Northwestern Journal of Law & Social Policy

Volume 17 | Issue 2 Article 4

Spring 2022

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Northwestern Journal of Law and Social Policy
Volume 17 (Spring 2022)

Outside *Tinker*'s Reach: An Examination of *Mahanoy Area School District v. B. L.* and its Implications

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ABSTRACT

In the 1969 landmark case Tinker v. Des Moines Independent Community School District*, the Supreme Court reassured students that they do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Ever since then, the exact scope of students' free speech rights has been unclear, but the high court has used* Tinker*'s substantial disruption test to clarify its scope in successive legal challenges. In 2017, B. L., a Mahanoy Area School District student, was suspended from her cheerleading team after using vulgar language off-campus that made its way back to her coaches. She challenged the decision in the courts, and when her case reached the Court of Appeals, the Third Circuit declined to use* Tinker*'s test in its decision, instead ruling that* Tinker *categorically does not apply to any off-campus speech. The Third Circuit's argument that courts should use a bright-line rule in applying* Tinker *to off-campus speech is a compelling one. This Comment evaluates the substance of the Third Circuit's decision, describes the Supreme Court's eventual retort, and discusses why the Supreme Court's ruling fails millions of public school students and their families. While the Supreme Court vindicated B. L., students suffer without clear guidance regarding student free speech rights.*

Keywords: free speech, students, *Mahanoy*, Supreme Court, *Tinker*, First Amendment, public schools, social media, school discipline, off-campus speech, substantial disruption test, Third Circuit, cheerleader case

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* The author is a J.D. candidate at Northwestern Pritzker School of Law in Chicago, Illinois. Michelle would like to gratefully acknowledge former Associate Dean of Inclusion & Engagement, Shannon Bartlett, for her incredible support and feedback which made this comment possible; Journal of Law and Social Policy 2020–2021 Comment Editor, Charlotte Franklin, whose feedback was invaluable in shaping this comment; the editors of the Journal of Law and Social Policy, who have provided valuable feedback throughout the process; and her wonderful and patient husband Josh Hufferd, who now knows more about public school free speech case law than he thought he ever would.

INTRODUCTION

B. L., now known as Brandi Levy, was a rising sophomore in high school when she was passed over for the varsity cheerleading squad and instead placed on the junior varsity squad for another year.[1] In her place, the coaches named an incoming first-year to the varsity squad.[2] Certainly, this was a frustrating turn of events for Levy.[3] So, she did what many young people might in her situation: she blew off some steam on social media.[4] About 250 of Levy's closest friends and acquaintances received a photo, or "snap," from her on Snapchat featuring Levy and her friend, middle fingers in the air, with the words "fuck school fuck softball fuck cheer fuck everything" superimposed over the picture.[5] Another snap came through giving context to the picture, expressing general frustration about her and another student remaining on the JV squad another year. Notably, none of the snaps explicitly mentioned the school's name.[6]

The snap disappeared after twenty-four hours, but her peers' reaction to Levy's profane message only grew.[7] A fellow cheerleader screenshotted the message and showed it to one of the cheerleading coaches.[8] Several students asked the coaches about Levy's snaps.[9] The coaches determined that Levy's snap violated policy and school rules, and they

[1] B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 175–76.
[8] *Id.* at 175.
[9] *Id.* at 175–76.

removed her from the squad, telling her she could try out again next year.[10] Levy's parents appealed the decision at several levels within the school system, all the way up to the superintendent; each administrator supported the school's decision to suspend Levy.[11] Levy's parents filed suit under 42 U.S.C. § 1983 in District Court for the Middle District of Pennsylvania, alleging that Levy had been deprived of her constitutional rights and specifically claiming that Levy's suspension from the cheer squad violated the First Amendment.[12] The district court granted summary judgment to Levy on her First Amendment claim, the Mahanoy Area School District appealed and, in response, the Third Circuit issued an explosive opinion in which it ruled that *Tinker v. Des Moines Independent Community School District* should not be used to evaluate Levy's off-campus speech.[13] This decision spurred the Supreme Court to grant the school district's writ of certiorari.[14] After the Court heard oral argument, it issued a groundbreaking 8-1 ruling in favor of Levy, acknowledging that Levy's speech did not warrant punishment by the Mahanoy Area School District while attempting to salvage the power of schools and authorities to sanction unwanted behavior.[15]

Part I of this Comment will provide a brief history of the exceptions the Supreme Court has created in the wake of landmark school free speech case *Tinker v. Des Moines Independent Community School District*. Part II will provide the Third Circuit's history of student free speech case law which led to its surprising decision to locate all off-campus student speech outside of *Tinker*'s reach in Levy's case. Then, in Part III, this Comment will analyze *B. L. ex rel Levy. v. Mahanoy Area School District*, the Third Circuit's 2020 decision. This Comment will explain the Third Circuit's reasoning in its decision to grant students free speech rights coextensive with those of adults for off-campus speech and review the Third Circuit's analysis of other circuit approaches, illuminating the split between circuits. Part IV will focus on the Supreme Court's ruling, whether its rejection of the Third Circuit's approach still offers a satisfactory rule for defining off-campus speech within the purview of school discipline, and the legal implications of applying the Supreme Court ruling for students and schools.

I. BRIEF HISTORY OF FIRST AMENDMENT CASE LAW IN PUBLIC SCHOOLS

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech."[16] However, before *Tinker v. Des Moines Independent Community School District* was decided in 1969, common law doctrine dictated that students in public schools were under the authority of their teachers and administrators of the school they attended because the schools stood *in loco parentis*, or in the role of the parent.[17] That meant they had parent-like authority to discipline students and keep order in classrooms

[10] *Id.* at 176.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 176–77.
[14] *Id.*; *Granted & Noted List, October Term 2020 Cases for Argument as of July 2, 2021*, THE SUP. CT. (July 29, 2021), https://www.supremecourt.gov/orders/20grantednotedlist.pdf.
[15] Mahanoy Area Sch. Dist. v. B. L. *ex rel* Levy, 141 S. Ct. 2038, 2040 (2021).
[16] U.S. CONST. amend. I, § 3.
[17] Perry A. Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271, 271–76 (1986).

and schools.[18] The Vietnam War and ensuing protests in public schools brought a new student free speech doctrine to the Supreme Court. After the *Tinker* decision, the Supreme Court heard several successive free speech court challenges, each of which have informed the student free speech landscape.

