are A Stupid B ____." Another page set forth a diminutive drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.[436]

The website was viewed by students who shared it with teachers.[437] Ultimately, the teachers alerted the principal who convened a faculty meeting about it and then notified both the local police and the FBI; both organizations declined to charge J.S.[438]

Mrs. Fulmer, the victim of the website, learned of the threats, became frightened, and was unable to finish the school year.[439] She requested and received approved medical leave which required that three substitute teachers be hired to finish out the year.[440] J.S. finished the school year, continuing to attend classes and participate in extracurricular activities.[441] At the end of the school year, the school district sent J.S. a letter, advising him that he would be suspended for three

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[431] *Id.* at 850.
[432] *Id.*
[433] *Id.* at 851.
[434] *Id.*
[435] *J.S. ex rel. H.S.*, 807 A.2d at 850.
[436] *Id.*
[437] *Id.* at 852.
[438] *Id.*
[439] *Id.*
[440] *Id.*
[441] *J.S. ex rel. H.S.*, 807 A.2d at 852.

days because of the website.[442] It later increased the suspension to ten days and then decided to begin expulsion proceedings against J.S.[443] J.S. did not attend the hearings but was notified that the school had expelled him.[444] J.S., through his father, then filed suit, alleging that the school district's behavior had violated his First Amendment rights.[445] J.S. lost in the lower courts so appealed to the Supreme Court of Pennsylvania which affirmed the decisions of the three-member Commonwealth Court.[446]

The Court opened its analysis by noting that the "right of free speech is not absolute at all times and under all circumstances," citing to *Chaplinsky v. New Hampshire*.[447] After reviewing *Tinker*, *Bethel*, and *Hazelwood* as well as existing First Amendment doctrine and its exceptions,[448] the Court concluded that J.S.'s website was not a true threat and that neither *Bethel* nor *Hazelwood* were applicable.[449] It upheld the lower court's decision, concluding that *Tinker's* substantial disruption prong was satisfied with the disruption created when Mrs. Fulmer took a medical leave and was replaced by substitute teachers.[450]

While the above list is selective rather than comprehensive, the above cases are the primary cases relied upon by both parties.[451] The school district cited the cases for the proposition that a circuit split existed[452] while B.L. argued that no such split existed.[453] Instead, her argument was that all of these cases could be distinguished.[454] The arguments made by the parties will be discussed next.

The Arguments: What Was Said?

B.L.'s Approach

B.L. initiated the lawsuit, arguing that the school's discipline violated her First Amendment rights.[455] Requesting a TRO and then a preliminary injunction, her attorneys initially argued that the United States Court of Appeals, Third Circuit's precedent in *Layshock* and *Snyder* made it clear that schools had no authority to punish off-campus school speech because the speech was disrespectful or profane.[456] The attorneys further argued that the courts had yet to decide whether off-campus speech could be punished under *Tinker*.[457] Yet even if *Tinker* was applicable, there

[442] *Id.*
[443] *Id.* at 852.
[444] *Id.* at 853.
[445] *Id.*
[446] *Id.*
[447] *J.S. ex rel. H.S.*, 807 A.2d at 854; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
[448] *J.S. ex rel. H.S.*, 807 A.2d at 854 (The court noted that certain types of speech are not protected and include fighting words, inciting others to lawless behavior, defamatory speech, obscenity and true threats. In addition, time, place, and manner regulations are also acceptable even when speech is protected. It stated the Supreme Court of the United States had recognized that the school environment was unique which also permitted regulation of speech, in some instances, that would not otherwise be permitted.).
[449] *Id.* at 855-62.
[450] *Id.* at 869.
[451] Brief in Opposition to Petition for Writ of Certiorari, *supra* note 261, at 8-14.
[452] Petition for Writ of Certiorari, *supra* note 37, at 11-17.
[453] Brief in Opposition to Petition for Writ of Certiorari, *supra* note 261, at 8-14.
[454] *Id.*
[455] B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 610-12 (M.D. Pa. 2017).
[456] Memorandum of Law in Support of Plaintiff B.L's Motion for Summary Judgment, *supra* note 27, at 7-8.
[457] *Id.* at 10.

was nothing in the record to indicate that the coaches or the school district expected B.L.'s Snapchat post to create a substantial disruption.[458] Nor did the post create a substantial disruption.[459] From the beginning, B.L.'s primary argument was that the school lacked the authority to punish her for her off-campus speech.[460]

Responding to B.L., Mahanoy Area School District disagreed, arguing that *Layshock*, *Snyder*, and *Bethel* were applicable only to suspensions from school.[461] B.L. was suspended, not from school, but from an extracurricular activity, and thus *Layshock*, *Snyder*, and *Bethel* were not applicable to her case. [462] The school also argued that *Bethel* allowed the school to punish B.L. for her off-campus speech if such speech was directed at the school community.[463] B.L.'s speech was directed at the school.[464]

After B.L. was granted a TRO and preliminary injunction, discovery was held, and both parties then petitioned for summary judgment.[465] Mahanoy petitioned for summary judgment, arguing that its suspension did not violate B.L.'s First Amendment rights for four reasons.[466] The school argued that schools were allowed to punish students for off-campus speech.[467] The issue was not whether the schools could punish such speech but rather when.[468] Next, the school argued that students' free speech rights should not substantially interfere with a school's educational mission according to *Tinker*.[469] Permitting B.L.'s behavior to go undisciplined permitted a substantial disruption of the school's educational mission.[470] Because B.L. was suspended from an extracurricular activity in which she did not have a protected property interest, there was no First Amendment violation.[471] Lastly, the school argued that *Bethel* did permit B.L. to be punished for her off-campus speech.[472] Failure to uphold the discipline meant that courts were sending an "anything goes" message to students and undercutting administrators' authority to exercise control of the school environment.[473]

