

OFF-CAMPUS SPEECH AND THE BASIS OF PUBLIC-SCHOOL AUTHORITY
IN *MAHANOV V. B.L.*

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INTRODUCTION

The stories behind many of the Supreme Court’s school speech cases inspire admiration. The landmark cases tell of Jehovah’s Witnesses who refused to perform a salute they considered idolatrous and anti-war protestors who silently demonstrated, knowing they would be suspended.¹ The latest of the Court’s student-speech cases began with a less illustrious story—a Snapchat Story. In *Mahanoy Area School District v. B.L.*, the Supreme Court held that the First Amendment protected speech that a high school student posted on social media outside school hours.² But the Court limited its holding and did not announce a rule to govern off-campus speech.³ *Mahanoy* added another wrinkle to the frayed patchwork of student-speech cases and highlighted the confusion in this area of constitutional law.

The Court famously declared in the 1969 case *Tinker v. Des Moines Independent Community School District* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴ *Tinker* and its progeny recognize the existence of circumstances in which a school may regulate student speech but have never laid down a hard-and-fast rule. For example, in *Bethel School District No. 403 v. Fraser*, the Court refused to find a First Amendment violation when a school censured a

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¹ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

² 141 S. Ct. 2038, 2042–43 (2021).

³ *Id.* at 2045.

⁴ 393 U.S. at 506.

student for the crass student government nomination speech he gave to the student body.⁵ But the Court's First Amendment jurisprudence regarding the rights of public-school students has never taken a definite shape. The result has been a fuzzy set of boundaries, justified by mixed premises and accompanied by an untold number of exceptions. *Mahanoy* asked the Court whether *Tinker*'s "substantial disruption" test applies when students face discipline for off-campus speech.⁶

This Note starts with a review of the historical landscape of student-speech jurisprudence that led up to *Mahanoy*. Next, it reviews *Mahanoy* from the origin of the dispute to its resolution at the Supreme Court. The Note then proceeds to survey the existing confusion, as noted by courts and commentators, in student-speech jurisprudence and demonstrates *Mahanoy*'s failure to clarify or resolve it. Finally, it examines the various approaches found in *Mahanoy*'s three opinions. While other scholars have already criticized *Mahanoy* for refusing to announce a clear rule, this Note offers a deeper, more philosophical analysis of the entire question of public-school speech regulations. This Note will evaluate, specifically, the competing legal-philosophical accounts of the government's authority to regulate student speech. Three such theories undergird the opinions in *Mahanoy*; this Note evaluates the merits of all three. To solve the present difficulties in student-speech jurisprudence and provide clarity to students, parents, and schools, courts must correctly identify the authority of school power. This Note argues that Justice Samuel Alito correctly identified the authority of school regulations but incorrectly applied his theory in this case.

I. THE LAW BEFORE *MAHANAY*

Tinker has cemented itself as the cornerstone student-speech case. But when the Court decided *Tinker*, its ideological groundwork was a quarter-century old, having been laid by *West Virginia State Board of Education v. Barnette*.⁷ *Barnette* considered the rights of students and their parents (who belonged to the Jehovah's Witness religion) as against the state's mandate to instill patriotism in its young citizens.⁸ The Court held that the public school could not compel symbolic speech—a salute and pledge to the American

⁵ 478 U.S. 675, 685 (1986).

⁶ 141 S. Ct. at 2044.

⁷ 319 U.S. 624 (1943).

⁸ *Id.* at 631.

flag—without running afoul of the First Amendment.⁹ *Barnette* represented an unusually fast overruling for the Court, which had upheld a similar compulsory flag salute just three years earlier in *Minersville School District v. Gobitis*.¹⁰ For the first time, the Court held that the Fourteenth Amendment protected public-school students when the state acted via the public school.¹¹

A. *Tinker and the Recognition of Free-Speech Rights of Public-School Students*

Twenty-four years after *Barnette*, the country was once again at war—this time in Vietnam. Three students in Des Moines, Iowa, devised a plan to express their opposition to America’s involvement in that war by wearing black armbands over their school clothes in a silent protest.¹² The school district suspended the three students, who then sued for an injunction and nominal damages.¹³ The district and appellate courts upheld the students’ suspension.¹⁴ On certiorari, the Supreme Court reversed, holding that the school had violated the students’ First Amendment rights.¹⁵ Justice Abe Fortas drafted the opinion, garnishing it with a perennially quoted line: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁶ The central holding of *Tinker* does not emerge clearly from its text apart from its progeny.¹⁷ But the Court implied that the school could have justified its action “by a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school.”¹⁸ The Court has retroactively strengthened that statement, citing *Tinker* for the rule that schools must

⁹ *Id.* at 642.

¹⁰ 310 U.S. 586 (1940).

¹¹ *Barnette*, 319 U.S. at 637 (“The Fourteenth Amendment, as now applied to the States, protects the citizen *against the State itself and all of its creatures—Boards of Education not excepted.*” (emphasis added)).

¹² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

¹³ *Id.*

¹⁴ *Id.* at 504–05.

¹⁵ *Id.* at 514. To this day, the *Tinker* siblings frequently file amicus briefs in student-speech cases. *See, e.g.*, Brief of Amici Curiae Mary Beth Tinker and John Tinker in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255).

¹⁶ *Tinker*, 393 U.S. at 506.

¹⁷ *See infra* Section III.B.

¹⁸ *Tinker*, 393 U.S. at 513.

demonstrate a material and substantial disruption, or that they reasonably anticipated it, to justify a regulation of student speech.¹⁹

B. Fraser, Kuhlmeier, and Morse

Tinker did not specify which types of student expression would *not* receive constitutional protection, except for one aside that contrasted the school's punitive action against "regulation[s] of the length of skirts or the type of clothing, to hair style, or deportment."²⁰ In the last fifty years, three prominent cases have clarified that, notwithstanding *Tinker*, the First Amendment does not protect a given category of student speech. These three cases provided what are often considered exceptions to *Tinker*: (1) lewd speech, (2) speech that bears the school's mark, and (3) speech advocating illegal drug use.²¹

In *Bethel School District v. Fraser*, the Court ruled against a student who had given a sexually suggestive speech to the student body and received school discipline as a result.²² The plaintiff student had given a stump speech, comprised of crude sexual innuendos, to a group of his peers, endorsing his friend and classmate for student government.²³ The school suspended the student and removed him from the list of speaker candidates at that year's commencement ceremony.²⁴ The student's First Amendment challenge found success at the trial court and on appeal, but the Supreme Court reversed

¹⁹ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 690 (1986) (Marshall, J., dissenting) ("The District Court and Court of Appeals conscientiously applied [*Tinker*], and concluded that the School District had not demonstrated any disruption of the educational process."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("Students in the public schools . . . cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'"); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'").

²⁰ *Tinker*, 393 U.S. at 507–08.

²¹ See, e.g., *Morse*, 551 U.S. at 418; *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 435 (M.D. Pa. 2019), *aff'd*, 964 F.3d 170 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021). For an argument that at least two of the three "exceptions" to *Tinker* are really nothing more than applications of its rule, see *infra* Section III.B.

²² 478 U.S. at 677–80.

²³ *Id.* at 677–78.

²⁴ *Id.* at 678.

his award.²⁵ In holding that the Constitution did not protect the student's speech from retaliatory discipline, the Court appealed to the public school's "role and purpose."²⁶ A public education must "inculcate the habits and manners of civility"²⁷ and the "fundamental values necessary to the maintenance of a democratic political system."²⁸ As such, the school board may—and indeed must—balance the individual's freedom to express himself against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior."²⁹

The next exception in the Court's student-speech jurisprudence came around in 1988 with *Hazelwood School District v. Kuhlmeier*.³⁰ The plaintiffs in *Kuhlmeier* were students enrolled in the school's newspaper class, where they edited the school newspaper.³¹ The dispute began when the class wanted to publish one story about three students who were pregnant while in high school and another about students' experiences with their parents' divorces.³² Faced with concerns over the divulgements in the stories and the imminent printing deadline for the paper, the school's principal scrapped the two pages on which the controversial stories were to appear.³³ The Supreme Court reversed the Eighth Circuit,³⁴ holding that the school had not violated the students' rights.³⁵ The Court reasoned that the *Tinker* standard "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."³⁶

Morse v. Frederick introduced a third exception to *Tinker*: student speech that promotes drug use.³⁷ Here, the student plaintiff brought a fourteen-foot

²⁵ *Id.* at 679–80, 687.

²⁶ *Id.* at 681.

²⁷ *Id.* (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

²⁸ *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

²⁹ *Id.* at 681. This line of reasoning in *Fraser* foreshadows the "nurseries-of-democracy theory" discussed *infra* Section III.C.1.

³⁰ 484 U.S. 260 (1988).

³¹ *Id.* at 262.

³² *Id.* at 263.

³³ *Id.* at 264.

³⁴ The Eighth Circuit had characterized the school paper as a "public forum" and thus unsusceptible to school officials' censorship. *Id.* at 265.

³⁵ *Id.* at 276.

³⁶ *Id.* at 272–73.

³⁷ 551 U.S. 393 (2007).

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banner reading “BONG HiTS 4 JESUS” to a school-approved social event.³⁸ The Court approved the school’s suspension of the high school junior.³⁹ The Court, leaning on *Fraser* and *Kuhlmeier*, felt free to all but abandon the *Tinker* analysis, instead focusing (like *Fraser*) on the school’s mission and purpose, part of which, purportedly, was “educating students about the dangers of illegal drug use.”⁴⁰

II. MAHANOY

The history and context discussed above bring us finally to *Mahanoy Area School District v. B.L.* Unlike the ideologically minded *Tinkers*, high school freshman B.L. did not concoct a plan to express an unpopular political position through covert symbolism. But neither was her speech as absurdist as *Fraser*’s sexually explicit campaign rally or as nihilistic as “BONG HiTS 4 JESUS.” B.L. merely did what has become endemic to the human condition in the last decade: she aired her grievances on social media.