A. Tinker v. Des Moines Independent Community School District

In 1969, the Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District* cemented the limited free speech rights of students for generations to come, holding that a student's right to free speech is protected unless that student "substantially" disrupts the operation of a school.[19] Here, a "substantial" disruption is so pervasive that it interferes with a school official's ability to discipline a student or maintain order in the school environment.[20] While the Court has carved out a number of exceptions in the intervening decades, *Tinker*'s landmark ruling has controlled the student free speech landscape for the fifty years since it was decided.[21]

Tinker involved high school students who silently protested the Vietnam War by wearing black armbands at their school.[22] The school punished the students by suspending them until they agreed to stop wearing the armbands at school.[23] The students filed suit under 42 U.S.C. § 1983 alleging that the students' punishment violated their First Amendment rights.[24] They sought nominal damages and an injunction to stop the school district from disciplining the students.[25] The district court dismissed the complaint, and the Court of Appeals for the Eighth Circuit affirmed the dismissal.[26] After granting certiorari, the Supreme Court reversed that decision in a victory for the students.[27]

The Court's review spawned the famous line penned by Justice Fortas for the majority that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[28] Importantly, however, Justice Fortas also cautioned that student rights are not without their limits.[29] The Court granted that students could still be punished for their speech by school administrators if the speech "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."[30] This standard has become known as the "substantial disruption" test, and remains key to understanding *Tinker* and its

[18] *Id.*
[19] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
[20] *Id.* at 505, 509, 513.
[21] *See* Charles J. Russo, *The Supreme Court and Student Free Speech: A Retrospective Look at* Tinker v. Des Moines Independent Community School District *and Its Progeny*, 45 U. DAYTON L. REV. 189, 191 (2020).
[22] *Tinker*, 393 U.S. at 504–05.
[23] *Id.* at 504.
[24] *Id.* at 504–05.
[25] *Id.* at 504.
[26] *Id.* at 504–05.
[27] *Id.* at 514.
[28] *Id.* at 506.
[29] *Id.* at 507, 509.
[30] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

applicability to student free speech cases.[31] However, the "substantial disruption" test has limitations.[32] The school should not discipline students for disruptions causing only awkwardness or unpleasantness, but should only take action on actual substantive disruption or speech that the school can reasonably expect will cause a substantial disruption.[33] The students' armbands were a passive form of protest, a form of speech that did not itself interrupt class, "entirely divorced from actually or potentially disruptive conduct by those participating in it,"[34] and the Court found that the students' speech did not cause a substantial disruption.[35]

B. Bethel School District Number 403 v. Fraser

In 1986, the Supreme Court's decision in *Bethel School District Number 403 v. Fraser* once again shifted the school free speech landscape.[36] There, the Court created another carve-out to the student free speech rights enumerated in *Tinker*.[37] Instead of using the substantial disruption test set forth in *Tinker* to guide its decision, the Court considered the school's particular interest in prohibiting vulgar speech to "teach[] students the boundaries of socially appropriate behavior."[38]

In *Fraser*, a high school student gave a speech at an assembly nominating a fellow student for the student government, and in the process, utilized several double entendres to give the speech sexualized meaning in an attempt at humor.[39] School policy prohibited "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."[40] The Court overturned both the district court and the Ninth Circuit, determining that the speech at issue in *Fraser* was unlike the speech protected in *Tinker* because it combined non-political origins with inappropriate content.[41] Taken altogether, the Court concluded that the balance of interests tilted in favor of the school's latitude to discipline students for profane language and gestures.[42]

The Court held that even under the First Amendment, schools can still prohibit the use of "lewd and indecent language" in a non-political context "during a school-sponsored activity" to protect minors from inappropriate behavior and educate them about "the shared values of a civilized social order."[43] Because Fraser's speech was both non-political in its joking support for a classmate and plainly vulgar, the Court found that disciplining Fraser with a three-day suspension was "entirely within [the school's] permissible authority."[44]

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[31] Allison N. Sweeney, *The Trouble with* Tinker*: An Examination of Student Free Speech Rights in the Digital Age*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 359, 389 n.189 (2019).
[32] *Tinker*, 393 U.S. at 509.
[33] *Id.*
[34] *Id.* at 505.
[35] *Id.* at 514.
[36] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 675 (1986).
[37] *Id.* at 686–87.
[38] *Id.* at 681.
[39] *Id.* at 678.
[40] *Id.*
[41] *Id.* at 680–81.
[42] *Id.* at 681.
[43] *Id.* at 679–80.
[44] *Id.* at 676, 685.

C. Hazelwood School District v. Kuhlmeier

Two years later, another student free speech case presented itself to the Supreme Court.[45] In *Hazelwood School District v. Kuhlmeier*, the school principal deemed two pages of the school newspaper too controversial to publish and ordered them removed from the resulting final copy.[46] The two pages at issue included stories that discussed student pregnancies and student impact from parental divorce.[47] Because the principal wanted to avoid delaying the last newspaper issue of the year, the principal ordered the two offending pages removed from publication.[48]

Students and staff members of the school newspaper filed suit under 42 U.S.C. § 1983 seeking a declaration from the court that the paper was a free speech forum fully protected by the First Amendment.[49] The district court held for the school, and the Court of Appeals for the Eighth Circuit reversed the decision, holding for the students.[50] The Eighth Circuit's reasoning relied in part on the conclusion that the school newspaper was a public forum, and as such, could not be censored by the school unless such censorship fell under *Tinker*'s substantial disruption test.[51] The Court of Appeals saw no foreseeable chance that the censored articles would have materially or substantially disrupted the school's operation.[52]

The Supreme Court reversed the Eighth Circuit, concluding instead that the school newspaper was not a forum for public expression. Specifically, the Supreme Court pointed out that the school newspaper's facilities were not "open for indiscriminate use by the general public"[53] but were instead "reserved for other intended purposes."[54] The Court asserted that the school newspaper, as fully funded by the Board of Education and as part of the school's educational curriculum, was not a public forum but rather a "supervised learning experience for journalism students."[55]

As a result, the Court concluded the school had the right to assert its authority over the content of school-sponsored publications "so long as their actions are reasonably related to legitimate pedagogical concerns."[56] Educators have authority over these and "other expressive activities . . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants" because they are "part of the school curriculum."[57] The Court's ruling in *Hazelwood* created yet another framework separate from *Tinker*'s "substantial disruption" test for school officials to curate the speech inside schools.[58] Specifically, *Hazelwood* established that administrators have

[45] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988).
[46] *Id.* at 263–64.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 264–65; Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1461 (E.D. Mo. 1985).
[50] *Hazelwood*, 484 U.S. at 265–66.
[51] *Id.* at 265.
[52] *Id.*
[53] *Id.* at 267 (quoting Perry Educ. Ass'n. v. Perry Loc. Educators' Ass'n., 460 U.S. 37, 47 (1983)).
[54] *Id.* at 267.
[55] *Id.* at 270.
[56] *Id.* at 273.
[57] *Id.* at 271.
[58] *Id.*

the right to not "promote particular student speech" notwithstanding the First Amendment when that speech arises from "expressive activities . . . that the public might reasonably perceive to bear the imprimatur of the school."[59]

D. Morse v. Frederick

The most recent Supreme Court case that shaped student free speech precedent was *Morse v. Frederick*, commonly known as the "BONG HiTS 4 JESUS" case.[60] The controversial speech in *Morse* occurred off-campus, as students were attending a parade on the street adjacent to the school as a school-authorized field trip during school hours.[61] The event had press accompanying it, and as the parade passed, Frederick, a high school student, and his friends, also students, brandished a fourteen-foot-long banner with the phrase "BONG HiTS 4 JESUS" on it for the TV cameras to capture.[62] When Frederick refused to put down the banner, Principal Morse suspended him for ten days, citing a Juneau School Board Policy that prohibited all public expression favoring illegal drugs.[63] Frederick appealed the suspension, but the superintendent upheld it.[64] The superintendent noted that, similar to the circumstances of *Fraser*, Frederick had not engaged in political speech.[65] Frederick was not agitating for the legalization of marijuana, but had merely promoted illegal drugs.[66] Doing so was "clearly disruptive of . . . the school's educational mission."[67]