B.L. responded to the above arguments by continuing to assert that her suspension from the cheerleading squad violated her First Amendment rights and arguing that *Layshock*, *Snyder*, *Tinker*, and *Bethel* all held that it was unconstitutional for public schools to punish students for profane or disrespectful social media posts created outside of school.[474] She continued to argue that *Bethel* and *Tinker* did not extend to off-campus speech.[475] More importantly, it was her position that *Layshock, Snyder, Tinker*, and *Bethel* rather than *Kowalski* controlled.[476] While both

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[458] *Id.* at 1.
[459] *Id.*
[460] *Id.*
[461] Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *supra* note 29, at 7-14.
[462] *Id.*
[463] *Id.* at 20.
[464] *Id.* at 7-10.
[465] *Id.* at 4.
[466] *Id.* at 5-21.
[467] Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *supra* note 29, at 7.
[468] *Id.*
[469] *Id.* at 9.
[470] *Id.* at 9-12.
[471] *Id.* at 12.
[472] *Id.* at 18.
[473] Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *supra* note 29, at 18.
[474] Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 6, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019), 2019 WL 11689972.
[475] *Id.* at 6-8.
[476] *Id.* at 7-10.

parties agreed about the facts, B.L. kept insisting that the school misunderstood and mischaracterized the applicable law.[477]

What was the misunderstanding? B.L.'s attorneys argued that *Tinker* did not allow schools to punish off-campus speech absent a reason to anticipate that the speech would cause a substantial or material disruption.[478] Based upon these facts, B.L. could not be punished under *Tinker* as there was neither a substantial nor material disruption caused by her conduct.[479] No evidence existed to demonstrate that the Cheerleading Rules used to punish B.L. served a valid educational purpose.[480] If the rules did not have a pedagogical purpose sufficient to punish student speech under *Tinker,* allowing such punishment would lead to totalitarianism.[481] It was irrelevant to First Amendment analysis as to whether B.L. had a protected property interest in the extracurricular activity; *Layshock* and *Snyder* were not limited to school suspensions or expulsions.[482] Lastly, the school's citation to and reliance upon *Earls*[483] and *Acton*[484] was misplaced.[485] *Earls* and *Acton* were decisions involving the Fourth rather than the First Amendment and were irrelevant to B.L.'[486]

B.L.'s arguments won, and she prevailed at the district court level, obtaining a TRO and preliminary injunction; she also prevailed in her request for a summary judgment.[487] From this ruling, the school appealed to the United States Court of Appeals, Third Circuit.[488]

Mahanoy Area School District's Approach

Disappointed in the result, the school put forth five arguments in its Brief to the United States Court of Appeals, Third Circuit, regarding the application of *Tinker.*[489] It first argued that the facts of *Mahanoy* were sufficiently different to be distinguishable from both *Layshock* and *Snyder*.[490] Since *Layshock* and *Snyder* involved a suspension from school rather than a suspension from an extracurricular activity, these cases were inapplicable to B.L.'s case.[491] The school's attorneys noted that Pennsylvania law distinguished between school and extracurricular activities via statute which reinforced the school's position that neither *Snyder* nor *Layshock* were applicable to the *Mahanoy* facts since both of those decisions involved school suspensions rather than an extracurricular activity suspension.[492]

Mahanoy then argued that schools must be permitted to teach and enforce socially acceptable behavior for students.[493] Enforcing extracurricular rules assisted schools with their

[477] *Id.* at 16-17.
[478] *Id.*
[479] *Id.*
[480] Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment*, supra* note 474, at 11.
[481] *Id.* at 12.
[482] *Id.* at 18.
[483] Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822 (2002).
[484] Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
[485] Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, *supra* note 474, at 19-20.
[486] *Id.*
[487] B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 170-75 (M.D. Pa. 2017)..
[488] *Id.*
[489] Brief of Appellant to the Court of Appeals, Third Circuit, *supra* note 48, at 9-24.
[490] *Id.* at 10-14.
[491] *Id.*
[492] *Id.* at 20.
[493] Brief of Appellant to the Court of Appeals, Third Circuit, *supra* note 48, at 22.

educational mission as *Tinker* permitted.[494] Lastly, Mahanoy noted that the district court's improper analysis meant that B.L.'s vulgar speech received the same level of protection as the pure political speech of *Tinker*, which was not the intent of *Tinker*.[495] The school explained that not all speech is protected by the First Amendment.[496] Unprotected categories of speech, e.g., content regulation, included obscenity, fighting words, incitement, and defamation.[497] The First Amendment was never intended to give absolute protection to every individual to speak whenever or wherever she pleases or to use any form of address that she chooses.[498] Time, place, and manner regulations, in addition to selected content regulations, were permitted.[499] These reasons meant that the school was entitled, under *Tinker* and *Bethel*, to punish B.L. for her vulgar, off-campus, speech which was directed at the school.[500]

B.L. again responded to the school's arguments, repeating her position that *Layshock* and *Snyder* both governed, and that both prohibited public schools from "reaching beyond the schoolyard"[501] to "punish a student for expressive conduct that originates outside the school house, did not disturb the school environment, and was not related to any school sponsored event."[502] Even if *Tinker* were applicable, which B.L. argued it was not, B.L.'s conduct caused no substantial disruption.[503] Again, B.L. reiterated that all of the cases cited by the school in its brief were distinguishable from her facts.[504]

B.L. again prevailed[505] with the majority of the United States Court of Appeals, Third Circuit, concluding that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[506] Judge Ambro concurred in the court's judgment but disagreed with its reasoning, noting, "I dissent from the majority's holding that, on the facts before us … [that *Tinker*] … does not apply to 'off-campus' speech."[507] He observed that the Court of Appeals, Third Circuit was the first court to conclude categorically that *Tinker* did not apply to off-campus student speech.[508]