In 2017, B.L. took the news that she would not be on the varsity cheerleading squad—or in her preferred position on the softball field that year—rather sourly.⁴¹ Over the weekend,⁴² at a convenience store with a friend, B.L. took to Snapchat (presumably because TikTok had not yet gained a foothold as the preeminent forum for such things).⁴³ She uploaded two posts to her Story. The first was a selfie of B.L. and a friend, middle fingers extended, with the caption “F[***] school f[***] softball f[***] cheer f[***] everything.”⁴⁴ The second contained only text: “Love how me and [my friend] get told we need a year of jv before we make varsity but tha[t] doesn’t matter to anyone else? 🙄”⁴⁵ The posts did not refer to Mahanoy Area High School, and the girls in the photo wore street clothes.⁴⁶ B.L.’s Story was

³⁸ *Id.* at 397.

³⁹ *Id.* at 409–10.

⁴⁰ *Id.* at 408.

⁴¹ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2043 (2021).

⁴² The day of the week of B.L.’s posts is ambiguous. B.L.’s original complaint alleges that she posted to her Story on “Saturday, May 28, 2017.” Verified Complaint at 5, *B.L. v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607 (M.D. Pa. 2017) (No. 3:17-cv-1734). But May 28, 2017, was a Sunday.

⁴³ *Mahanoy*, 141 S. Ct. at 2043.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *B.L.*, 289 F. Supp. 3d at 610 n.2 (memorandum opinion on preliminary injunction).

private, meaning that only her Snapchat “Friends” could view it.⁴⁷ The record does not indicate the number of Friends B.L. had, but the high schooler testified that the number was somewhere around 250.⁴⁸ Before the automatic twenty-four-hour time period caused B.L.’s posts to disappear from her Story, other students took screenshots of the photos.⁴⁹

As social media posts are wont to do, B.L.’s Story found its way from screens to the schoolhouse. One fellow member of the cheer squad who had taken a screenshot of B.L.’s Story was the daughter of one of the junior varsity coaches.⁵⁰ The other cheer coach heard about the posts from a group of concerned students, who opined to the coach that the posts were “inappropriate.”⁵¹ The Thursday after B.L. had posted on her Story, one of the cheer coaches pulled her out of class.⁵² The coach informed B.L. that because she had disrespected the coaches, the school, and her fellow cheerleaders, she would be suspended from the cheer squad.⁵³

According to school officials, “B.L. was disciplined for violating the Respect Provision and the Negative Information Rule of the Cheerleading Rules.”⁵⁴ Before B.L. had tried out for the varsity squad, she and her mother had signed a document binding her to several rules.⁵⁵ The “Respect Provision” read, “Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures.”⁵⁶ The “Negative Information Rule” stated, “There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.”⁵⁷ When the school board refused to entertain B.L.’s father’s appeal, B.L. (through her parents) sued.⁵⁸

⁴⁷ *Id.* at 610.

⁴⁸ *Id.* at 610 n.3.

⁴⁹ *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 433 (M.D. Pa. 2019), *aff’d*, 964 F.3d 170 (3d Cir. 2020), *aff’d*, 141 S. Ct. 2038 (2021).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *B.L.*, 289 F. Supp. 3d at 610.

⁵³ *Id.*

⁵⁴ *B.L.*, 376 F. Supp. 3d at 433.

⁵⁵ *Id.* at 432.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 433.

A. B.L.'s Victories in the Lower Courts

B.L. successfully obtained a preliminary injunction prohibiting the school from “(a) enforcing the Cheerleading Rules pertaining to out-of-school speech against Plaintiff B.L.; and (b) excluding Plaintiff B.L. from the cheerleading squad on account of her out-of-school speech.”⁵⁹ She won again on summary judgment.⁶⁰

In its opinion granting summary judgment, the district court discussed two of the School District’s main arguments: (1) that B.L. waived her First Amendment rights by assenting to the Rules and (2) that because B.L. had no constitutional right to participate in extracurricular activities, its actions could not be a violation of her rights.⁶¹ The court dismissed the School District’s waiver argument, holding that B.L.’s consent to the Rules did not make her speech punishable.⁶² In the court’s eyes, the strict standard for waiver—including bargaining equality and representation by counsel—was not met.⁶³ The court characterized the Rules as “conditioning extracurricular participation on a waiver of a constitutional right” and therefore “coercive.”⁶⁴ The absence of a constitutional right to extracurricular activities was equally unconvincing to the district court.⁶⁵ It reasoned that “[t]he right a public school infringes by punishing a student for protected speech is not the right to education or to play a sport, it is the right to freedom of speech.”⁶⁶ The court awarded B.L. nominal damages, directed the School District to expunge her disciplinary record, and prohibited the School District from enforcing the Cheerleading Rules against her.⁶⁷

The School District appealed, and the three-judge panel of Third Circuit judges affirmed B.L.’s victory.⁶⁸ The panel opinion began by explaining why the First Amendment protected B.L.’s speech.⁶⁹ Under Third Circuit

⁵⁹B.L. v. Mahanoy Area Sch. Dist., No. 3:17-CV-1734 (M.D. Pa. Oct. 5, 2017) (order granting preliminary injunction).

⁶⁰*B.L.*, 376 F. Supp. 3d at 438.

⁶¹*Id.* at 437–41.

⁶²*Id.* at 437–38.

⁶³*Id.*

⁶⁴*Id.* at 437.

⁶⁵*Id.* at 438–41.

⁶⁶*Id.* at 439.

⁶⁷*See id.* at 445.

⁶⁸B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 194 (3d Cir. 2020), *aff’d*, 141 S. Ct. 2038 (2021).

⁶⁹*Id.* at 177.

precedent, B.L.’s posts qualified as “off-campus speech.”⁷⁰ Before *B.L.*, the Third Circuit had avoided the question of whether *Tinker*’s “substantial disruption” test extended to off-campus speech.⁷¹ Here, that question was unavoidable. The panel diverged from its sister circuit courts, holding that *Tinker* did not apply away from campus.⁷² The court reasoned that *Tinker* had always been a “narrow accommodation” to the school context, lowering the “constitutional shield” that disruptive speech normally enjoys.⁷³ That constitutional shield remained whenever students speak “outside school-owned, -operated, or -supervised channels” and in a way “that is not reasonably interpreted as bearing the school’s imprimatur.”⁷⁴

The Third Circuit panel also agreed with the district court that “B.L. [did not] waive[] her First Amendment right to post the ‘f[***] cheer’ snap.”⁷⁵ Hinting that the requirement to assent to the Cheerleading Rules was an “unconstitutional condition[],” the panel bypassed that question.⁷⁶ The Respect Provision only purported to apply “when [students are present] at games, fundraisers, and other events.”⁷⁷ But B.L. posted to her Snapchat Story at a convenience store, not a sporting event.⁷⁸ The Negative Information Rule stated, “There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.”⁷⁹ The court was “hard pressed to find in the words ‘f[***] cheer’ any discernable negative *information* about the cheerleading program.”⁸⁰ Having found that B.L.’s speech was protected and that neither of the cheerleading rules applied to her posts, the panel affirmed the district court.⁸¹

⁷⁰ *Id.* at 178–81.

⁷¹ *Id.* at 183.

⁷² *Id.* at 189.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 192.

⁷⁶ *Id.*

⁷⁷ *Id.* at 193.

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 194.

B. *The Supreme Court's Opinion*

Mahanoy Area School District sought review in the Supreme Court.⁸² According to a public Facebook post, the School District believed that the Third Circuit's opinion "le[ft] schools powerless to respond to speech that is directed at the school environment and would have a devastating effect on students' well-being during the school day."⁸³ The question presented in Mahanoy's Petition for Certiorari was "Whether [*Tinker*], 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."⁸⁴ The Supreme Court granted certiorari.⁸⁵

Justice Stephen Breyer authored the relatively brief majority opinion, which was joined by all the other justices except Justice Clarence Thomas.⁸⁶ After recounting the factual and procedural history of the case, the Court summarized the development of its student-speech jurisprudence through the years.⁸⁷ The Court then immediately expressed its disapproval of the Third Circuit's holding that *Tinker* does not apply to off-campus speech.⁸⁸ Contra the Court of Appeals, schools retain constitutionally sanctioned power to regulate student speech off campus.⁸⁹ The Court listed "several types of off-campus behavior that may call for school regulation" but refused to "determine precisely which of many school-related off-campus activities" fall within that power.⁹⁰ In fact, the Court expressly refused to offer a bright-line rule for off-campus speech:

[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

⁸² See Petition for Writ of Certiorari, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255).

⁸³ *Both Sides of Mahanoy Area Cheerleading Case Argue in Public – School Appeals To SCOTUS*, COAL REGION CANARY (Jan. 3, 2021), <https://coalregioncanary.com/2021/01/03/mahanoy-area-vs-bl-supreme-court-arguments-in-public/>.

⁸⁴ Petition for Writ of Certiorari, *supra* note 82, at 1.

⁸⁵ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 976 (2021) (granting writ of certiorari).

⁸⁶ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2042 (2021).

⁸⁷ *Id.* at 2044–45.

⁸⁸ *Id.* at 2045.