Frederick filed suit under 42 U.S.C. § 1983 seeking damages, a declaration that his speech was protected, and an injunction against the punishment.[68] The district court granted summary judgment for Morse, and the Court of Appeals for the Ninth Circuit reversed.[69] The Ninth Circuit found that Frederick was entitled to the protections afforded by the *Tinker* "substantial disruption" test and that Morse and the school board had failed to establish that Frederick's banner met that test.[70] Accordingly, the Ninth Circuit ruled that Frederick's First Amendment right to display the banner was "clearly established."[71]

The Supreme Court reversed the Ninth Circuit's ruling by clarifying that Frederick did not have the right under the First Amendment to hold the banner.[72] Chief Justice Roberts explained that Morse's interpretation of the banner as potentially promoting illegal drug use was reasonable, remarking that the phrase could be taken as advising others to "[[t]ake] bong hits," or as reveling in drug use, e.g., "[we take] bong hits."[73] He further explained that, regardless of Frederick's asserted motive for creating and displaying the

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[59] *Id.*
[60] Morse v. Frederick, 551 U.S. 393 (2007).
[61] *Id.* at 397.
[62] *Id.*
[63] *Id.* at 398.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 398–99.
[68] *Id.* at 399.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 399–400.
[72] *Id.* at 400.
[73] *Id.* at 402.

banner—that he and his friends wanted to get on television—the meaning of the banner itself could reasonably be taken as promoting illegal drug use.[74] In disagreement with the Ninth Circuit, he reasoned that this motive even lent support to the presumption that his speech was non-political.[75]

Roberts established that Frederick's speech was non-political, promoted illegal drug use, and was performed at a school-authorized field trip. With these facts in mind, Chief Justice Roberts ran through the carve-outs established by the Court in *Tinker*, *Fraser*, and *Hazelwood*.[76] Roberts recalled the Court's treatment of student rights in the Fourth Amendment context, emphasizing that while students have constitutional rights, "the nature of those rights is what is appropriate for children in school."[77] He then cited to Congress's stated legislative priorities to make schools a critical resource for educating students and counseling them against illegal drug use, finding that the school board policy reflected these legislative priorities.[78] Chief Justice Roberts reasoned that since students' rights are not coextensive with the rights of adults outside a school context, and since curtailing illegal drug use is an urgent legislative priority, censoring student speech that can be reasonably understood to promote drug use is acceptable under *Tinker*'s acknowledgment of the "special characteristics of the school environment."[79]

Morse v. Frederick was decided on these narrow grounds, and Chief Justice Roberts declined to broaden this ruling to declare the speech "plainly 'offensive'" under *Fraser*, remarking that to do so would be to "stretch[] *Fraser* too far."[80] As a result, public school students, their parents, school district officials, and even legislators are now left with a patchwork of rules and standards from which to construct their constitutional rights in a school setting. In *Morse*—a case where the student conducted his speech off-campus—the Court failed to clarify the status of all student speech that occurs off-campus, instead choosing to narrowly focus its ruling on off-campus speech that occurs in the context of a school-sponsored activity.[81]

In the absence of such clarification, lower courts have advanced several lines of reasoning for when schools can and cannot punish speech in K-12 public schools.[82] Most find that *Tinker* applies, but disagree about the kinds of speech punishable under the "substantial disruption" test.[83] While the Supreme Court has suggested in dicta that speech punished in both *Fraser* and *Hazelwood* would not have been punished if the speech occurred off-campus, the lack of explicit guidance on the applicability of *Tinker, Fraser, Hazelwood* and *Morse* to off-campus speech leaves courts, administrations, state governments, parents, and most importantly, students in the dark about the extent to which the First Amendment protects off-campus student speech.[84]

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[74] *Id.*
[75] *Id.* at 402–03.
[76] *Id.* at 403–07; *see supra* Part I.
[77] *Id.* at 406 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).
[78] *Id.* at 408.
[79] *Id.*
[80] *Id.* at 409.
[81] Sweeney, *supra* note 31, at 387–88.
[82] *Id.* at 388.
[83] *Id.* at 388–89.
[84] Ashley Waddoups, *Schools to Students: Post That, and You Won't Play: When Schools Condition Students' Participation in Extracurricular Activities on Appropriate Social Media Use*, 2019 BYU L. REV.

Confusion has only intensified in the online era about the Supreme Court's unwillingness to clarify the scope of student speech rights.[85] Social media's reach has blurred the boundaries of "campus," especially when controversial content is created entirely off-campus.[86] Only the Third Circuit has sketched out case law that styles off-campus student speech as comprehensively protected under the First Amendment.[87] The Third Circuit's recent decision in *B. L.* was made possible only through a good deal of judicial experimentation via several landmark appellate cases. The following section lays out some of that case history.

II. THE THIRD CIRCUIT'S APPROACH TO STUDENT SPEECH

In two cases decided together in 2011, the Third Circuit held that student speech off-campus involving the creation of fake social media profiles that lampooned school administrators was protected under the First Amendment.[88] In these two cases, the Third Circuit set the stage for its analysis in *B. L.* by setting new limitations for schools and administrators with regard to off-campus student speech. The cases delineated a new category of protected student speech: offensive or vulgar speech created off-campus that happened to find its way onto school grounds.

A. Layshock ex rel. Layshock v. Hermitage School District

In *Layshock ex rel. Layshock v. Hermitage School District*, Layshock created a "parody profile" of his high school principal on MySpace in 2005.[89] He filled the profile with fake, puerile, and humiliating information, and the profile inspired several other copycat fakes, each more vulgar than Layshock's.[90] Layshock accessed the MySpace profile at school, as did other students in the computer lab, and because of the technology coordinator's unavailability, computer programming classes were cancelled for five days until Christmas break to limit student access to these fake profiles while on school grounds.[91]

Layshock admitted to creating the fake profile and apologized to the principal.[92] The next month, he was called in for an informal hearing, and the school district found him guilty of a laundry list of transgressions, including "[d]isruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; [and] Computer Policy violations (use of school pictures without

839, 844–45 (2019) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988), Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1982) (Brennan, J., concurring)).

[85] *See generally* Bell v. Itawamba Cnty. Sch. Bd. 799 F.3d 379 (5th Cir. 2015) (en banc); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011) (en banc).

[86] *Id.*

[87] *See generally* B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013) (en banc); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

[88] *See Layshock*, 650 F.3d 205; *J.S.*, 650 F.3d 915.

[89] *Layshock*, 650 F.3d at 207–08.

[90] *Id.* at 208–09.

[91] *Id.* at 209.