Mahanoy then petitioned the Supreme Court of the United States for a Writ of Certiorari.[509] The school offered three arguments as to why the Court should grant certiorari, again reiterating that a circuit split existed as to whether *Tinker* was applicable to off-campus student speech.[510] It next listed the numerous legal and practical consequences for students, parents, teachers, and school administrators because of existing federal regulation regarding bullying and state legislation

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[494] *Id.*
[495] *Id.* at 22-24.
[496] *Id.* at 25-34.
[497] *Id.*
[498] *Id.*
[499] Brief of Appellant to the Court of Appeals, Third Circuit, *supra* note 48, at 25-34.
[500] *Id.*
[501] Brief of Appellee, B.L., to the United States Court of Appeals, Third Circuit at 20, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019).
[502] *Id.*
[503] *Id.* at 37.
[504] *Id.* at 35-49.
[505] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).
[506] *Id.* at 189.
[507] *Id.* at 194.
[508] *Id.* (Ambro, J., dissenting).
[509] Petition for Writ of Certiorari, *supra* note 37, at 10.
[510] *Id.* at 10-25.

regarding harassment.[511] This case provided an ideal vehicle for the Court to address these recurring issues. Lastly, it argued that the United States Court of Appeals, Third Circuit, simply got the decision wrong.[512] It failed to help schools grapple with the very real issue of handling off-campus student speech that migrated onto campus.[513]

B.L. responded to the petition, urging the Court to deny certiorari.[514] First, she argued that no circuit split existed.[515] Why? Because the United States Court of Appeals, Third Circuit's, majority panel "held only that the First Amendment does not permit public school officials to punish off-campus speech that: (1) does not constitute harassment or threat of violence; (2) took place off-campus on a weekend outside of school hours; (3) was not disseminated through school-owned, -operated, or -supervised channels or at a school event; and (4) did not bear the school's imprimatur."[516] The school district treated "the decision below as simply applying an on-off switch based on whether speech takes place on or off campus."[517] It misconstrued the decisions of other circuit courts.[518] Next, B.L. argued that this case was a "poor vehicle" for deciding whether *Tinker* was applicable to off-campus speech because even if it was, B.L.'s conduct did not create a substantial disruption as required by *Tinker*.[519] Thus, *Tinker* was inapplicable.[520] Lastly, B.L. refuted the school's argument that the Third Circuit's decision was incorrect.[521] She argued that "[p]ermitting school officials to regulate student expression that occurs on a weekend, off-campus, with no specific connection to the school would severely diminish students' free-speech rights in the world at large."[522]

The Court granted certiorari.[523]

Mahanoy then submitted its arguments to the Court in its brief.[524] It argued that the First Amendment did not bar schools from disciplining off-campus student speech that inflicted on-campus harms.[525] Citing Noah Webster, Mahanoy argued that schools had been disciplining disruptive off-campus speech since 1790.[526] From 1790 through 1969, educators disciplined off-campus student speech that threatened on-campus student disruptions.[527] *Tinker* continued to allow this punishment but added the requirements of "substantial disruption" or "interference with the rights of others."[528] *Tinker* did not disturb the settled principle that the constitutional rights of students in the public school setting are not automatically co-extensive with the rights of adults in

[511] *Id.* at 9.
[512] *Id.* at 21.
[513] *Id.*
[514] Brief in Opposition to the Petition for Certiorari, *supra* note 261.
[515] *Id.* at 8.
[516] *Id.* at 9-10.
[517] *Id.* at 10.
[518] *Id.* at 8.
[519] *Id.* at 14.
[520] Brief in Opposition to the Petition for Certiorari, *supra* note 261, at 16.
[521] *Id.* at 17.
[522] *Id.* at 20.
[523] B.L. v. Mahanoy Area Sch. Dist., 141 S. Ct. 976 (2020).
[524] Brief of Petitioner, *supra* note 259, at 13-47.
[525] *Id.* at 13–16.
[526] *Id.* at 13.
[527] *Id.* at 13–16.
[528] *Id.* at 16–18.

other settings.[529] Part of a school's job was to teach students the boundaries of socially acceptable behavior so schools could establish rules of decorum in the school setting.[530]

Next, Mahony argued that *Tinker* offered students First Amendment speech protection.[531] What protection was offered? The protection, said the school, is the "reasonably foreseeable" test.[532] Is it reasonably foreseeable that the off-campus speech will reach school and create a substantial disruption?[533] If so, students should then know that when their speech becomes "school" speech, it is subject to punishment by the school.[534] Mahanoy's attorneys argued that the purpose of *Tinker's* substantial disruption test was to prevent schools from silencing student speech with which the school disagreed.[535] Schools must target the disruption caused by the speech rather than the viewpoint of the speech expressed by the student.[536]

The school's attorneys then argued that the holding of the Third Circuit would create chaos with existing state law, federal law, and regulation.[537] In every state, whether by state law or school policy, schools regulate off-campus student speech that caused on-campus disruptions or interfered with the rights of other students or school staff, e.g.., bullying or harassment.[538] Federal law required schools to protect their students' on-campus learning environment, regardless of whether the harassment originated inside or outside of the schoolhouse gate.[539] To create a safe learning environment, schools were required to address online messages.[540] Why? Such messages created