⁸⁹ *Id.*

⁹⁰ *Id.*

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.⁹¹

Having laid to rest any hopes of a guiding principle for off-campus speech, the Court then presented a triad of generalities.⁹² Public schools, according to the Court, normally receive First Amendment "leeway" (a word used four times in the opinion).⁹³ But "three features of off-campus speech" call for courts to limit that leeway when students speak off campus.⁹⁴ First, schools' caretaking role, which justifies some regulation of student behavior during the school day, is inapplicable when students are at home with their parents.⁹⁵ Second, the prospect of the regulation of off-campus speech warrants judicial skepticism, as it effectively sanctions round-the-clock surveillance of student communication.⁹⁶ If the schoolhouse gate follows students everywhere they go, they may never be able to "engage in [certain] kind[s] of speech at all."⁹⁷ And finally, because schools are the "nurseries of democracy," they have an interest in allowing the marketplace of ideas to set up shop among their pupils.⁹⁸ In short, school authority is weakened on the weekend. The Court then highlighted the ways in which those three features favored B.L.'s speech, which was the kind of speech the First Amendment most firmly protects.⁹⁹

Finally, the Court analyzed the three interests proffered by the School District as justifying its authority to punish B.L. for her Snapchat Story.¹⁰⁰ First, the school's interest in inculcating civility, which carried the day in *Fraser*, had less force against B.L.'s out-of-school speech to friends.¹⁰¹ Parents, the Court repeated, resume their disciplinary roles when school lets out.¹⁰² What is more, the School District had not shown that it generally held

⁹¹ *Id.*

⁹² *Id.* at 2046.

⁹³ *Id.* at 2045–46.

⁹⁴ *Id.* at 2046.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* Recall the Court's similar reasoning in *Fraser*, *supra* Section I.B.

⁹⁹ *Mahanoy*, 141 S. Ct. at 2046–47.

¹⁰⁰ *Id.* at 2047–48.

¹⁰¹ *Id.* at 2047.

¹⁰² *See id.*

students accountable for out-of-school profanity.¹⁰³ Second, the record did not even meet *Tinker*'s "substantial disruption" test.¹⁰⁴ Third, the school did have a valid interest in maintaining team morale, but B.L.'s posts posed little threat to it.¹⁰⁵ To conclude its opinion, the Court acknowledged the trivial nature of B.L.'s speech but countered that "sometimes it is necessary to protect the superfluous in order to preserve the necessary."¹⁰⁶

C. Justice Alito's Concurrence

Justice Alito wrote a concurring opinion, joined only by Justice Neil Gorsuch, in which he explored a broader legal framework for public-school free speech questions.¹⁰⁷ Unsatisfied with the Court's unspecific analysis, Justice Alito "wr[ote] separately to explain [his] understanding of . . . the framework within which . . . cases like th[ese] should be analyzed."¹⁰⁸ Justice Alito argued that a school's power to regulate student speech must rest on a theory that a school acts *in loco parentis* by parents' implicit consent.¹⁰⁹ After all, there must be some reason why "the First Amendment . . . allow[s] the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school."¹¹⁰ And "no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech."¹¹¹ Parental consent, in Justice Alito's view, was the "only plausible" justification for the partial diminution of students' speech rights.¹¹² But sending one's children to public school does not amount to a full sanction of all their punitive activities.¹¹³ To Justice Alito, the question should be whether parents implicitly delegated their authority over their child in any given context.¹¹⁴

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2047–48.

¹⁰⁵ *Id.* at 2048.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2048–59 (Alito, J., concurring).

¹⁰⁸ *Id.* at 2048.

¹⁰⁹ *Id.* at 2051–52.

¹¹⁰ *Id.* at 2049–50.

¹¹¹ *Id.* at 2050.

¹¹² *Id.* at 2051.

¹¹³ *See id.* at 2052.

¹¹⁴ *Id.*

How does this modified *in loco parentis* approach play out when students leave campus? Simple. Courts should ask, when presented with attempted regulations of off-campus speech, “whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question.”¹¹⁵ For Justice Alito, this question likely yields an affirmative answer in the following contexts: online instruction, assigned essays, school trips, school sports, travel to and from school, and after-school programs.¹¹⁶ The “other end of the spectrum,” which lies beyond school authority, consists of “speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern.”¹¹⁷ The threat of even substantial disruption cannot justify regulation of such speech because to hold otherwise would be to sanction the “heckler’s veto.”¹¹⁸ In the middle lie the difficult cases, which involve threats, bullying, and disrespectful criticism of teachers and administrators.¹¹⁹ In these cases, schools may reasonably infer that parents delegate to them the authority to regulate those kinds of speech.¹²⁰

Justice Alito declared that B.L.’s case against the school “does not fall into any of these categories.”¹²¹ B.L. did not criticize any individuals or even mention her school by name; instead, she merely uttered “[u]nflattering speech” about school and cheer (and, technically, “everything”).¹²² While many parents, including B.L.’s, may have disapproved of B.L.’s profanity, Justice Alito considered it unreasonable “to infer that [B.L.’s parents] gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity.”¹²³ And because their implied consent did not extend to such regulation, the Court’s decision was correct under the parental-consent framework.

¹¹⁵ *Id.* at 2054.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2055.

¹¹⁸ *Id.* at 2056. Mahanoy’s attorney agreed during oral argument that a heckler’s-veto-style regulation would be impermissible. *Id.* at 2056 & n.17. A “heckler’s veto” occurs when authorities justify a prohibition or punishment of speech by pointing to the audience’s potential or actual backlash. *See United States v. Betts*, 509 F. Supp. 3d 1053, 1061 (C.D. Ill. 2020).

¹¹⁹ *Mahanoy*, 141 S. Ct. at 2056–57 (Alito, J., concurring).

¹²⁰ *Id.* at 2057.

¹²¹ *Id.*

¹²² *Id.* at 2057–58; *id.* at 2043 (majority opinion) (“[F***] everything.”).

¹²³ *Id.* at 2058 (Alito, J., concurring).

D. Justice Thomas's Dissent

The *Mahanoy* decision was not unanimous. Justice Thomas delivered one of his characteristic dissents, employing his familiar originalist framework.¹²⁴ The Court erred, according to Justice Thomas, because it swept “150 years of history supporting the coach” under the rug.¹²⁵ If viewed through the correct lens—that of history—the Court would have seen that the cheer coaches acted within their rightful authority.

Justice Thomas began by looking to what “ordinary citizens” would have understood the relevant constitutional provisions to encompass at the time they were enacted.¹²⁶ For Justice Thomas, that question amounts to asking what practices were prevalent at the time of enactment.¹²⁷ Justice Thomas pinpoints a case from Vermont in 1859—*Lander v. Seaver*—as the appropriate barometer of original understanding.¹²⁸ In *Lander*, a public-school student called his teacher “Old Jack Seaver” in the presence of other students after school.¹²⁹ The Supreme Court of Vermont held that “where the offence has a direct and immediate tendency to injure the school and bring the master’s authority into contempt,” out-of-school conduct was within the school’s disciplinary authority.¹³⁰ Because this rule was “widespread,” Justice Thomas reasoned, it qualifies as an accurate representation of the state of the law in the late nineteenth century.¹³¹ Because the Court did not address its reasons for departing from *Lander*’s injury-to-the-school standard, Justice Thomas “would thus apply the rule.”¹³²

In keeping with his usual practice, Justice Thomas argued that the Court’s jurisprudence had been off track for a considerable time. The second half of the dissent argued that the Court’s “student-speech cases are untethered from any textual or historical foundation.”¹³³ When the Fourteenth Amendment was ratified, publicly funded schools did not function as state actors “but as

¹²⁴ *Id.* at 2059–63 (Thomas, J., dissenting).

¹²⁵ *Id.* at 2059.

¹²⁶ *Id.*

¹²⁷ *See id.* (“Cases and treatises from that era reveal that public schools retained substantial authority to discipline students.”).

¹²⁸ *Id.* at 2059–60 (citing *Lander v. Seaver*, 32 Vt. 114 (1859)).

¹²⁹ *Lander*, 32 Vt. at 115.

¹³⁰ *Id.* at 120.

¹³¹ *Mahanoy*, 141 S. Ct. at 2060 (Thomas, J., dissenting).

¹³² *Id.* at 2061.

¹³³ *Id.*

delegated substitutes of parents.”¹³⁴ Justice Thomas conceded that the radical differences between nineteenth- and twenty-first-century public schooling may justify abandoning that approach.¹³⁵ But the Court, in his estimation, has never offered a compelling enough reason to do so.¹³⁶

Justice Thomas blamed the difficulty of *Mahanoy* on *Tinker*’s failure to “explain itself.”¹³⁷ *Tinker* relied on a slew of past Supreme Court cases for the proposition that the First Amendment protects the free speech of public-school students.¹³⁸ But Justice Thomas maintained, as he had in previous school-speech cases, that the *Tinker* Court had (forgive me) tinkered with the holdings of those cases.¹³⁹ For example, Justice Thomas pointed out in *Morse v. Frederick* that *Tinker* relied on *Meyer v. Nebraska* for the proposition that the First Amendment protects student speech.¹⁴⁰ But *Meyer* involved a private school’s challenge to a state law banning the teaching of the German language.¹⁴¹ But the problem, for Justice Thomas, did not start with *Tinker*; even *West Virginia State Board of Education v. Barnette* (the 1943 flag-salute-protester case) missed the mark.¹⁴² *Barnette*, too, “failed to mention the historical doctrine undergirding school authority.”¹⁴³ For Justice Thomas, *Mahanoy* represented the latest domino in a long line of judicial mistakes that started in 1943. The opinion displays the Justice’s desire to return to where the Court began regarding student speech.

Under the *Lander* “injury-to-the-school” standard, B.L.’s speech does not fare well. Her decision to participate on the cheer squad made her a face of the school, increasing the chances that her audience would associate her speech with the school.¹⁴⁴ The forum of her speech—a social media app—may have increased the school’s license to discipline her as compared to off-campus, in-person conversations.¹⁴⁵ Given the tendency of social media posts to reach a wide range of people in a short span of time, the risk for injury to

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 2063.