[92] *Id.*

authorization)."[93] The school suspended Layshock for ten days, placed him in alternative education, banned him from participating in all extracurricular activities and his class graduation, and considered expelling him from the school.[94] None of the other fake profile creators were punished.[95] As a result of this unfair treatment, Layshock's parents filed suit under § 1983 in federal court, arguing that the First Amendment protected his speech.[96] The district court granted summary judgment to the Layshocks on their First Amendment claim, and the school district appealed.[97]

Since the district court found that the school district could not prove that Layshock's behavior fell under the *Tinker* "substantial disruption" test, and the school district did not appeal this finding, the Third Circuit's opinion focused on the school district's attempt to create a "sufficient nexus" between Layshock's alleged activities and the school district.[98] Had the school found a sufficient nexus, Layshock's activities would have been punishable under the *Tinker* carve-out for vulgarity created under *Fraser*.[99] However, the school district's sufficient nexus argument relied on the fact that Layshock accessed the school district's website and downloaded a photo of his principal to post on the fake profile.[100] In 2022, this argument, on its face, strains credulity because the owner of a smartphone might copy and save pictures from the internet several times a day with no thought given to who owns the picture (unless it's an NFT). Even in 2011, the court easily dismissed it as "unpersuasive at best."[101]

The Third Circuit pointed the school district to *Thomas v. Board of Education*, a 1979 Second Circuit decision finding no sufficient relation between a school and its students' creation of an off-campus publication: "[the fact] [t]hat a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet do not alter the fact that [the magazine] was conceived, executed, and distributed outside the school."[102] Concluding that the allegedly sufficient nexus in *Layshock* was even less substantive than in *Thomas*, the Third Circuit rejected the school district's argument.[103] The court concluded that it would be dangerous to allow the state to "reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[104]

The school district also argued that the speech should be considered "on-campus" because it was "aimed at the School District community and the Principal and was accessed on campus by [Layshock] . . . [so i]t was reasonably foreseeable that the profile would" arouse the attentions of the school district.[105] To justify this argument, the school district cited several cases where a school was allowed to punish a student for offensive speech

[93] *Id.*
[94] *Id.* at 209–10.
[95] *Id.* at 210.
[96] *Id.* at 211.
[97] *Id.* at 211.
[98] *Id.* at 214.
[99] *Id.* at 214–16.
[100] *Id.* at 214.
[101] *Id.* at 215.
[102] *Id.* at 215 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979)).
[103] *Id.* at 216.
[104] *Id.*
[105] *Id.* at 214.

online.[106] However, the cases that the school district relied upon all fell under *Tinker*'s "substantive disruption" test, with threats of violence in two cases and a student who riled up her classmates to protest the cancellation of a school activity in another.[107] As a result, the court concluded that a school might punish expression outside of school "under certain very limited circumstances, none of which are present here."[108] The court added that *Fraser* would not have supported the school district's claim at any rate since Chief Justice Roberts said Fraser's speech would have been protected off-campus in *Morse*.[109] The Third Circuit's decision to identify Layshock's actions as taking place off-campus is not without its critics, given that the profile was accessed at school.[110] This fact at least arguably created the possibility for a substantial disruption under *Tinker*.[111]

B. J.S. ex rel Snyder v. Blue Mountain School District

The Third Circuit case decided in tandem with *Layshock, J.S. ex rel. Snyder v. Blue Mountain School District*, was extremely similar to *Layshock*. Here, a student created a fake profile of a principal, the creator was found out, and the creator received a ten-day suspension.[112] However, the connection between the student and the school was even more attenuated since the profile was not accessible from the school.[113] In *J.S.*, the student took steps to make the fake profile private, and there were only a few connections between the school and the profile: another student brought in a printed copy of the profile at the principal's request, there were mere nominal disruptions in class, and there were nominal disruptions to a counselor's appointments (since the disciplinary meeting with J.S. required the presence of a counselor).[114]

In *J.S.*, the district court found that *Fraser* and *Morse* applied since the language at issue was "vulgar, lewd, and potentially illegal speech that had an effect on campus . . . even though it arguably did not cause a substantial disruption of the school."[115] The Third Circuit disposed of this argument by assuming *Tinker* applied to J.S.'s speech and running it through the "substantial disruption" test.[116] It concluded that the speech did not meet that bar and that the "*narrow* exceptions" of the rule, including *Fraser*, *Hazelwood*, and *Morse*, did not apply here.[117] Specifically, the Third Circuit recognized that *Fraser* governs speech in school, *Hazelwood* governs school-sponsored speech, and *Morse* governs behavior "that could reasonably be interpreted as promoting illegal drug use" at a school-approved field trip.[118] Writing for the Third Circuit, Judge Chagares pointed out that all of these issues

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[106] *Id.* at 216–17.
[107] *Id.* at 217–18.
[108] *Id.* at 219.
[109] *Id.* at 219 (quoting Morse v. Frederick, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.")).
[110] Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 426–27 (2011).
[111] *See id.*
[112] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–23 (3d Cir. 2011).
[113] *Id.* at 922.
[114] *Id.* at 921–23.
[115] *Id.* at 923.
[116] *See id.* at 927.
[117] *See id.*
[118] *Id.*

were distinguishable from those in *J.S.*[119] The court reasoned that the case does not generate any reasonable forecast of "substantial disruption" and compared the school's reaction to the "undifferentiated fear or apprehension of disturbance" that *Tinker* warns against.[120] Consequently, the Third Circuit soundly rebuffed the school district's attempts to liken the fake profile to cases where students were disciplined for off-campus threats of violence and for protests disrupting the campus.[121]

Importantly, the Third Circuit explicitly rejected the school district and district court's contention that the speech fell under the *Fraser* exception to *Tinker* for vulgar and lewd speech.[122] The Third Circuit set a threshold question for applying *Fraser*: did the speech occur on campus?[123] Finding that the speech happened off-campus outside school hours, the Third Circuit concluded that *Fraser* could not apply,[124] foreshadowing its ruling in the *B. L.* case.[125]

C. Dueling Concurrences in Layshock *and* J.S.

In a set of dueling concurrences in *Layshock* and *J.S.*, respectively, Judges Jordan and Smith traded visions of a future Supreme Court ruling on the issue of whether *Tinker* is applicable to off-campus speech.[126] In the *Layshock* concurrence, Judge Jordan, joined by one other judge, expressed his frustration that the *J.S.* concurrence leaves the future of *Tinker* as applied to off-campus speech in doubt.[127] In contrast, Judge Jordan leaned on the language of *Tinker* itself, where the *Tinker* Court said "conduct by the student, in class or out of it, which for any reason . . . materially disrupts 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."[128] By citing this language in *Tinker*, Judge Jordan expressed that *Tinker* specifically allowed for school officials to punish student speech, even off-campus.[129] He reasoned that the Third Circuit's decision here sidestepped this issue, leaving the door open for future decisions to ignore this language in *Tinker* and overturn precedent.[130]

In the above quote from *Tinker*, the Supreme Court used the *cf.* signal asking readers to compare the situation presented in *Tinker* to *Blackwell v. Issaquena County Board of Education*, a Fifth Circuit case from 1966.[131] In *Blackwell*, students were suspended for refusing to remove freedom buttons that they wore around school for the purpose of

[119] *Id.*
[120] *Id.* at 928–29.
[121] *Id.* at 930.
[122] *Id.* at 932.
[123] *See id.*
[124] *Id.*
[125] *See* B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020).
[126] *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–20 (3d Cir. 2011) (en banc); *see J.S.*, 650 F.3d at 936–37 (Smith, J., concurring).
[127] *Layshock*, 650 F.3d at 219–20 (Jordan, J., concurring).
[128] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (citing from Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966)).
[129] *Layshock*, 650 F.3d at 221–22 (Jordan, J., concurring).
[130] *Id.*
[131] *Blackwell*, 363 F.2d 749.