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[529] *Id.* at 16.
[530] Brief for Petitioner*, supra* note 259, at 19.
[531] *Id.* at 16.
[532] *Id.* at 28.
[533] *Id*.
[534] *Id.* at 28–29.
[535] *Id.* at 29.
[536] Brief for Petitioner*, supra* note 259, at 29–30.
[537] *Id*. at 31–39.
[538] *Id.* at 31; *see also* Ala. Code § 13A-11-8(a)(1), (b)(1); Alaska Stat. Ann. § 11.61.120(a); Ariz. Rev. Stat. Ann. §§ 13-2916, 13-2921; Ark. Code Ann. §§ 5-71-208, 5-71-209; Cal. Penal Code § 653m; Colo. Rev. Stat. Ann. § 18-9-111; Conn. Gen. Stat. Ann. § 53a-181; Del. Code Ann. tit. 11, § 1311; D.C. Code Ann. § 22-3133; Fla. Stat. Ann. § 784.048; Ga. Code Ann. §§ 16-5-90, 16-11-39.1; Haw. Rev. Stat. Ann. §§ 711-1106, 711-1106.5; Idaho Code Ann. § 18-7906; 720 Ill. Comp. Stat. Ann. 5/26.5-2, 5/26.5-3; Ind. Code Ann. § 35-45-2-2; Iowa Code Ann. § 708.7; Kan. Stat. Ann. § 21-6206; Ky. Rev. Stat. Ann. § 525.080; La. Stat. Ann. §§ 14:40.3,14:285; Me. Rev. Stat. Ann. tit. 17-A, §§ 210-A, 506; Md. Code Ann., Crim. Law §§ 3-803, 3-804; Mass. Gen. Laws ch. 265, § 43A; *id.* ch. 269 § 14A; Mich. Comp. Laws Ann. § 750.411h; Minn. Stat. Ann. §§ 609.748, 609.79, 609.795; Miss. Code Ann. §§ 97-3-107, 97-45-15; Mo. Ann. Stat. §§ 565.090, 565.091, 565.225, 565.227; Mont. Code Ann. §§ 45-5-220, 45-8-213; Neb. Rev. Stat. Ann. § 28-311.03; Nev. Rev. Stat. Ann. §§ 200.571, 200.575; N.H. Rev. Stat. Ann. § 644:4; N.J. Stat. Ann. §§ 2C:12-10, 2C:33-4.1; N.M. Stat. Ann. §§ 30-3A-2, 30-20-12; N.Y. Penal Law § 240.26; N.C. Gen. Stat. Ann. §§ 14-196, 14-196.3(b); N.D. Cent. Code Ann. §§ 12.1-17-07, 12.1-17-07.1; Ohio Rev. Code Ann. § 2917.21; Okla. Stat. Ann. tit. 21, § 1172; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. §§ 2709(a), 2709.1; 11 R.I. Gen. Laws Ann. §§ 11-52-42, 11-59-2; S.C. Code Ann. §§ 16-3-1710, 16-3-1730; S.D. Codified Laws §§ 22-19A-1, 22-19A-4; Tenn. Code Ann. § 39-17-308; Tex. Penal Code Ann. § 42.07; Utah Code Ann. §§ 76-5-106, 76-5-106.5; Vt. Stat. Ann. tit. 13, §§ 1027, 1062; Va. Code Ann. §§ 18.2-152.7:1, 18.2-427; Wash. Rev. Code Ann. §§ 9A.46.020, 9A.46.110, 9.61.230; W. Va. Code Ann. §§ 61-2-9a, 61-3C-14a, 61-8-16; Wis. Stat. Ann. § 947.0125; Wyo. Stat. Ann. § 6-2-506.
[539] *See* 20 U.S.C. §§ 1400–1482 (2020) (Individuals with Disabilities Education Act) and 42 U.S.C. § 12132 (2020) (Americans with Disabilities Act); *see also* U.S. Dept. of Educ., Off. of Civ. Rts., Dear Colleague Letter (October 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [https://perma.cc/6AAM-LHWD], regarding school's responsibilities for student harassment under the Federal Civil Rights Law at 42 U.S.C. § 2000(e) (2020).
[540] Brief for Petitioner*, supra* note 259, at 38.

a permanent record that transient in-person conversations did not.[541] The Third Circuit's rule would prevent schools from performing and protecting basic school operations.[542]

B.L. responded to the school's brief with her own, making five arguments.[543] She argued that applying *Tinker* outside of school would seriously undermine the speech rights of students because outside of school, students have a First Amendment right to be free from content-based censorship.[544] Why? Content based restrictions on speech are presumptively unconstitutional. This allows people, rather than the government, to decide what to say.[545] Rather, *Tinker* is a narrow exception to the First Amendment's prohibition on content discrimination and is limited to the school environment.[546] Schools can regulate school speech, i.e., speech that takes place under school supervision.[547]. Limiting *Tinker* to the school environment is sensible as it is too vague to apply outside of school.[548] It is an "unacceptable basis for regulating speech in the world at large."[549] As in the court in *Snyder v. Phelps*[550] said: "[We] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[551]

B.L. then listed several examples of schools punishing student speech considered inappropriate.[552] After listing these examples, B.L. then asked whether schools should be able to punish students for taking a photo and video of a crowded, mask-less school hallway and posting it on Twitter to demonstrate that a school was not necessarily following the rules regarding social distancing in the Covid-19 pandemic.[553] Should students be forced to curtail what they say while off-campus in the event that the school later deems the speech to be disruptive? These are the problems, argued B.L., that would arise under by the school's standard.[554]

Because true threats, obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are not protected under the First Amendment,[555] schools have the power to handle harassment and bullying. Schools can also discipline students for aiding and abetting violations of school regulations or conduct.[556] There is no need to expand *Tinker*. [557]