¹³⁷ *Id.* at 2062.

¹³⁸ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

¹³⁹ *See id.*

¹⁴⁰ *Morse v. Frederick*, 551 U.S. 393, 420 n.8 (2007) (Thomas, J., concurring).

¹⁴¹ *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923).

¹⁴² *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting).

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

the school is greater on social media than elsewhere.¹⁴⁶ And while B.L.’s speech may have indeed taken place “off campus,” Justice Thomas reprimanded the Court for accepting this fact “uncritically”; after all, online content often becomes visible at school.¹⁴⁷

III. CRITICISMS OF *MAHANAY*

Mahanoy was a hollow victory for the First Amendment. On one hand, its holding protected unpopular, uncouth words spoken in a relatively inconsequential forum. Such speech, as the majority noted, often needs protection more than any other kind of speech.¹⁴⁸ And as the Court and the concurring opinion noted—and the dissent did not dispute—“B.L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.”¹⁴⁹ Quite right. Lament as some might over the prolificity of profanity in the mouths of today’s teens, one could scarcely argue that B.L.’s speech was more offensive than Paul Robert Cohen’s “F*** the Draft” shirt.¹⁵⁰

But on a conceptual level, *Mahanoy* is a disappointing opinion.¹⁵¹ Many commentators and advocacy groups waited anxiously for a ruling in this case, only to be let down by the lackluster result. The Court had an opportunity to provide clarity on “a number of genuinely difficult First Amendment issues” but resolved “precisely zero” of them.¹⁵² Jenny Diamond Cheng lists the following examples of issues still unresolved after *Mahanoy*: What are schools to do when students discuss hot-button political, religious, or social issues online?¹⁵³ Does *in loco parentis* justify the curtailment of the speech of high school students who have reached legal majority?¹⁵⁴ Was the district court correct in saying that schools may not condition extracurricular

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2063.

¹⁴⁸ *See id.* at 2048 (majority opinion).

¹⁴⁹ *Id.* at 2046–47.

¹⁵⁰ *See* Cohen v. California, 403 U.S. 15 (1971). The Court held in this landmark case that the message on the defendant’s t-shirt—visible to the public, not just to a limited group of “friends”—was protected speech.

¹⁵¹ The opinion’s shortcomings will be the subject of the remainder of this Note.

¹⁵² Jenny Diamond Cheng, *Deciding Not to Decide: Mahanoy Area School District v. B.L. and the Supreme Court’s Ambivalence Towards Student Speech Rights*, 74 VAND. L. REV. EN BANC 511, 512–13 (2021) (arguing that *Mahanoy* was not a victory for student free speech).

¹⁵³ *Id.* at 518–19.

¹⁵⁴ *Id.* at 519–20.

participation on the waiver of free speech rights?¹⁵⁵ Does the severity of punishment matter in public school rights cases?¹⁵⁶ David L. Hudson Jr. adds the following questions to the growing list: Where is the line between on- and off-campus speech?¹⁵⁷ And what, exactly, is the legal relevance of the “three features” of student speech listed in the transparently Breyerian opinion—are they factors for courts to balance or merely factoids for judges to remember?¹⁵⁸

This Note shares Cheng’s and Hudson’s disappointment and confusion about the state of the Court’s student-speech jurisprudence after *Mahanoy*. What primarily distinguishes this Note from their criticisms is that while Cheng and Hudson take for granted the basic validity of *Tinker*, this Note will not assume that premise.¹⁵⁹ But for the sake of brevity and relevance, this Note will assume the basic constitutional validity of the existence of public schools.¹⁶⁰

Mahanoy suffered from three interrelated flaws: failure to provide a much-needed rule, reliance on confusing precedent, and refusal to discuss the source of school authority. This section will discuss each in turn.

A. *Mahanoy’s Failure to Provide Necessary Guidance to Courts*

Mahanoy was an exercise in minimalism and a demonstration of minimalism’s weakness.¹⁶¹ Recall the question presented to the Court: “[w]hether [*Tinker*], 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.”¹⁶² The

¹⁵⁵ *Id.* at 520; see also *supra* note 86 and accompanying text.

¹⁵⁶ Cheng, *supra* note 152.

¹⁵⁷ David L. Hudson, Jr., *Mahanoy Area School District v. B.L.: The Court Protects Student Social Media but Leaves Unanswered Questions*, CATO SUP. CT. REV., 2020–2021, at 93, 105.

¹⁵⁸ *Id.* at 105–06.

¹⁵⁹ See Cheng, *supra* note 152, at 512; see also Hudson, *supra* note 157, at 96–97.

¹⁶⁰ While the author entertains serious doubts about the compatibility between constitutional principles and the mission of public education, a Note of this scope has no room to explore that question.

¹⁶¹ Legal scholars may employ various technical definitions of “minimalism.” This Note does not mean to assert that the Court’s opinion in *Mahanoy* is an example of any given school of minimalism. This Note uses “minimalism” fairly colloquially, referring to the Court’s express refusal to “set forth a . . . general . . . rule.” *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021).

¹⁶² *Id.* at 2044 (alterations in original).

Court's answer amounts to—in the words of the popular meme—“Well yes, but actually no.”¹⁶³ Not only does *Mahanoy* not apply existing law; it does not even create new law. *Mahanoy* “simply posits three vague considerations and reaches an outcome.”¹⁶⁴

The Court's minimalism is especially troubling given the widespread confusion around public school authority. By the time *Mahanoy* reached the Supreme Court, the status of student-speech jurisprudence was ostensibly defined by *Tinker* minus the three supposed “carveouts” of *Fraser*, *Kuhlmeier*, and *Morse*.¹⁶⁵ But the existence of those four cases has not resulted in a consensus among lower courts of what the First Amendment demands in the public-school context. On the contrary, student-speech cases “require[] recourse to a complicated body of law that seeks, often clumsily, to balance a number of competing First Amendment imperatives.”¹⁶⁶ For example, despite the apparent direction to lower courts contained in *Tinker* and its progeny, one judge vividly described his circuit's student-speech jurisprudence as “a dumpster fire.”¹⁶⁷ He provided an example of the knot that the Fifth Circuit had tied itself into:

In our circuit, public school teachers can make students pledge allegiance to Mexico but can't make students write down our own pledge. The first assignment is a “cultural and educational exercise,” but the second is a compelled patriotic statement forbidden by the First Amendment. A teacher who gives the first assignment merits qualified immunity, but a teacher who gives the second will have to convince a jury he had a “pedagogical purpose.” I assume the reverse is also true. So, a teacher can make students pledge allegiance to the American Flag as a “cultural and educational exercise” but

¹⁶³ Philipp & GuAgIsOrAb, *Well Yes, But Actually No*, KNOW YOUR MEME (Feb. 15, 2019), <https://knowyourmeme.com/memes/well-yes-but-actually-no>.

¹⁶⁴ 141 S. Ct. at 2059 (Thomas, J., dissenting).

¹⁶⁵ See David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1115 (2020) (“The Court in *Tinker* set the general standard and then in subsequent cases created so-called ‘*Tinker* carve-outs’ for ‘vulgar and lewd’ speech, school-sponsored speech, and speech that school officials reasonably believe advocates the illegal use of drugs.”).

¹⁶⁶ *Morgan v. Swanson*, 659 F.3d 359, 364 (5th Cir. 2011).

¹⁶⁷ *Oliver v. Arnold*, 19 F.4th 843, 859 (5th Cir. 2021) (Duncan, J., dissenting) (disagreeing with the denial of rehearing en banc).

can't make students write down the Mexican pledge if he wants to promote *el Patriotismo*.¹⁶⁸

Given the doctrine of qualified immunity, which requires plaintiffs to show that their asserted right was “clearly established,”¹⁶⁹ the ambiguity in student-speech jurisprudence is even more frustrating. The primary way a plaintiff overcomes qualified immunity is with “case law finding a violation under factually similar circumstances.”¹⁷⁰ When caselaw is unclear, therefore, qualified immunity becomes the default, and cases laying down First Amendment boundaries lose their bite.¹⁷¹ Qualified immunity, bolstered by ambiguity from courts, guarantees that “even when a court finds that a school official has violated a student’s constitutional rights by disciplining her for off-campus speech, the student will almost certainly be unable to recover money damages.”¹⁷²

A glance at newspaper headlines reveals another reason for the necessity of clarity in student-speech jurisprudence. Across the country, public schools have become a battleground for culture wars.¹⁷³ Parents and school boards have clashed over critical race theory (CRT),¹⁷⁴ progressive gender ideology,¹⁷⁵ and COVID protocols such as face-mask mandates.¹⁷⁶ In

¹⁶⁸ *Id.* at 858–59 (citations omitted).

¹⁶⁹ *Mullenix v. Luna*, 577 U.S. 7, 11 (2015).

¹⁷⁰ *Oliver*, 19 F.4th at 850 (Ho, J., concurring).

¹⁷¹ *See, e.g., Morgan*, 659 F.3d at 371 (finding a constitutional violation when school officials prohibited students from distributing evangelistic materials but nevertheless holding that the officials were entitled to qualified immunity because the constitutionality of their actions was not “beyond debate”).

¹⁷² Cheng, *supra* note 152, at 513.

¹⁷³ Charles M. Blow, Opinion, *How Our Classrooms Became Battlegrounds*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/opinion/united-states-classrooms-conflicts.html>; Jonathan Zimmerman, *Why the Culture Wars in Schools Are Worse Than Ever Before*, POLITICO (Sept. 19, 2021, 7:26 AM), <https://www.politico.com/news/magazine/2021/09/19/history-culture-wars-schools-america-divided-512614>.