conveying a political message.[132] Upon receiving their suspensions, the students collected some buttons from a bus driver who was distributing them, and threw them into the school building through the windows.[133] This was an act conducted on school property; it was an act of defiance executed fully on-campus, though not within the boundaries of the classroom.[134] Nothing in the facts of *Blackwell* supposes that off-campus conduct was the objectionable conduct that would have fallen under the guidance provided in *Tinker*.[135] If the case offers a useful analogy, "in class or out of it" was referring to both the armbands and freedom buttons in *Tinker* and *Blackwell*—wearing political accessories on-campus, whether inside the four corners of the classroom or not, as a form of silent, peaceful protest.[136] Were the "in class or out of it" statement made in a vacuum, Judge Jordan's reliance on that language would carry more weight. However, since the Supreme Court's signal cite intends to draw an analogy from *Blackwell*, where no off-campus activity occurred, "in class or out of it" should perhaps not be read to include fully off-campus, after-hours speech.[137]

Judge Jordan added that the *J.S.* concurrence embraces an artificial on-campus/off-campus distinction because of the ubiquity of smart technology that often accompanies both teachers and students to school.[138] He wrote that *Tinker*'s guidance "balance[s] the need for order in our public schools with respect for free speech" and because of this, courts should be applying and not avoiding its test.[139] Judge Jordan further asserted that reliance on property lines to obscure the balancing of interests fails at the task set forth by *Tinker*.[140] The *Tinker* test functions to clarify the Court's balancing of the free speech rights of students with the compelling interests of educators in maintaining an orderly learning environment, and sidestepping the test because of a perfunctory distinction between on- and off-campus missed the point.

Judge Jordan then focused on the effect of the speech in question. Citing *Schenck v. United States*'s famous pronouncement that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," he asked why we would accept such a result were the troublemaker to be standing just off campus property and directing disruption into the school via technology.[141] Finally, Judge Jordan closed by reminding the reader of *Saxe v. State College Area School District*, another Third Circuit decision which declared that, "if a school can point to a well-founded expectation of disruption," then a student's speech may fall under *Tinker*'s "substantial disruption" test.[142]

On the other hand, the concurrence in *J.S.*, joined by four other judges of the *en banc* court, entertained the possibility that *Tinker* may not apply at all to off-campus speech.[143]

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[132] *Id.* at 751–52.
[133] *Id.* at 752.
[134] *Id.*
[135] *Id.* at 753–54.
[136] *Id.* at 750–51.
[137] *See generally id.*; *see* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–20 (3d Cir. 2011) (en banc).
[138] *Layshock*, 650 F.3d at 220 (Jordan, J., concurring).
[139] *Id.* at 220–21.
[140] *Id.*
[141] *Id.* at 221–22.
[142] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001).
[143] *J.S.*, 650 F.3d at 936–37 (Smith, J., concurring).

If *Tinker* did not apply to this speech, the First Amendment would protect students' off-campus speech coextensively with that of adult "citizens in the community at large."[144] Judge Smith, writing for the concurrence, noted that courts already agree that *Tinker*'s carve-outs in *Fraser*, *Hazelwood*, and *Morse* only apply to on-campus speech (and in *Morse*'s case, to school-sponsored events). The concurrence pointed out that the *Tinker* decision relies on "the special characteristics of the school environment" to underscore the need for speech restrictions,[145] and Judge Smith sought additional support from post-*Tinker* cases in the Second and Fifth Circuit to support this point.[146]

The concurrence then asked the thornier question: what constitutes "on-campus" or "off-campus" speech in the modern age?[147] Here, Judge Smith agreed with Judge Jordan's *Layshock* concurrence more than it may have led us to believe: Judge Smith's *J.S.* concurrence "would have no difficulty applying *Tinker* . . . where a student sent a disruptive email to school faculty from his home computer."[148] The *J.S.* concurrence suggests that the Third Circuit's approach recommends expanding the public's working definition of "on-campus" to include speech that is intentionally directed at a school.[149] Judge Smith raised a distinction between speech intentionally directed at campus and speech that "foreseeably makes its way onto campus," to avoid being overbroad and encapsulating off-campus speech that discusses school subjects.[150] In any case, the concurrence claimed that the facts at issue before the Third Circuit did not require exploring this distinction, given that it was "perfectly clear" that J.S.'s speech was off-campus.[151] Against the backdrop of these cases and the opinions that accompanied them, the Third Circuit decided in *B. L. ex rel Levy v. Mahanoy Area School District* that *Tinker* does not apply to off-campus speech.

III. *B. L. EX REL LEVY V. MAHANOY AREA SCHOOL DISTRICT* AND OFF-CAMPUS SPEECH

In an opinion by Judge Krause, the Third Circuit categorically stated in *B. L. ex rel Levy v. Mahanoy Area School District* that Levy could not be punished for her off-campus speech because *Tinker* does not apply to off-campus speech.[152] The Third Circuit built on its discussion of off-campus student speech in the *Layshock* and *J.S.* decisions and, understanding the importance of clarity to further the discussion on student free speech, chose to create a bright-line rule protecting all off-campus student speech under the First Amendment. To better understand the Supreme Court's reaction to this opinion, it is important to understand the evolution of the Third Circuit's view that *Tinker* does not apply

[144] *Id.*
[145] *Id.* at 937–38.
[146] *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979) (ruling that an underground newspaper produced and distributed largely off-campus by students did not create a sufficient nexus between the school and the students to view the newspaper content as on-campus speech, even if occasionally stored on-campus); *see* Porter v. Ascension Parish Sch. Board, 393 F.3d 608, 615 (5th Cir. 2004) (ruling that a student who drew and stored a graphic picture of his school being attacked off-campus could not be punished for his off-campus speech).
[147] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *See* B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).

to off-campus speech.[153] Understanding the *B. L.* decision requires examination of the two main issues in *B. L.*[154]

A. Determining Whether Levy's Speech Was On Campus

First, the Third Circuit cited *J.S.* for the proposition that a student's First Amendment rights "'are coextensive with [those] of an adult's' outside [the school] context."[155] The court then reviewed the "line" between on-campus and off-campus speech, a line that, recalling the previous section, courts and judges alike appeared wary to define.[156] After acknowledging that the line cannot merely be drawn at the classroom's or even at the school's brick-and-mortar boundaries, this court reflected on how *Morse*, *Hazelwood*, and *Fraser* all dealt with speech that was either school-sponsored or otherwise school-controlled.[157] This analysis focused on the forum of control for the speech itself rather than the effect of the speech.[158] The Third Circuit then cited to its own appeal to absurdity from *Layshock* against the school reaching into a family's home to punish speech there.[159] Of course, in the age of remote learning amidst the COVID-19 pandemic, the Third Circuit's pronouncement rings a bit hollow. Similarly hollow is the echo of Judge Smith's *J.S.* concurrence confidently predicting that the court would have no problem punishing the speech in a student's inflammatory email sent to school administrators.[160]

The Third Circuit acknowledged that defining the line between on- and off-campus is increasingly difficult given society's oversaturation with social media.[161] However, it forged ahead with an analysis based on two Supreme Court cases concerning the unique intersection of the internet and First Amendment rights: *Reno v. ACLU* and *Packingham v. North Carolina*.[162] In both cases, Judge Krause observed, the Supreme Court was reluctant to use a heavy hand in creating novel legal theories to vindicate First Amendment concerns.[163] Instead, she noted, the Court applied existing doctrines and settled precedent to the novel challenges that digital communication and censorship present.[164] She argued that the Third Circuit should use the same method here.[165]