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[541] *Id.*
[542] *Id.* at 39–43.
[543] Brief for Respondents, *supra* note 262, at 8–11.
[544] *Id.* at 8.
[545] *Id.* at 11.
[546] *Id.*
[547] *Id.* at 13-17.
[548] *Id.* at 17.
[549] Brief for Respondents, *supra* note 262, at 17.
[550] Snyder v. Phelps, 562 U.S. 443, 458 (2011).
[551] Brief for Respondents, *supra* note 262, at 18.
[552] *Id.* at 19-21. The list included: "Wearing a shirt stating, 'homosexuality is shameful. Romans 1:27;' Quoting scripture and distributing small rubber dolls along with cards stating that they 'represented the actual size and weight of a 12 week old baby;' Wearing shirts that read '[w]e are not criminals' to protest an immigration bill; Wearing a shirt that displayed the American flag and stated 'Old Glory Flew over legalized slavery for 90 years;' Displaying a Confederate flag, drawing a Confederate flag, wearing clothing depicting the Confederate flag, and wearing clothing that states 'Our School Supports Freedom of Speech for All (Except Southerners);' Signing a petition to state that football players did not want to play for their coach after he was accused of abusing players; and Wearing a University of San Diego sweatshirt and Los Angeles Lakers and Dodgers jerseys."
[553] *Id.* at 22.
[554] *Id.* at 18.
[555] *Id.* at 25.
[556] *Id.* at 27.
[557] Brief for Respondents, *supra* note 262, at 27.

B.L.'s brief next discussed closely related doctrines regarding teachers' free speech rights in public schools and the application of the Fourth Amendment in the public school setting.[558] She concluded that neither doctrine supported the school.[559] Next, she asked how it was workable for the school to claim that it would extend *Tinker* to off-campus speech that students intentionally direct at the school environment that foreseeably reaches that environment.[560] There would be no limit to such a rule, resulting in both content and viewpoint discrimination.[561]

B.L.'s brief then acknowledged and responded to the arguments contained in the brief submitted by the Solicitor General for the United States.[562] Under the United States' approach, the vast majority of student speech outside the school environment would not be subjected to *Tinker*.[563] B.L. agreed with this approach but then noted that the government took the exact opposite approach in her particular case.[564] Such behavior was inconsistent with the principle that the government was espousing.[565] How, asked B.L., did this protect student speech?[566]

Lastly, B.L. argued that if the Court expanded *Tinker* to speech outside the school environment, it should limit its application in that context and should require intent by students to cause a substantial disruption to prevent the school district's broad interpretation of *Tinker*.[567] Even if the Court decided to apply *Tinker* to the facts of the case, B.L. argued that the school district had violated her First Amendment rights as her speech failed to satisfy the "substantial" or "material" disruption prong of *Tinker*. [568]

The United States Solicitor General's Approach

On March 1, 2021, the Acting Solicitor General filed an amicus curiae brief with the Court, supporting the petitioner, Mahanoy Area School District.[569] The Solicitor General framed the issue facing the Court as "whether the First Amendment categorically prohibits its public-school officials from disciplining students for speech that occurs off-campus."[570] The United States provided three reasons for its interest in the case.[571] First, it noted that the federal government operated hundreds of public schools, both primary and secondary, throughout its military installations and Indian reservations.[572] Several federal government agencies, including the Department of Education, the Department of Justice, and the Department of Health and Human Services, also had an interest in this particular case as these departments provided significant resources to address and prevent the bullying and harassment of students throughout the country.[573]

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[558] *Id.* at 28–31.
[559] *Id.* at 28–32.
[560] *Id.* at 32.
[561] *Id.*
[562] *Id.* at 38-42.
[563] Brief for Respondents*, supra* note 262, at 38.
[564] *Id.* at 39–40.
[565] *Id.*
[566] *Id.* at 38–42.
[567] *Id.* at 43–44.
[568] *Id.* at 46–47.
[569] *See* Docket Sheet at 1, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021), (No. 20-255).
[570] Brief for the United States as Amicus Curiae Supporting Petitioner at I, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 976 (2021) (20-255), 2021 WL 859695, at I [*hereafter* Brief for the United States].
[571] *Id.* at 1.
[572] *Id*.
[573] *Id.*

Lastly, the government noted that it had a "substantial interest in the correct interpretation and application of the federal constitution."[574]

The Solicitor General made two arguments.[575] The first argument stated that "the First Amendment does not categorically prohibit public school officials from disciplining students for speech that occurs off-campus."[576] Next, it claimed that "off-campus student speech that threatens the school community or intentionally targets certain individuals, groups or discrete school functions may qualify as school speech potentially subject to discipline by school officials."[577]

Under the first argument, the Solicitor General argued that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.[578] Why? Public schools prepare individuals for participation as citizens and teach them the values upon which society rests.[579] According to *Bethel*, a school may prohibit student speech that "would undermine the school's basic educational mission."[580]

Next, Solicitor General noted that a number of constitutional rights apply differently in the public school setting.[581] As an example, *New Jersey v. TLO*[582] allowed Fourth Amendment searches in public schools on the basis of "reasonable suspicion" rather than "probable cause."[583] *Earls* and *Acton*[584] also allowed a lesser standard for student searches in the public school setting while *Goss v. Lopez*[585] permitted procedural due process to be satisfied with only "rudimentary procedures."[586] The Solicitor General then stated: "The First Amendment is no exception."[587] It cited *Bethel*, *Morse*, and *Hazelwood*, saying that "public schools may discipline students for speech that otherwise would enjoy First Amendment protection if uttered by adults outside of the school environment."[588]

Readers of the Solicitor General's amicus curiae brief were reminded that the "appropriate question is whether and under what circumstances off-campus student speech may, consistent with the First Amendment, be treated as 'school speech' and therefore potentially subject to discipline by public school officials."[589] According to the United States Court of Appeals, Third Circuit, the answer to the above question would turn on arbitrary distinctions such as whether the student drafted the message on his or her computer or used the school's computer and whether the behavior occurred a minute before the school bell rang or a minute afterward.[590] This approach was likely to create confusion rather than end it.[591] This categorical approach could also undermine schools'