¹⁷⁴ Christopher Hooks, *Critical Race Fury: The School Board Wars Are Getting Nasty in Texas*, TEX. MONTHLY (Nov. 2021) <https://www.texasmonthly.com/news-politics/critical-race-fury-the-school-board-wars-are-getting-nasty-in-texas/>.

¹⁷⁵ NewsNation, *School Board Meeting Over Transgender Rules Becomes Chaotic*, YOUTUBE (June 23, 2021), https://www.youtube.com/watch?v=h8bfEUn_dNg.

¹⁷⁶ *Disrupted Florida School Board Meetings Now Common in Age of COVID and Mask Debates*, OCALA STARBANNER (Feb. 25, 2022, 8:44 AM), <https://www.ocala.com/story/news/education/2022/02/25/school-board-florida-parental-choice-mandatory-covid-mask-mandates/6922775001/>.

response, states have passed legislation mandating transparency in school curricula.¹⁷⁷ Critics have described the classroom transparency movement as a “witch hunt”¹⁷⁸ and a “bogeyman.”¹⁷⁹ Sympathizers with the disgruntled parents, on the other hand, claim that CRT, progressive gender ideology, and draconian COVID measures pose a threat to the healthy development of American children and have encouraged legislative and social pushback.¹⁸⁰

The fight over school curriculum has not confined itself to school boards and state legislative proposals; it has reached the courthouse. Fourteen parents sued a Nevada school district over its COVID-19 mask mandate, alleging that the mandate violated “their fundamental right under Nevada’s state constitution to make child rearing decisions.”¹⁸¹ Parents in Virginia sued their children’s school district, alleging that the school administration implemented an “anti-racism” policy that incorporated elements of Critical Race Theory and denigrated white students because of their race.¹⁸² Importantly, legal action against school curricula is far from an exclusively

¹⁷⁷ Governor Ron DeSantis Signs Bill that Requires Curriculum Transparency, FLA. GOVERNOR (Mar. 25, 2022), <https://www.flgov.com/2022/03/25/governor-ron-desantis-signs-bill-that-requires-curriculum-transparency/>; Tyler Kingkade, *They Fought Critical Race Theory. Now They’re Focusing on ‘Curriculum Transparency,’* NBC NEWS (Jan. 20, 2022, 11:38 AM), <https://www.nbcnews.com/news/us-news/critical-race-theory-curriculum-transparency-rcna12809> (reporting that “[l]awmakers in at least 12 states have introduced legislation to require schools to post lists of all of their teaching materials online, including books, articles and videos”).

¹⁷⁸ Justin Parmenter, *North Carolina’s Witch Hunt Over Critical Race Theory*, PROGRESSIVE MAG. (Sept. 8, 2021, 12:26 PM), <https://progressive.org/public-schools-advocate/north-carolina-witch-hunt-critical-race-theory-parmenter-210908/>.

¹⁷⁹ Brandon Tensley, *The Engineered Conservative Panic over Critical Race Theory, Explained*, CNN (July 8, 2021, 5:40 PM), cnn.com/2021/07/08/politics/critical-race-theory-panic-race-deconstructed-newsletter/index.html.

¹⁸⁰ Christopher F. Rufo, *Radical Gender Theory Comes to the Heartland*, CITY J. (Aug. 24, 2022), <https://www.city-journal.org/radical-gender-theory-comes-to-the-heartland> (reporting on a gender-theory training program in a Missouri public school and calling for Missouri’s attorney general to investigate the program as he did the school’s critical race theory training program); Editorial, *Fresh Evidence that COVID School Closures Led to Dramatic Setbacks in Learning for America’s Kids*, NEW YORK POST (Oct. 24, 2022, 7:25 PM), <https://nypost.com/2022/10/24/fresh-evidence-that-covid-school-closures-led-to-dramatic-setbacks-in-learning-for-americas-kids/> (reporting on evidence of declines in test scores due to COVID-related closures and suggesting a political motive lay behind those closures).

¹⁸¹ Ruiz v. Sisolak, No. 2:21-CV-02036-GMN-BNW, 2021 WL 6134350, at *1 (D. Nev. Dec. 28, 2021).

¹⁸² Ibanez *ex rel.* R.I. v. Albemarle Cnty. Sch. Bd., No. CL21001737-00 (Va. Cir. Ct. Dec. 22, 2021) (Alliance Defending Freedom), <https://adfflegal.org/case/ci-v-albemarle-county-school-board>.

conservative effort; in past decades, progressives and reactionaries have been on reverse sides of the school board debates, for example, during the height of the creationism controversy.¹⁸³

Those controversies—especially their legal components—illustrate the dire need for clear and direct answers on what the First Amendment requires of public educators and accentuate the failure of *Mahanoy* to provide them. While not all of today’s public-school controversies deal with student speech, the social media question addressed in *Mahanoy* is relevant to all of them. According to the American Academy of Child and Adolescent Psychiatry, 90% of teenagers between the ages of thirteen and seventeen report they have used social media; 75% have at least one active social media profile; 51% use social media daily.¹⁸⁴ Those with a broad experience with members of Generation Z know that TikTok is, for many, the primary platform for spreading and exchanging ideas. If schools can regulate student speech that occurs on social media, as *Mahanoy* suggested they can, students’ posts could spark more litigation. That means that even issues that do not directly concern students’ rights—for example, CRT, LGBTQ topics, and COVID restrictions—can potentially ignite litigation if students share their ideas about those issues on social media. As the public-school controversy continues heating up, courts may hear lawsuits over social media posts more controversial than B.L.’s expletive-laden tirades.

In summary, courts do not know how the Constitution applies to student speech because the Supreme Court has not told them. America’s present cultural moment, fraught with intense debates taking place on and around public schools, demands that courts come to those debates armed with clarity. But rather than provide that clarity, the *Mahanoy* Court abdicated its guiding role.

B. *Flawed Foundations in Student-Speech Jurisprudence*

Part of what made *Mahanoy* a difficult case—and perhaps why the Court did not announce a rule—is the conceptual difficulty around student speech present since *Barnette*. As Justice Thomas noted in his *Mahanoy* dissent, *Barnette* “failed to mention the historical doctrine undergirding school

¹⁸³ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹⁸⁴ *Social Media & Teens*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx (last updated Mar. 2018).

authority.”¹⁸⁵ True. The *Barnette* Court did not discuss the *in loco parentis* theory. Rather, *Barnette* bypassed the question of school authority altogether and focused on West Virginia’s two-step scheme of (1) “condition[ing] access to public education on making a prescribed sign and profession” and (2) “coerc[ing] attendance by punishing both parent and child” (the student’s parents even faced jailtime).¹⁸⁶ The state’s coercion of the flag salute with no way out for dissenters troubled the Court.¹⁸⁷ While Thomas criticizes the *Barnette* Court primarily for ignoring history, the conceptual problems in *Barnette*’s analysis persist even for the non-originalist. West Virginia’s one-two-punch scheme likely struck the Court (and much of the country) as intuitively wrong. But by ignoring the special circumstances of the public-school setting, the Court introduced a point of confusion at best and contradiction at worst. If school attendance is mandatory, as in *Barnette*, then every rule proscribing or compelling expression on threat of expulsion is unconstitutional by *Barnette*’s logic.¹⁸⁸ That is because a student who would normally be able to speak or keep silent faces the choice of attending school and relinquishing his rights or being punished for truancy. This is not to assert without argument that no principle exists to distinguish various types of speech regulations; it is merely to point out that *Barnette*, *Tinker*, and other subsequent student-speech cases have never identified such a principle.¹⁸⁹ As deeply rooted as *Barnette*’s holding is, the Court’s refusal to ever reconsider it potentially merits forgiveness.

Tinker added confusion to the jurisprudential mix by substituting flashy language for rigorous legal logic. Several theories of student-speech rights emerge as plausible readings of *Tinker*.¹⁹⁰ References to “material and substantial,” “disruption,” and “interference” appear in various forms throughout the opinion as elements that a school must demonstrate before it can permissibly regulate speech.¹⁹¹ But how these elements fit into a test is less clear. At times, the Court appears to require only that school authorities

¹⁸⁵ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2062 (2021) (Thomas, J., dissenting).

¹⁸⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630–31 (1943).

¹⁸⁷ *See id.* at 630 (“The sole conflict is between authority and rights of the individual.”).

¹⁸⁸ This leaves aside conduct such as fighting words that would be punishable outside the school context.

¹⁸⁹ The author is skeptical that such a principle exists.

¹⁹⁰ *See* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE* 76 (2018) (“[*Tinker*] can be understood to contain no fewer than three different, competing approaches for regulating student speech.”).

¹⁹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 509, 511, 513–14 (1969).

have reasonable ground to “forecast” material or substantial disruption.¹⁹² Elsewhere, however, *Tinker* seems to demand proof that students subject to punishment *themselves* cause disruption and not merely that other students do so in backlash.¹⁹³ The Court rejected the “heckler’s veto”¹⁹⁴ basis for the school’s action because, “in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁹⁵ In fact, the Court criticizes the district court for being satisfied with the lesser showing.¹⁹⁶

As a result of those ambiguities, judges applying *Tinker* have disagreed about what it means. In his *Fraser* dissent, Justice Thurgood Marshall would have ruled in favor of the student who gave a lewd campaign speech because the school “failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent’s speech.”¹⁹⁷ Those words suggest that Justice Marshall understood *Tinker* to require a showing of *actual* disruption. The Fifth Circuit in *Morgan v. Swanson* likewise stated that *Tinker* required “a showing of material and substantial disruption.”¹⁹⁸ But at other times, courts count *Tinker*’s rule satisfied if the school has “*reason to believe* that [student] expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’”¹⁹⁹ Writing after *Mahanoy*, the Seventh Circuit stated that *Tinker* requires “school officials [to] present ‘facts [that] might *reasonably have led school authorities to forecast* substantial disruption of or material interference with school activities’ or the invasion of the rights of others.”²⁰⁰ In sum, *Tinker* left a legacy of confusion.