Next, the decision took the Circuit's prior holdings in *J.S.* and *Layshock* and compared them to *Thomas* and *Porter*—two decisions created in the "analog era" before the internet—to characterize the Third Circuit decisions as a natural extension of already existing doctrine.[166] Recalling *Thomas*, the 1979 underground newspaper case, the Second

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[153] *See id.* at 170 (3d Cir. 2020); *see* Petition for a Writ of Certiorari, Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 976 (No. 20–255) (filed Aug. 28, 2020).
[154] *See B. L.*, 964 F.3d at 176–77.
[155] *Id.* at 178 (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011)).
[156] *See id.* at 178–79.
[157] *Id.* at 178.
[158] *Id.*
[159] *Id.*
[160] *J.S.*, 650 F.3d at 940 (Smith, J., concurring).
[161] *B. L.*, 964 F.3d at 179.
[162] *Id.*; *see generally* Reno v. ACLU, 521 U.S. 844 (1997); *see generally* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
[163] *B. L.*, 964 F.3d at 179–80.
[164] *Id.* at 180.
[165] *Id.*
[166] *Id.*

Circuit characterized the speech of the newspaper as off-campus speech subject to more expansive protection under the First Amendment because most of the work to produce and distribute the newspaper was intentionally done off-campus.[167] While some of the newspapers had incidental contact with the school, the students intentionally kept the lion's share of the work related to the newspaper—including its distribution—off-campus, and so the speech was deemed to be off-campus.[168] *Porter* involved a disturbing and graphic drawing that a student made of his school being attacked that his brother inadvertently brought to campus years later.[169] The Fifth Circuit held in 2004 that the speech was "neither speech directed at the campus nor a purposefully communicated true threat," and was therefore entitled to First Amendment protection outside of *Tinker*'s guidance.[170]

What the Third Circuit pulled from these two cases was something of a balancing test.[171] Levy's speech was physically off-campus, outside of school hours, "without school resources," and on a social media platform unconnected with the school. Given all of these circumstances and referring back to *J.S.* and *Layshock*, the Third Circuit concluded that mere mention of the school combined with indirect reach of the speech into the school were not enough to overcome those facts.[172] However, the Third Circuit's decision not to explicitly articulate a balancing test was deliberate; a footnote indicated that the court chose not to direct future courts on how to define the on/off-campus distinction—a decision the court called an act of "judicial restraint."[173]

B. Can a School Punish a Student for Off-Campus Speech?

Having laid to rest the controversy over whether the speech was off-campus, the court then addressed the second issue: whether Levy's punishment for her speech could be justified under *Tinker*, *Fraser*, or another approach.[174] The Third Circuit swept aside the school district's attempt to argue that the speech was punishable under *Fraser* because the speech involved the use of an extracurricular school activity to "graft an extracurricular distinction onto our case law."[175] The opinion additionally noted that using Fourth Amendment and due process case law is inappropriate in the First Amendment context because "[t]he First Amendment . . . abhors 'ad hoc balancing of relative social costs and benefits,'" and the First Amendment does not require that claimants show that their interest in free speech outweighs countervailing governmental interests in punishing speech.[176] Judge Krause concluded that, since Levy's speech was beyond the reach of the school's

[167] Thomas v. Bd. of Educ., 607 F.2d 1043, 1045–46, 1050 (2d Cir. 1979).
[168] *Id.* at 1050.
[169] Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004).
[170] *Id.* at 620.
[171] *B. L.*, 964 F.3d at 180–81.
[172] *Id.*
[173] *Id.* at 181 n.4 (remarking that "[o]ur concurring colleague asserts that it is 'a fundamental principle of judicial restraint' that we must avoid analyzing constitutional issues beyond those implicated by 'the precise facts' before us . . . [w]e take no issue with that general principle. Indeed, that principle explains why, although we had to tease out the on- and off-campus distinction enough to be confident about how to categorize B. L.'s speech, we have refrained from opining about how that distinction should be applied in future cases").
[174] *Id.* at 181.
[175] *Id.* at 182.
[176] *Id.* (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

control, it did not matter what the punishment was or if she was involved in an extracurricular activity; it only mattered that she was punished at all when her speech fell under the protection of the First Amendment.[177]

Next, the court responded to the school's argument that, under *Tinker*, Levy's snap was likely to fall under the "substantial disruption" test.[178] The court reiterated the Third Circuit's holding that the offending snap "took place beyond the 'school context'" based on where, when, on which platform the speech was uttered, and whether school resources were used in uttering it.[179] Since the appellant argued that *Tinker* applied and that the "substantial disruption" test was met, the court had no choice but to face the issue it had previously ducked. To avoid deciding it under the assumption that *Tinker* applied, the court would have had to acknowledge and take a position regarding other unresolved constitutional disputes involving the "substantial disruption" test's application to the extracurricular context.[180] Additionally, without clarity at the appellate level, district courts failed to coalesce around a unified approach to these questions in the years since *J.S.* and *Layshock*—years that have cemented the ubiquity of social media and constant digital connectedness, leaving the scope of student free speech rights in a digital world unclear and in chaos.[181]

C. Examining Alternative Circuit Approaches

For that reason, the Third Circuit examined the approaches other circuits had taken before rejecting them in turn.[182] First, it examined the "reasonably foreseeable" approach, where courts should apply *Tinker* when it is "reasonably foreseeable that a student's off-campus speech would reach the school environment."[183] This approach began with two cases involving threats of violence,[184] but expanded beyond that to cases of harassment,[185] and finally, to cases involving neither threats of violence nor harassment.[186] Next, it detailed the "sufficient nexus" test, where courts apply *Tinker* to off-campus speech if the speech has "a sufficient 'nexus' to the school's 'pedagogical interests.'"[187] This approach has mainly been used in cases to combat cyberbullying and harassment between students.[188] Lastly, it examined how some circuits have applied *Tinker* to off-campus speech without articulating a standard.[189]

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[177] *Id.* at 183.
[178] *Id.*
[179] *Id.*
[180] *Id.* at 183–84; *id.* at 184–85 n.9–10.
[181] *Id.* at 185.
[182] *Id.* at 185–86.
[183] *Id.* at 186.
[184] *Id.*; *see generally* Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011).
[185] *See generally* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142 (9th Cir. 2016); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012).
[186] *See generally* Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 53 (2d Cir. 2008).
[187] *B. L.*, 964 F.3d at 186.
[188] *Id.*; *see generally* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).
[189] *B. L.*, 964 F.3d at 186–87; *see* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 394 (5th Cir. 2015) (en banc); *see* Wynar v. Douglas Cmty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013).