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[574] *Id.*
[575] *Id.* at III.
[576] Brief for the United States, *supra* note 570, at III.
[577] *Id.*
[578] *Id.* at 8–9.
[579] *Id*.
[580] *Id.*
[581] *Id.* at 9.
[582] New Jersey v. T.L.O, 469 U.S. 325, 341 (1985).
[583] *Id.* at 339–344.
[584] *See* Bd. of Educ. v. Earls, 536, 837 U.S. 822 (2002); *see also* Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995).
[585] Goss v. Lopez, 419 U.S. 565, 581 (1975).
[586] *Id.* at 582; *see also* Brief for the United States, *supra* note 570, at 10.
[587] Brief for the United States, *supra* note 570, at 10.
[588] *Id.* at 11.
[589] *Id.* at 14.
[590] *Id.* at 15.
[591] *Id.*

efforts to respond to threats to the safety of their students and staff.[592] Should schools "do nothing and risk the safety of the school community or take action and risk a lawsuit?"[593] This places schools in a terrible position.[594]

Following the above approach, which is based on the student's physical location when drafting a message, would undermine a school's efforts to combat harassment and bullying.[595] Several provisions of federal and state law existed that were applicable to harassment and bullying.[596] Protecting students from harassing and bullying conduct was necessary to provide students with the educational activities to which they were entitled.[597]

The second argument noted that "off-campus student speech that threatens the school community or intentionally targets certain individuals, groups or discrete school functions may qualify as school speech"[598] that could be subject to discipline by school officials. Since "[s]peech on public issues occupies the highest rung of hierarchy of First Amendment values,"[599] it is entitled to special protection. Speech that occurs off-campus but can properly be regarded as "school speech" that is subject to discipline by school officials includes the following examples:

1. Speech that creates a threatening environment;
2. Speech that deprives other students of educational opportunities to which they are entitled because of bullying or harassing behavior;
3. Speech that would undermine the essential functioning of the educational curriculum; or
4. Speech that would breach school security.[600]

The United States disagreed with the Mahanoy Area School District regarding the alleged protection provided by *Tinker* to off-campus student speech.[601] It noted that it wanted to protect the rights of both the school and students.[602] How could it accomplish that? It cited a decision from the United States Court of Appeals, Ninth Circuit, *McNeill v. Sherwood School District 88J.*[603] *McNeill*, said the Solicitor General, identified three relevant factors to be used to determine when off-campus speech could be disciplined.[604] It considered the following: "(1) the degree and likelihood of harm to the school caused or augured by the speech; (2) whether it was reasonably foreseeable that the speech would reach and impact the school; and (3) the relation between the content and context of the speech and school."[605]

Considering *McNeill* and *Kowalski*, the Solicitor General stated it was difficult to formulate a single universal rule that captured the types of off-campus student speech that school officials might properly regard as school speech that could be disciplined when warranted.[606] Instead, a test

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[592] *Id.* at 14–16.
[593] Brief for the United States, *supra* note 570, at 14–16.
[594] *Id.* at 15.
[595] *Id.* at 16.
[596] *Id.* at 16–19.
[597] *Id.* at 19.
[598] *Id.*
[599] Brief for the United States, *supra* note 570, at 20.
[600] *Id.* at 24.
[601] *Id.* at 21-22.
[602] *Id.* at 18.
[603] McNeill v. Sherwood Sch. Dist., 88J, 918 F.3d 700 (9th Cir. 2019).
[604] *Id.* at 707.
[605] *Id.*
[606] Brief for the United States, *supra* note 570, at 23.

was needed.[607] What should the test be? The Solicitor General recommended that the following categories of off-campus student speech could be identified as school speech, potentially subject to discipline, if it was speech that:

1. Threatens or reasonably can be regarded as threatening a school community;

2. Intentionally targets specific groups or individuals in the school community, i.e., identifiable students and teachers; or

3. Intentionally targets specific school functions or programs regarding matters essential to or inherent in the functions or the programs themselves.[608]

The inquiry into the facts then becomes twofold: has the off-campus student speech become "school speech?" If so, the speech is disciplined, the next question to ask is whether the discipline violated the First Amendment.[609]

The Solicitor General then asked the Court to vacate the judgment of the United States Court of Appeals, Third Circuit.[610]

After submitting the brief, the Acting Solicitor General then filed a Motion for Leave to Participate in Oral Arguments as Amicus Curiae and for divided argument on March 29, 2021.[611] On April 5, 2021, the Court granted the Solicitor General's motion.[612]

The test proposed by the Solicitor General seemed to better protect both the students and schools than either test suggested by Mahanoy or B.L. Mahanoy wanted to apply *Tinker* and *Bethel* to off-campus student speech which would have substantially invaded much of students' off-campus and after hours speech.[613] B.L. insisted that *Tinker* was categorically inapplicable to off-campus student speech, ignoring the reality that threats, bullying, harassment, and cheating could be created off-campus but still create a substantial disruption at the school.[614] The Solicitor General's suggested test provided a compromise between the two extreme approaches.