Another major flaw in *Tinker* is that it likely fails its own test. Justin Driver observes: “It is a bitter irony, indeed, that the Supreme Court’s most iconic defense of student speech rights was—at least as assessed by applying

¹⁹² *Id.* at 514.

¹⁹³ *See id.* at 508.

¹⁹⁴ The “heckler’s veto” occurs when parties react to a speaker with threats of violence and authorities fetter the speaker as a result, giving the hecklers a de facto “veto.” *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 478 U.S. 675, 690 (1986) (Marshall, J., dissenting).

¹⁹⁸ 659 F.3d 359, 402 (5th Cir. 2011).

¹⁹⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (second alteration in original) (emphasis added) (quoting *Tinker*, 393 U.S. at 509).

²⁰⁰ *Jacob ex rel. N.J. v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022) (emphasis added) (quoting *Tinker*, 393 U.S. at 514).

the test that it spawned to the dispute's actual (rather than the manufactured) facts—decided incorrectly.”²⁰¹ Driver observes that “[a]lthough opposition to the Vietnam War is remembered today as an extremely widespread phenomenon . . . that state of affairs had yet to emerge by the end of 1965,” when the *Tinker* plaintiffs’ protest took place.²⁰² Students in Des Moines who protested the Vietnam War faced assault, ostracism by school faculty, unfavorable representation by local news media, hate mail, and death threats.²⁰³ In light of these circumstances, *Tinker*’s description of the atmosphere at the Des Moines high schools rings hollow.²⁰⁴ To be fair, if the full scope of the facts had entered the discussion, the most student-friendly reading of *Tinker*’s test still might have yielded the same result. But the passages that focus on the reactions to the armband protest imply that if backlash to the *Tinker* plaintiffs had been rowdier, then the result might have been different.²⁰⁵ Predictably, courts have had difficulty knowing what exactly they are to do when faced with challenges to restrictions on student speech. If the *Tinker* test, applied honestly, would have permitted the school to censor the *Tinkers*’ armband protest, then its weakness as a lasting test is evident. Perhaps the only reliable development to come from *Tinker* is the Supreme Court’s inability to refrain from quoting Justice Fortas’s “schoolhouse gate” quip.²⁰⁶

One final word about *Tinker* and the subtle contextual changes of history. In an oddly quiet way, the Court shifted its characterization of *Tinker* from

²⁰¹ DRIVER, *supra* note 190, at 87.

²⁰² *Id.* at 85.

²⁰³ *Id.* at 85–86.

²⁰⁴ *Tinker*, 393 U.S. at 508 (“There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.”). Compare those remarks with the reports found in DRIVER, *supra* note 190.

²⁰⁵ See *Tinker*, 393 U.S. at 508 (“There is no indication that the work of the schools or any class was disrupted.”); *id.* at 514 (“[N]o disturbances or disorders on the school premises in fact occurred.”).

²⁰⁶ *Jones v. State Bd. of Educ.*, 397 U.S. 31, 35 (1970) (Douglas, J., dissenting); *Healy v. James*, 408 U.S. 169, 180 (1972); *Bd. of Educ. v. Pico*, 457 U.S. 853, 853 (1982); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983); *United States v. Grace*, 461 U.S. 171, 184 (1983); *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Morse v. Frederick*, 551 U.S. 393, 396 (2007); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044 (2021) (all quoting the “schoolhouse gate” line from *Tinker*).

an *extension* of students' rights to a *limitation* on them. The *Tinker* Court saw itself as paving a trail of individual liberties through a wilderness of government force.²⁰⁷ But *Mahanoy*, in its discussion of *Tinker*, repeatedly pointed to the way that the 1943 decision granted the government "leeway."²⁰⁸ For the *Mahanoy* Court, *Tinker* cut back individual liberty in the name of special school interests. The space between those two ways of understanding *Tinker* is more than just a piece of obscure legal trivia. It reveals significant differences in the Justices' assumptions and mental defaults. If, at bottom, *Tinker* advanced students' rights, then by implication every "exception" to *Tinker* is a return to the norm of school power. But if *Tinker* primarily granted the government "leeway" it otherwise lacked, then the tacit assumption is that the school has the burden of justifying every speech regulation.

After *Tinker* came the triad of exception cases summarized in Part I of this Note. Despite their reputation, those cases' status as "exceptions" warrants doubt. At least two appear instead to be straightforward (if confusingly articulated) applications of its rule. *Fraser* and *Kuhlmeier* concern lewd speech and speech that bears the school's mark, respectively. Those two categories of expression could arguably fit into the framework of the original *Tinker* test, although the Court itself has not seen them that way.²⁰⁹ The third exception is for speech that promotes illegal drug use. The designation of the first two of those cases—and the categories of conduct they encompass—as "exceptions" fuels the descent of student-speech jurisprudence into ambiguity. The Court in *Fraser* did not appear to be aware that it was carving out an exception to *Tinker*. Ironically, the school's disciplinary policy, which the school offered as evidence that its actions were not ad hoc, prohibited "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures"—language virtually copied and pasted from *Tinker*.²¹⁰ To be sure, Chief Justice Burger's analysis went beyond the concerns of *Tinker*, pointing to the "basic educational mission" of public schools and casting doubt on the "social value" of lewd speech.²¹¹ But *Fraser* never contradicted *Tinker*; in fact, Chief Justice Warren Burger expressly

²⁰⁷ See generally 393 U.S. at 503.

²⁰⁸ 141 S. Ct. at 2045–46.

²⁰⁹ See *Kuhlmeier*, 484 U.S. at 271 n.4, 272–73.

²¹⁰ *Fraser*, 478 U.S. at 678; *Tinker*, 393 U.S. at 509.

²¹¹ *Fraser*, 478 U.S. at 685.

distinguished *Fraser*'s facts from those in *Tinker*.²¹² Next, contrary to its own evaluation of itself, *Kuhlmeier* (the newspaper case) is not necessarily an "exception" to *Tinker*. The concept of an exception refers to an instance or category where the general principle fails to obtain.²¹³ *Kuhlmeier* did not say that in one kind of circumstance, the *Tinker* test does not apply to student speech. Rather, it recognizes a valid threshold question: Is a school newspaper "student speech" to begin with? Whether one approves of its holding or not, treating *Kuhlmeier* as an exception to *Tinker* mischaracterizes *Kuhlmeier* and contributes to insecurity for courts, commentators, and schools, who increasingly wonder whether the First Amendment has a definite meaning at all.

C. What Legally Justifies School Authority?

Justice Alito's analysis in his *Mahanoy* concurrence begins by asking, "Why does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?"²¹⁴ Alito successfully identifies the fundamental question. Every student-speech case since *Tinker* has operated on the reasonable assumption that schools must have the power to regulate students' speech if they are to function at all.²¹⁵ But where does this power come from? Even the slightest of school rules (e.g., "Thou shalt not give a diatribe against the death penalty during geometry class"), divorced from the school context, would be a violation of the First Amendment.

The source of public-school authority is legally important. As Tara Smith writes, "[T]he reason for having a legal system determines how its coercive power may be used."²¹⁶ The same basic principle applies to any specific

²¹²*Id.* at 680, 682, 686. Justice William Brennan Jr.'s concurrence contains language that reveals greater eagerness to harmonize the Court's holding with *Tinker*. *Id.* at 688–89 (Brennan, J., concurring) ("There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express. . . . Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of *disruptive* language in a speech given to a high school assembly." (emphasis added)).

²¹³See generally Tara Smith, *The Free Speech Vernacular: Conceptual Confusions in the Way We Speak About Speech*, 22 TEX. REV. L. & POL. 57 (2018).

²¹⁴*Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2049–50 (2021) (Alito, J., concurring).

²¹⁵*Id.* at 2050. ("As a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom.")

²¹⁶TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM 57 (2015).

government institution, including the public school. The proper limits of public schools' speech regulations therefore depend on the authority behind them. Smith further elucidates the consequences of getting this question wrong:

An incorrect understanding of the authority of law, in other words, injects inconsistencies into a legal system that place the official responsible for carrying out the law under impossible demands. He is expected to conform to two contradictory contexts: one in which the law in question is presumed, like all laws, to represent a valid use of government power, and one in which it does not. Because the very standards of objectivity have been warped by the inclusion of laws that lack genuine authority and that are incompatible with the valid laws, the legal official *cannot* do his job objectively.²¹⁷

Each opinion in *Mahanoy* rests on a different answer to Justice Alito's question. The majority opinion, while not explicit on the matter, makes obvious use of Breyer's trademark democracy-oriented principles to ground the school's authority to regulate speech.²¹⁸ Alito concludes that parents implicitly consent to the state's regulation of their children's speech.²¹⁹ And Justice Thomas looks to history and tradition to determine the scope of public schools' authority.²²⁰

1. The Popular Sovereignty Theory (or, the "Nurseries-of-Democracy Theory")

Justice Breyer accepted *Tinker's* common-sense premise that public schools may (and must) regulate some speech. But articulating his account of school authority presents with some difficulty. Unlike Justice Alito, Justice Breyer does not explicitly identify the nature of the authority by which schools justly regulate speech. But Justice Breyer's view on that question is

²¹⁷ *Id.* at 64.

²¹⁸ See generally STEPHEN BREYER, ACTIVE LIBERTY (2005).

²¹⁹ *Mahanoy*, 141 S. Ct. at 2051 (Alito, J., concurring).