However, the Third Circuit reasoned that even though other circuit courts adopted these standards with good intentions (e.g., to prevent a threat of violence, or a student from bullying another student), they had done so in a reactionary way that inadvertently incorporated too much speech for the original boundaries of *Tinker*'s test.[190] The court reasoned that these precedential cases should only serve as "a narrow accommodation of unusually strong interests on the school's side."[191]

The Third Circuit considered that living in a society where high schoolers share their speech on social media platforms does not necessitate that courts ought to shrink from applying the robust Supreme Court First Amendment precedents set in *Reno* and *Packingham*.[192] Indeed, digital connectedness demands that courts do so in the face of potential regulatory capture of protected speech.[193] As an example, the Third Circuit considered the hypothetical of a student who writes a blog post on the weekend at home about their teachers' competency and then shares that post with one of their many social media networks.[194] This hypothetical demonstrates the difference between the school context, where standing up in class and talking about teachers' competence would be inappropriate, and "beyond the school context," where this student is writing from, even if the blog post reaches the audience of students and administrators.[195]

The court's problem with the "sufficient nexus" test is that it is tautological—finding a nexus here means designating speech that would "interfere with the work and discipline of the school."[196] However, *Tinker*'s "substantial disruption" test is already exactly that, since the point of the underlying approach is to help the public understand what speech constitutes a substantial disruption to schools.[197] To assert a tautological test in order to ignore the existence of a line between on- and off-campus speech is, in the Third Circuit's view, a dangerous overreach.[198] What is more, such a highly pragmatic, non-standardized approach fails for unpredictability.[199] A lack of clarity on what the law is and how it is applied when it comes to student free speech rights can chill speech for students, teachers, and school administrators.[200]

The Third Circuit panel's chosen standard is that *Tinker* does not apply to off-campus speech.[201] The court defined "off-campus speech" as speech that is "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[202] It reasoned that Judge Smith's (now Chief Judge Smith's) concurrence in *J.S.* laid the groundwork for this conclusion.[203] The court was undeterred by "[r]ecent technological changes," claiming that those changes strengthened the

[190] *B. L.*, 964 F.3d at 187.
[191] *Id.*
[192] *Id.* at 187–88.
[193] *Id.*
[194] *Id.* at 188 n.11.
[195] *Id.*
[196] *Id.* at 188 (quoting Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 574 (4th Cir. 2011)).
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.* at 189.
[202] *Id.*
[203] *Id.*

conclusion that off-campus speech is, on the whole, outside *Tinker's* reach.[204] Faced with the choice of allowing administrators to punish both on- and off-campus student speech when they deem it necessary, and narrowly tailoring the boundaries of those interests to on-campus speech, Judge Krause chose the latter.[205] She concluded that the former "sacrific[es] precious freedoms that the First Amendment protects."[206] This conclusion also offered the clarity that prior decisions lacked, allowing students to fully enjoy their free speech rights under the law and allowing schools to understand the boundaries of their ability to punish speech.[207]

Lastly, the majority attempted to address some concerns with this conclusion. The first was raised by Judge Ambro's concurrence in this decision, which speculated that confusion may yet reign in an instance where speech that is clearly off-campus creates substantial disruption inside a school context.[208] The majority, hoping to preempt the concurrence's concern, claimed in response that school officials still have the authority to punish the speech of any student reacting to that off-campus speech in a disruptive manner while on campus.[209] The court likened online off-campus speech that schools might be eager to punish to a student making a controversial protest sign and displaying it in a public place, saying that there would be no mistake that a school could not punish such speech were it in the park.[210] The court also deferred judgment on future cases involving threats of violence and harassment, suggesting that there could be an alternative remedy for schools in such cases by designating such speech as "true threat[s]" if the government or schools can meet strict scrutiny exceptions to First Amendment protection.[211] The court maintained that, even if its holding places some unfortunate speech beyond the regulatory authority of schools, the sacrifice is necessary to maintain the expansive freedoms of the First Amendment.[212]

In response, Judge Ambro's concurrence urged the majority to kick the can down the road on the constitutional question of whether *Tinker* applies to off-campus speech and reminded his fellow jurists that not even Levy thought this question needed to be decided to reach a conclusion in this case. The concurrence noted that sister circuits in the Second and Fifth Circuits whose cases the majority relies on in *Thomas* and *Porter* have since decided closer cases based on other standards.[213] Judge Ambro thought that because there was clearly no "substantial disruption" that ensued in the school as a result of Levy's snap, it was unnecessary to reach the question of whether *Tinker* applies in an off-campus context; whether it did or not, the court's conclusion would be the same.[214] According to the concurrence, the court's definition of "off-campus" with regard to "school-owned, -

[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at 189–90.
[208] *Id.* at 190, 197.
[209] *Id.* at 190.
[210] *Id.*
[211] *Id.* at 190–91.
[212] *Id.* at 191.
[213] *Id.* at 195–96.
[214] *Id.* at 195.

operated, or -supervised channels[]" does not provide clear guidance on how such channels might be defined.[215]

Of course, much of the problem related to a lack of definitional clarity spawns from the fact that *B. L.* was not a close case; there was no hint of "substantial disruption" from the *Tinker* test, and therefore no need to apply *Tinker* in the first place.[216] Judge Ambro concluded that, since other circuits have decided much tougher cases than this one without drawing the conclusion that off-campus speech does not fall under *Tinker*, it was not appropriate for the majority to do so either, offering the advice, "[d]o not decide today what can be decided tomorrow, for tomorrow it may not need to be decided."[217] The Third Circuit's strong standard in favor of protecting student speech brings to mind the *J.S.* concurrence's breezy assurance that, if a student sent an inflammatory email to school administrators from their personal computer, it would be swept into the on-campus category.[218] For example, would a student emailing a school employee's work email address be enough to bring the student's speech inside "school-owned/-operated channels"? The Third Circuit's decision in *B. L.* left this question unanswered, perhaps in the hope that the Supreme Court would answer it for students' benefit. Unfortunately, the Supreme Court failed to provide crucial clarity with regard to the on- and off-campus distinction and its importance to the off-campus student speech analysis.

IV. THE SUPREME COURT RULING

Two months after the Third Circuit handed down its decision in *B. L.*, the Mahanoy Area School District petitioned for *certiorari* before the Supreme Court,[219] and the Court granted the school district's petition.[220] The ACLU of Pennsylvania served as counsel for Levy. The high court heard arguments from Levy and the Mahanoy Area School District, and then three months later handed down its decision: Levy's speech was not substantially disruptive and so fell outside *Tinker*'s reach.[221] However, Justice Breyer's decision articulated more than just a decision on Levy's speech; it also denounced the Third Circuit's bright-line rule and articulated a need for nuance with regard to online student free speech.[222]

A. The Court's New Test: It Depends

The Supreme Court declined to draw the bright line proposed by the Third Circuit in its decision.[223] Justice Breyer recounted that, while the majority panel went out on a limb to exclude off-campus speech from *Tinker*'s purview, Judge Ambro's concurring opinion

[215] *Id.*
[216] *Id.*
[217] *Id.* at 197.
[218] J.S. *ex rel* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (2011).
[219] *See* B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020); *see* Petition for a Writ of Certiorari, Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 976 (No. 20–255) (filed Aug. 28, 2020).
[220] *Granted & Noted List, October Term 2020*, THE SUP. CT. (July 29, 2021), https://www.supremecourt.gov/orders/20grantednotedlist.pdf.
[221] Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2043 (2021).
[222] *Id.* at 2043, 2048.
[223] *Id.* at 2043.