The Court's Holding

After reading the parties' briefs and appendices, reading the numerous amicus curiae briefs submitted, and listening to oral arguments, the Court handed down its decision on June 23, 2021.[615] It affirmed the United States Court of Appeals, Third Circuit's, decision with an eight to one ruling.[616] Justice Breyer wrote the opinion for the majority while Justice Alito drafted a concurrence which Justice Gorsuch joined.[617] Justice Thomas dissented.[618] While the majority

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[607] *Id*. at 24.
[608] *Id.* at 24.
[609] *Id.* at 28-29.
[610] *Id.* at 32.
[611] Motion of the U.S. for Leave to Participate in Oral Argument as Amicus Curiae and for Divided Argument at 1, Mahanoy Area Sch. Dist. v. B.L., 964 F.3d 170 (2020) (No. 20-255)..
[612]
[613] McNeill v. Sherwood Sch. Dist., 88J, 918 F.3d 707, 707-08 (9th Cir. 2019).
[614] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).
[615] *Id*. at 2038.
[616] *Id.* at 2048.
[617] *Id.* at 2038, 2048.
[618] *Id.* at 2059.

affirmed the Third Circuit's judgment, it disagreed with its reasoning.[619] Why? The Court explained that it did not offer a rule to cover every possible student speech scenario.[620] It said:

> [W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.[621]

Instead, it provided three features of "off-campus speech, that often, though not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech."[622] These "features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."[623] These three features are:

> *First*, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.
>
> *Second*, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.
>
> *Third*, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. [624]

[619] *Id.* at 2048.
[620] *Mahanoy Area Sch. Dist.,*141 S. Ct. at 2048.
[621] *Id.*
[622] *Id.* at 2046.
[623] *Id.*
[624] *Id.*

IV. Analysis: What Does It Mean?

Did the Court Get It Right?

The first question that comes to mind is why did the Court decide to hear this particular case while refusing to hear earlier, arguably more meritorious cases, such as *Layshock*, *Snyder* and *Kowalski*? What can be gleaned from the grant of certiorari for *Mahanoy* that was denied for *Layshock*, *Snyder*, and *Kowalski*?

Could it be that the United States Court of Appeals, Third Circuit, categorically said that *Tinker* was inapplicable to all off-campus student speech? While the Court agreed with the Third Circuit's result, it did not agree with its reasoning.[625] Thus, it seems reasonable to conclude that there are circumstances in which *Tinker* still applies to off-campus student speech. Bullying, harassment, threats, and cheating can all occur off-campus, but have on-campus implications that must be handled by schools. The Court refused to let stand a decision that absolutely prohibited a school from responding to any off-campus student speech.[626]

Instead, it acknowledged the perceived pettiness of Mahanoy's punishment, concluding that it could not be allowed.[627] It upheld B.L.'s First Amendment rights in this particular case, but it left room for a school to apply *Tinker* to off-campus student speech when appropriate.[628] When would such application be appropriate? The Court said three factors would be considered in the future when deciding whether to apply *Tinker* to off-campus student speech.[629] When the student is not at school, there is a preference for the parent, rather than the school, to handle any needed discipline of the student for behavior and speech.[630] This follows the Court's reasoning regarding the allocation of power between parents and the State as announced in *Meyer*, *Pierce*, and *Yoder*.[631] It also follows Blackstone's *Commentaries*.[632] Blackstone argued that the school stood *in loco parentis* to the student when the child was at school.[633] Since the child was no longer at school, the school did not stand *in loco parentis*, and thus the responsibility for discipline, or lack thereof, belonged to the parent rather than the school.[634] No tiered scrutiny was announced, but the Court said that it would be very "skeptical" of a school's attempt to regulate off-campus student speech, particularly speech of a political or religious nature.[635] The Court would require a school to meet a heavy burden when imposing punishment for off-campus speech.[636] Lastly, it reminded schools that part of their educational mission was to support students who engaged in unpopular expressions and ideas.[637]

As Justice Breyer noted, there was "no rule" provided for which all of the parties seemed to be clamoring.[638] Why? If one reviews the decisions of the Court from 1968 onwards regarding

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[625] *Mahanoy Area Sch. Dist.,*141 S. Ct. at 2048.
[626] *Id.* at 2045-46.
[627] *Id.* at 2048.
[628] *Id.* at 2046.
[629] *Id.*
[630] *Id.*
[631] *Mahanoy Area Sch. Dist.,*141 S. Ct. at 2053.
[632] *Id.* at 2052.
[633] *Id.* at 2051.
[634] *Id.*.
[635] *Id.* at 2046.
[636] *Id.*
[637] *Mahanoy Area Sch. Dist.,*141 S. Ct. at 2046.
[638] *Id.*

student speech, it is clear that there is no unanimous agreement. There are majority opinions with concurrences and dissents, but there are no unanimous opinions. Perhaps the Justices, along with members of society, are unable to agree as to how students should behave off-campus and when and how their conduct should be disciplined by parents. Discipline seems a very personal decision, based upon individual and family values, that is best left to the parents.

What happens when a school disagrees with how a parent handles off-campus student speech and discipline? Isn't *Mahanoy* really about whose is the power to discipline rather than whether Tinker was applicable to off-campus student speech? As this decision demonstrates, the Court actually answered the second question rather than the first. Off-campus student speech may be disciplined by schools only rarely, and schools will carry a heavy burden to justify interference with the parental relationship and students' First Amendment rights.[639]

What is the Court's Test or Analysis?

Reading the Court's opinion, one can conclude that there are two tests: one for on-campus speech and another for off-campus speech. For on-campus speech, the test remains as it was.[640] Did the speech create a substantial or material disruption of the school or invade the rights of others? If not, did the speech fit within one of the three categories below:

a. Did the speech involve lewd and vulgar speech at the school?
b. Did the speech carry the imprimatur of the school?
c. Lastly did the speech promote illegal drug use at school or at a school sanctioned event?[641]

If a school can answer "yes" to any of the above, it seems likely that punishment of the student's speech will be upheld.[642] What does *Mahanoy* add to this analysis? It seems arguable that *Mahanoy* stands for the proposition that in very limited and rare circumstances, off-campus student speech can be regulated and disciplined. But three factors, i.e., the lack of the school's *in loco parentis* standing, the heavy burden the school must meet to satisfy a skeptical court, and a school's duty to protect unpopular ideas; all weigh heavily against upholding the constitutionality of such discipline.