²²⁰ See *id.* at 2059 (Thomas, J., dissenting).

reasonably inferable from some language in the opinion and his prior writings.²²¹

Justice Breyer lists three factors that diminish schools' authority in the off-campus context and three general interests of the school.²²² Those six factors provide insight into his theory of school authority. One of the school's interests is that of "protecting a student's unpopular expression," and it arises from the fact that "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."²²³ But that mission also lies behind schools' authority to maintain order at school.

Justice Breyer's other writings confirm that, for him, the will of the people justifies the "leeway" schools and other institutions enjoy. Consider his popular-level book, *Active Liberty*, where he argues that judges should interpret the Constitution guided by the democratic principle of "a sharing of a nation's sovereign authority among" its people—what he calls "active liberty."²²⁴ Breyer contrasts active liberty with "modern liberty," or "the individual's freedom to pursue his own interests and desires free of improper government interference."²²⁵ The book's thesis aims to strike the "proper balance" between the two conceptions of liberty.²²⁶ Because active liberty centers around the People's collective rule, education—which enables people to carry out their "democratic responsibilities"—is vital to its success.²²⁷ Active liberty calls for judicial restraint because "a deep-seated conviction on the part of the people . . . is entitled to great respect"²²⁸ and judges should not interfere with "the right of a majority to embody their opinions in law."²²⁹ The above snapshot provides context to the Court's "nurseries of

²²¹ Justice Breyer mentions the doctrine of *in loco parentis*, but other statements indicate that he has more in mind than the authority parents implicitly bestow on schools. *See id.* at 2044–45 (majority opinion).

²²² *Id.* at 2046.

²²³ *Id.*

²²⁴ BREYER, *supra* note 218, at 3.

²²⁵ *Id.* at 4.

²²⁶ *Id.* at 5.

²²⁷ *Id.* at 9.

²²⁸ *Id.* at 10 (quoting *Otis v. Parker*, 187 U.S. 606, 609 (1903)).

²²⁹ *Id.* (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

democracies” statement. For the Court—for Justice Breyer, at least—schools may regulate student speech because society needs them to.

The theory that the will of the people is what grants a state the authority to restrict otherwise-free speech by its nature necessitates a balancing-of-interests approach. The Court did not claim to be deciding *Mahanoy* by balancing B.L.’s interests against the school’s interests. But despite the absence of explicit “balancing test” language, the opinion transparently functions that way. (“These features of [B.L.’s] speech . . . diminish the school’s interest in punishing B.L.’s utterance. But what about the school’s interest . . . ?”²³⁰) And that is not by accident. On this theory, a legal right is only as strong as the majority’s current desire to continue recognizing it. American citizens’ rights are, to speak in the language of the Founding, altogether alienable.

Public schools are creations of state constitutions and legislatures.²³¹ Those schools have many powers, not a few of which involve compulsion of students’ behavior. In many states, parents must choose between sending their children to public school or finding a state-sanctioned alternative.²³² The popular-sovereignty theory tacitly sanctions the legislature’s control—from the creation of schools to the authorization of school discipline and the punishment of truant students and their parents—over the speech and behavior of individual children and young adults. It holds that the basis for schools’ disciplinary authority does not lie in the consent of parents or the youth of students. Rather, it is society’s need for well-informed citizens that justifies the twofold requirement to (1) come to school and (2) keep your mouth shut. (Not *all* the way shut, mind you—nurseries of democracy, Breyer reminds us, have a personal stake in allowing children to speak somewhat freely to each other.²³³)

²³⁰*Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2047 (2021).

²³¹*See, e.g.*, TEX. CONST. art. VII, § 1. (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”).

²³²*See, e.g.*, TEX. EDUC. CODE § 25.085(b) (“Unless specifically exempted by Section 25.086, a child who is at least six years of age, or who is younger than six years of age and has previously been enrolled in first grade, and who has not yet reached the child’s 19th birthday shall attend school.”); *id.* § 25.086 (providing a list of exemptions to the general attendance requirement); *see also Mahanoy*, 141 S. Ct. at 2052 n.12 (Alito, J., concurring) (listing Pennsylvania’s requirements for homeschooled children).

²³³*Mahanoy*, 141 S. Ct. at 2046.

The popular-sovereignty’s version of the First Amendment expressly permits state agents to abridge the freedom of speech—because society needs them to. By its own terms, it gives an arm of the government “leeway” in the face of an otherwise sacred guarantee of protection.²³⁴ Again, this Note is not arguing against the existence of public schools; it is teasing out the consequences of three different justifications for school power. This Note submits that the nurseries-of-democracy answer to Justice Alito’s question violates the plain meaning and the spirit of the First Amendment and, as such, deserves rejection.²³⁵

As well as offending the Constitution, this theory all but guarantees that lower courts will never receive the clarity they so desperately need. If the source of school power is society’s need for a certain kind of student, then a court’s job in a student-speech case amounts to sticking its finger in the wind. The meaning of the First Amendment—what it allows, what it forbids—would not only change as society changes, but it would never be objective. It would also change from judge to judge, each one deciding in each case how best to divine democracy’s wishes for its nursery residents: by poll, by news headline, or by crystal ball. Courts should choose not to follow *Mahanoy* in locating the basis for school authority in society’s purported needs.

2. The Consent Theory

In an about-face from his statements in *Morse*,²³⁶ Justice Alito expressly names *consent* as the reason why “the First Amendment ever allow[s] the

²³⁴ *Id.*

²³⁵ *See id.* at 2049 (Alito, J., concurring).

²³⁶ For reasons unknown to the author, Justice Alito has turned 180 degrees on this exact point. In his *Morse* concurrence, he wrote:

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; *they do not stand in the shoes of the students’ parents*. It is a *dangerous fiction* to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. *It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis.*

551 U.S. 393, 424 (2007) (Alito, J., concurring) (emphasis added).

free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school.”²³⁷ When parents enroll their children in public school, he reasoned, they voluntarily cede their parental authority, and the school acts *in loco parentis*.²³⁸ But ironically, it is hard to see how, under Justice Alito’s approach, a student would have even the on-campus rights at play in *Tinker*. If a couple enrolled their child in a private school, the school’s regulation of the child’s behavior would not even *implicate* the Constitution, let alone violate it. What principled reason, then, does Justice Alito have for continuing to affirm the existence of students’ rights in public schools? Alito explains his piecemeal approach:

The answer must be that parents are treated as having relinquished the *measure* of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree—for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip.²³⁹

Why the piecemeal delegation of authority? If the consent theory assumes that parents could take their children out of public school at any time, where is the coercion? For Justice Alito, the answer lies in the *Commentaries* of William Blackstone.²⁴⁰ According to Blackstone, the scope of delegated authority depended on “the purposes for which [the tutor or schoolmaster was] employed.”²⁴¹ Because the common-law *in loco parentis* doctrine only inferred parental delegation within the scope of the schoolmaster’s educational purposes, so must it likewise with modern-day public schools.²⁴²

By proffering the consent theory, Justice Alito made way for an apparently simple test: In any given challenge of public-school authority, “the question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the

²³⁷ *Mahanoy*, 141 S. Ct. at 2049–50 (Alito, J., concurring).

²³⁸ *Id.* at 2051.

²³⁹ *Id.* at 2052 (emphasis added).

²⁴⁰ *Id.* at 2051.

²⁴¹ *Id.* (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *441).

²⁴² *Id.* at 2051–52.

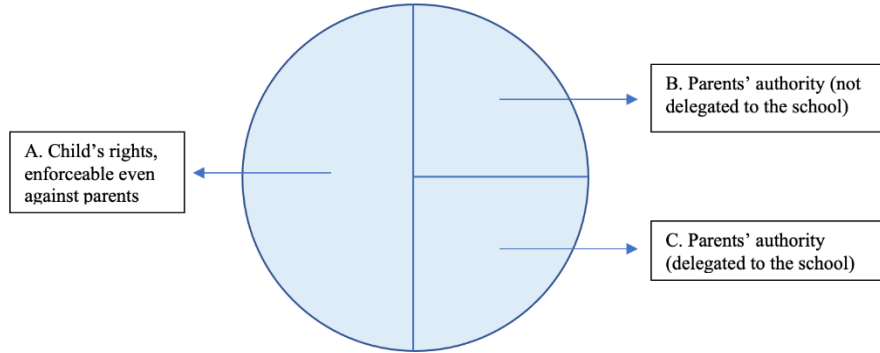
school the authority to regulate the speech in question.”²⁴³ The test arising from the consent theory is more attractive than the nurseries-of-democracy theory, as it recognizes that the parents have sovereignty—as against the state—over the discipline and upbringing of the children.

But ultimately, Justice Alito’s attempt to slice the pie of disciplinary authority into pieces results in a logical mess all over the kitchen of legal reasoning. If a couple implicitly consents to delegate to the school the disciplinary authority they have over their child, and the school disciplines the student in a way to which the parents did not consent, the *parents*, not the child, suffer legal harm. The dispute amounts to a disagreement over the exact measure of authority originally delegated. Consider a private school that punished a student in a manner identical to this case. If the student’s parents had not agreed that out-of-school profanity would be penalizable conduct, the dispute would be essentially contractual. The parents would face the alternative of accepting the school’s decision or challenging it with the contingent plan of procuring alternative education for their child if the appeal is denied.

To elucidate this point, imagine a circle representing the full rights of the child. Divide the circle into two halves: one is the portion of the child’s rights entrusted to the parent during minority, and the other is those rights the child possesses against even his parents (e.g., the right not to be abused). When the child goes to school, cut one of the semicircles in half. Label one of the resulting quarter-circles “*in loco parentis*”; that portion is what the parent has handed to the school. If the school acts outside its reasonably delegated authority—but within the bounds of what would be permissible for the parents—it has not violated the rights of the child; it has encroached on the

²⁴³ *Id.* at 2054. Space does not permit a full discussion of the following point, but consider the awkwardness of Alito’s proposed analysis when the plaintiff is an eighteen or nineteen-year-old public-school student who lives alone. *See* Cheng, *supra* note 152, at 519 (discussing the considerable number of legal adults enrolled in public high schools across the country).

authority retained by the parents.²⁴⁴ It would be crossing from “B” to “C” in the figure below.



The consent theory is both constitutional and coherent. Judges should continue to follow the historical and logical reasoning in Justice Alito’s *Mahanoy* concurrence, and in the future the Court should expressly adopt Alito’s concurrence.²⁴⁵ But ironically, the consent theory properly understood ought to have led Justices Alito and Gorsuch to dissent here. The school’s decision to discipline B.L. for her profane posts may have displeased her parents. But because B.L.’s use of profanity was safely within her parents’ disciplinary domain, B.L.’s coaches acted *in loco parentis* and did not violate the Constitution.

3. Deferring to History²⁴⁶

Justice Thomas agrees with this Note that the Court in *Mahanoy* “simply posit[ed] three vague considerations and reach[ed] an outcome.”²⁴⁷ He recognizes that “courts (and schools) will almost certainly be at a loss as to

²⁴⁴I do not claim that a public school could never violate a student’s constitutional rights. It could, if it took action that would be unlawful for the student’s parents.

²⁴⁵The Court has done as much in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2063–64 (2020), when it incorporated language from Justice Alito’s concurrence in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 198–206 (2012) (Alito, J., concurring).

²⁴⁶Justice Thomas’s trademark originalism distinguished his dissenting opinion. In an evaluation of his approach, general criticism of certain points of the originalist philosophy will be unavoidable. Nevertheless, this section will deal with originalism only insofar as it pertains to the question of student-speech rights.

²⁴⁷*Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

what exactly the Court's opinion today means."²⁴⁸ And like Justice Thomas, this Note argues that *Mahanoy* was decided wrongly. But the dissent punted to history on the fundamental question of school authority and thus failed to satisfactorily justify its conclusion.²⁴⁹

For Justice Thomas, the First and Fourteenth Amendments' meanings, the average 1868 United States citizen's understanding of the scope of free speech, and the freedoms actually enjoyed by individuals in 1868 are identical in substance and thus valid proxies for each other. He notes that "[c]ases and treatises from th[e] era [of the Fourteenth Amendment's ratification] reveal that public schools retained substantial authority to discipline students."²⁵⁰ In the blunt words of his *Morse* concurrence, "the First Amendment, as originally understood, does not protect student speech in public schools."²⁵¹ Seeing no constitutional reason to depart from this historical practice, Justice Thomas "would thus apply the rule."²⁵² Because Reconstruction-era courts permitted schools to discipline students for out-of-school speech, the public most likely did not believe that the First Amendment protected such speech. And because the public then did not believe the First Amendment protected such speech, the First Amendment in fact *does not* protect such speech.

What, for Justice Thomas, justifies school authority? "History" is the closest the reader gets to an answer: "150 years of history support[ed] the coach" in this case.²⁵³ But that reasoning passes the buck and dodges the question. Justice Thomas's reasoning says to litigants, in effect, that it does not matter where schools get the authority to regulate students' speech. In fact, it does not even matter where the public in 1868 thought schools got their authority. All that matters is that, for one reason or another, the 1868 public did not understand the freedom of speech to encompass any speech

²⁴⁸ *Id.* at 2063.

²⁴⁹ At times, Justice Thomas also appears to favor *in loco parentis* as a theory of school authority, *see also* *Morse v. Frederick*, 551 U.S. 393, 413–19 (2007) (Thomas, J., concurring), but he does not lean too heavily on it. He admits that "[p]lausible arguments can be raised in favor of departing from that historical doctrine." *Mahanoy*, 141 S. Ct. at 2061 (Thomas, J., dissenting). A reader may reasonably infer that Justice Thomas favors *in loco parentis* as a policy, but the argument he makes in this case is based on an appeal to history.

²⁵⁰ *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

²⁵¹ 551 U.S. at 410–11 (Thomas, J., concurring); *see also* *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

²⁵² *Mahanoy*, 141 S. Ct. at 2061 (Thomas, J., dissenting).

²⁵³ *Id.* at 2059.

uttered by students while they were at school.²⁵⁴ Professor Tara Smith's criticisms of Public Understanding Originalism are helpful here:

[W]hile language is the means of expressing the law, a given understanding of that language is not the same thing as the law. . . . The meaning of a word depends, at the most fundamental level, on the nature of the things it refers to and not on what a group of people thinks it refers to. . . . While other people's beliefs about words' meaning can sometimes help us to answer [legal] questions correctly, those beliefs are not the reality that we are after. . . . [Knowing the usage of a word prevalent at a given time] can be a valuable aid in determining which concept it is that a word in a particular legal provision designated. Once that has been learned, however . . . , it is crucial to recognize that the way a word is understood and the meaning of the word—the nature of its referents (in any of its distinct usages)—are two different things.²⁵⁵

The above criticism is unlikely to shake the committed originalist. But even as an exercise in Public Understanding Originalism, Justice Thomas's dissent still contains a fatal error. The "familiar example" Justice Thomas cites as evidence of the original understanding of free speech—*Lander v. Seaver*,²⁵⁶ a Vermont Supreme Court case—did not even involve a free-speech claim against the school.²⁵⁷ Instead, the case involved a suit for battery against the schoolmaster who whipped the plaintiff student for insulting him after having returned home from school.²⁵⁸ The focus of the *Lander* court's analysis was not whether the student possessed a constitutional off-premises free-speech right, but whether the schoolmaster's authority extended to insubordination committed after the student arrived at home.²⁵⁹ (The court answered in the affirmative.²⁶⁰) Furthermore, the Vermont Supreme Court distinguished the schoolmaster from public officers:

²⁵⁴ *Id.*

²⁵⁵ See SMITH, *supra* note 216, at 167–70.

²⁵⁶ 32 Vt. 114 (1859).

²⁵⁷ See *Mahanoy*, 141 S. Ct. at 2053 n.14 (Alito, J., concurring).

²⁵⁸ *Lander*, 32 Vt. at 115.

²⁵⁹ *Id.* at 120.

²⁶⁰ *Id.* at 121.

The schoolmaster does not belong to the class of public [sic] officers He is included rather in the domestic relation of master and servant In no proper sense can he be deemed a public officer exercising, by virtue of his office, discretionary and *quasi judicial* powers.²⁶¹

However facially similar the facts in *Lander* and *Mahanoy* may be, the holding of the former is inapposite to the latter.

Nevertheless, Justice Thomas interpreted *Lander* as evidence that the First Amendment, as originally understood, did not protect off-campus speech that tended to harm the school by subverting its authority.²⁶² Turning to B.L.’s speech, he reasoned that both her position on an extracurricular team and her use of social media as a forum increased the harm to the school and its programs.²⁶³ Both of those circumstances aggravated her offense, giving the school even more justification for punishing her.²⁶⁴ But if *in loco parentis* means that school officials do not operate as state actors, as *Lander* emphatically held, why does the First Amendment require the “harm” link? That question stands out even more considering Justice Thomas’s endorsement of the idea that public schools historically “operated not as ordinary state actors.”²⁶⁵ This dissent’s erroneous application of a tort case to a completely unrelated constitutional question exemplifies the weakness of an uncritical deference to history.²⁶⁶

CONCLUSION

The convolution in *Mahanoy* revealed that the “fixed star in our constitutional constellation” sometimes turns out to be just a smudge on the telescope.²⁶⁷ Public-school students find themselves in a unique position among Americans with respect to the ambiguity of their constitutional rights. *Mahanoy* had an opportunity both to clarify the standard of free-speech

²⁶¹ *Id.* at 122.

²⁶² *Mahanoy*, 141 S. Ct. at 2060 (Thomas, J., dissenting).

²⁶³ *Id.* at 2062.

²⁶⁴ *Id.*; see also *supra* Section II.D.

²⁶⁵ *Mahanoy*, 141 S. Ct. at 2061.

²⁶⁶ *Id.* at 2060–62.

²⁶⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

violations by public-school officials and to provide a rule in the off-campus context. Regrettably, it clarified nothing and provided little more than a concrete-bound analysis of the facts before it. The Court balanced “state interests” against students’ rights—a constitutionally suspect approach that continues to blur the concepts involved.

Judicial review of state public-school action should more precisely define the scope of students’ constitutional rights and avoid vague and indeterminate analyses such as the test used in *Mahanoy*. This Note has argued that the crux of that question is the nature of public schools’ authority to regulate speech—because a rule’s authority necessarily defines its application. This Note then presented the uncomfortable truth that the most rationally consistent and constitutionally appropriate approach—the consent theory—would mean throwing out the cherished *Tinker* rule and leaving the protection of students’ freedom of expression to school boards or school choice. If there is solace to be found in this bleak reality, this Note locates it in the gradual, ongoing erosion of *Tinker*’s holding by the three exception cases. That is, overruling *Tinker* and replacing it with a more rational standard would simply amount to an acceptance of what has already been happening for the last five decades.²⁶⁸

In conclusion, *Mahanoy* follows *Tinker* as another Supreme Court case that rests on an unpolished conceptual foundation, resulting in an unclear standard for lower courts. Justice Thomas’s concern from his *Morse* concurrence remains acute: “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not.”²⁶⁹

²⁶⁸See Cheng, *supra* note 152, at 512 (acknowledging the ongoing “retrenchment on student rights”).

²⁶⁹*Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).