Does this lack of a rule for off-campus student speech create more confusion? Did *Mahanoy* help schools? Lisa Blatt, attorney for the school, responded to the Court's opinion, by warning "that protecting student's online speech would be 'open season' on schools and would produce 'chaos' in the lower courts."[643]

Is There a Better Test?

Using the Solicitor General's position from both its brief and oral argument, it seems that its approach provides more illumination to schools, parents, and students as to when students' off-campus speech can be constitutionally disciplined by schools.[644] Under the government's

[639] *Id.*
[640] *Id.*
[641] *Id.*
[642] *See supra* p. 34,
[643] Marcia Coyle, *1st Amendment Protects Cursing Cheerleader's Off- Campus Speech, Justices Say*, NATIONAL L.J. (June 23, 2021, 10:53 AM), https://www.law.com/nationallawjournal/2021/06/23/1st-amendment-protects-cursing-cheerleaders-off-campus-speech-justices-say [https://perma.cc/PTR6-RBUV].
[644] *See supra* p. 33,

approach, the analysis becomes twofold.[645]Two questions must be asked.[646] The first is whether the off-campus student speech has become school speech that can be regulated and disciplined by the school.[647] To answer this question, the following factors must be used:

a. does the speech threaten or can it reasonably be regarded as threatening the school community;

b. does the speech intentionally target specific groups or individuals in the school community; or

c. does the speech intentionally target specific school functions or programs regarding matters essential to or inherent in the functions or the programs themselves?[648]

If the answer to any of the above is "yes," then the students should expect that speech to qualify as school speech that is potentially subject to discipline.[649] The inquiry does not end here.[650] Next, it must be asked whether the disciplined school speech violated the First Amendment.[651] To answer that question, it must be asked whether the off-campus speech created a substantial disruption, e.g., threats to the school or individuals within the school, cheating, or whether it impinged on the rights of others, such as harassment of teachers or staff or the bullying of students.[652] If the speech involved threats, harassment, bullying, or cheating, even if off-campus, it seems likely that schools can constitutionally discipline it.

Applying this test to the *Mahanoy* facts, one could argue that B.L.'s speech did indeed target a specific school program, the cheerleading squad. Thus, she should have arguably understood that if such speech reached the school's administrator, it would be considered "school speech." But the second test must also be satisfied. Did B.L.'s speech create a substantial disruption or impinge upon the rights of others? That answer seems to be "no." While vulgar and rude, B.L.'s post did not create a substantial disruption. Neither school routines nor classes were disrupted by B.L.'s statement.[653] It was, at best, thirty minutes of tittle tattle among students and annoyed coaches. The school was not swamped or overrun with parents concerned for the safety of their children. Some of the students were angry that B.L. was allowed to say such things and get away with it, but this was by no means the substantial disruption that *Tinker* envisioned. Did it impinge upon the rights of others? Were Coaches Luchetta-Rump and Gnall harassed or bullied? Again, the answer seems to be "no." While B.L. made her displeasure with the cheerleading squad known, she did not single out or name the coaches or cheerleading squad members.[654] Instead, she expressed great frustration with her life.[655] Did she express it inappropriately? Perhaps.

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[645] Brief for the United States, *supra* note 570, at 7.
[646] *Id.*
[647] *Id.*
[648] *Id.*
[649] *Id.* at 13.
[650] *Id.*
[651] Brief for the United States, *supra* note 570, at 13.
[652] *Id.* at 28.
[653] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021)..
[654] *Id.* at 2043.
[655] *Id.*

Whose Is the Power?

Whose decision should it have been to punish B.L., her parents' or the school's? Ultimately, this is the question that the Court answered.[656] Following a line of cases that began in the early twentieth century with *Meyer*, the Court concluded that the power usually belongs to the parents rather than the school.[657] The Court did leave room for exceptions to this, but it noted that rarely would schools, no longer standing *in loco parentis*, be able to successfully punish off-campus student speech.[658]

Conclusion

Mahanoy became the fifth decision in the Court's student speech cases. While some might argue that it added little clarity to the existing student speech doctrine in the public school setting, that is incorrect. An innocuous case, blown out of proportion, came before the Court, requiring it to decide whether and when schools could constitutionally discipline off-campus student speech.[659] The Court left intact the *Tinker* analysis for the discipline of on-campus student speech without adding to it or subtracting from it.[660] It answered the question as to whether *Tinker* was applicable, under any circumstances, to off-campus student speech.[661] The answer was a very qualified "yes," with schools being required to satisfy a heavy burden to skeptical courts when disciplining off-campus student speech.[662] The lack of *in loco parentis* standing was a major factor that mitigated against such punishment.[663] Whose is the power to discipline? On the whole, the Court says that power, when students are off-campus, primarily belong to the parents rather than the schools.[664] What happens when the school disagrees with a parent's decision? That decision apparently awaits another day. Did the Court indeed protect the "necessary" in B.L. or was it "much ado about nothing"? Will B.L. be forever known as the "cursing cheerleader"? What constitutes a "substantial disruption" or "interferes with the rights of others?" *Mahanoy* raises many questions that have yet to be answered.

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[656] *Id.* at 2048.
[657] *Id.* at 2046.
[658] *Id.*
[659] Mahanoy Area Sch. Dist., 141 S. Ct. at 2046.
[660] *Id.* at 2045.
[661] *Id.*
[662] *Id.* at 2046.
[663] *Id.*
[664] *Id.*