(*see* Section III.B, *supra*) pointed out that, by *Tinker*'s own test, Levy's speech was not substantially disruptive, and so the court need not have reached the question of whether *Tinker*'s test should apply.[224] Justice Breyer thus sidestepped the debate about what constitutes on-campus or off-campus speech and rejected the Third Circuit's strong stance on excluding off-campus speech from the *Tinker* test.[225] While the Court ruled that Levy's speech was not punishable by the school, on the topic of the actual question presented—whether *Tinker*'s test applies to student speech occurring off-campus—Justice Breyer's answer was to repeat, in so many words, the old adage: it depends.[226]

Justice Breyer's rejection of the Third Circuit's stance relied on the practical considerations presented by the parties to the case and by interested parties in *amici* briefs.[227] The Court agreed with the school district and others that situations involving bullying and harassment, threats aimed at others in the school environment, and breaches of rules regarding schoolwork that occur off-campus because of computer learning or other circumstances were all among valid reasons to avoid categorical exclusion of off-campus speech from the *Tinker* test.[228] Justice Breyer emphasized that not only have the school and learning environments rapidly changed with the introduction of computers and learning over the Internet, but the off-campus activities that may fall under the *Tinker* test might also depend on the student's age, or on the school, among other factors.[229] It would be unwise to impose a singular bright-line rule for such a foundational issue in a constantly changing social and developmental environment.

In recognition of these considerations, Justice Breyer instead articulated a framework to which a feature test can be applied in order to assess school interests in regulating or curtailing speech.[230] These three features, as they apply to the off-campus speech in question, support a weaker nexus between the speech and the school's interest in regulating it.[231] First, Justice Breyer highlighted that generally, off-campus speech falls within the domain of parental responsibility, which relieves the school of its role to stand *in loco parentis*, or in the role of the parent.[232] Second, he observed that if schools have the unmitigated right to regulate off-campus speech along with on-campus speech, that composes the totality of a student's speech.[233] Skepticism in regulating off-campus speech is therefore necessary to avoid the result that a student may be entirely curtailed from unregulated speech.[234] Justice Breyer noted that, of the classes of student speech, political and religious speech ought to face the highest threshold for regulation off-campus.[235] Third, Justice Breyer stated that the schools that angle to regulate student speech actually have an interest in protecting unpopular speech, and that protecting unpopular ideas, especially when the student's unpopular ideas are expressed off-campus, is fundamental to student

[224] *Id.* at 2044.
[225] *Id.* at 2045.
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.* at 2046.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*

understanding of our democracy.[236] The Court noted that these are three features of off-campus speech that distinguish it from on-campus speech and that they create a weaker case for schools to regulate the questionable speech.[237]

Justice Breyer declined to give any kind of threshold for these features' strength to qualify speech as protected under the First Amendment.[238] He also explicitly punted the issue of whether a student's location off-campus can "make the critical difference" for student speech protection, but noted that in a future case, this case would serve as an example.[239]

B. Levy's Speech

With regard to Levy's speech in particular, the Court agreed with the Third Circuit that her speech is protected by the First Amendment.[240] Justice Breyer wrote that Levy was engaging in criticism of the rules of her community when she posted the offending snap.[241] Levy's "criticism did not involve features that would place it outside the First Amendment's ordinary protection."[242] The speech involved neither fighting words nor obscenity as defined in *Cohen v. California*.[243]

Next, Justice Breyer applied the features he had articulated to assess the validity and importance of the school district's interests against Levy's speech interests. He concluded that the school's interest should not prevail on the basis of the three separate, but complementary, reasons.[244] First, Levy spoke on her own time, off-campus, using her personal technology, to a private audience.[245] This weakens the school's interest in educating Levy by teaching good manners and discouraging the use of vulgar language because the school is presumably not standing in the role of the parents while she is at a convenience store using her phone on the weekend.[246] Second, since the speech was off-campus, the Court should be skeptical of its regulation unless it squarely fit the bill of *Tinker*'s substantial disruption test. The Court did not find that the minor disruption that followed Levy's speech inside the school met *Tinker*'s "demanding" standard for a "substantial disruption."[247] Third, Justice Breyer dismissed the coaches' rationale for suspending Levy, one of whom said that it was not for any specific impact but simply because the "negativity" in Levy's speech "could impact students in the school."[248] *Tinker*

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[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*; Cohen v. California 403 U.S. 15, 19–20 (1971) (saying, of a case in which the appellant was convicted for wearing a jacket which read "Fuck the Draft" inside the Los Angeles Courthouse, "[t]his is not . . . an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.").
[244] *Id.* at 2047.
[245] *Id.*
[246] *Id.*
[247] *Id.* at 2047–48.
[248] *Id.* at 2048.

made clear that "undifferentiated fear or apprehension" is not enough to meet the standard to curtail First Amendment right to speech.[249] This speech is not punishable simply because its unpopularity resulted in generalized negativity.

This short opinion concluded with a pointed call-out to the Third Circuit's decision, where Justice Breyer noted that the Court does not agree with it; rather, it agreed with the Third Circuit concurrence, which cited similar reasons for ruling in favor of Levy to those of the Court here.[250]

C. Justice Alito's Concurrence

Justice Alito, who joined the 8–1 majority, also wrote a concurring opinion where he focused on developing a more concrete framework to analyze potential regulation of off-campus student speech.[251] His analysis began with an interesting question: why should public school teachers and administrators have an authority, even limited, to curtail student speech in a way that private school teachers and administrators do not?[252] His answer was that parents consent to the dimunition of their child's speech rights by enrolling the child in a public school; this line of reasoning is the basis of the *in loco parentis* theory.[253] Alito looked to history, where at one extreme teachers and administrators at a boarding school stood fully *in loco parentis*, and at the other homeschooled children were entirely within the scope of their parents' care.[254] Given that students attend school for part of the day, Justice Alito viewed administrative authority to regulate student speech as correlative with students' presence in an environment where the teacher or administrator has supervisory control over the student.[255] In that same light, he emphasized that such supervision is only part-time, and that parents' decision to send a child to public school does not equal a waiver of their authority over their children.[256]

Armed with this understanding, Justice Alito used the question of whether parents in this situation "can reasonably be understood to have delegated to the school the authority to regulate the speech in question" as a distinction for difficult cases in which administrators may try to regulate off-campus student speech.[257] Using this question, he easily distinguished some instances where parents have clearly delegated regulatory authority to school faculty and staff (like speech during online school instruction, field trips, and extracurricular activities), from instances where the speech clearly falls under First Amendment protection (like off-campus speech related to public issues, including politics and religion).[258] Even if a school tried to claim that such speech was the cause of a substantial disruption to classroom activities, it could not punish the student for engaging in the latter speech, as it is unreasonable to believe that parents would relinquish their child's right to engage in this speech off-campus by enrolling the student in a public

[249] *Id.*
[250] *Id.*
[251] *Id.* at 2048–49.
[252] *Id.* at 2049–50.
[253] *Id.* at 2051.
[254] *Id.*
[255] *Id.* at 2052.
[256] *Id.*
[257] *Id.* at 2054.
[258] *Id.* at 2054–55.

school.[259] While Justice Alito acknowledged that the hardest cases come when criticism evolves into hurtful speech toward students, faculty, staff, and administrators, and threats against the same, he did not offer a clear solution for determining those cases.[260] He only concluded that Levy's case is not one; her speech was merely crude off-campus criticism of school programs, which clearly falls under the category of First Amendment protection that her parents would not reasonably have inferred they were relinquishing when enrolling Levy in school.[261]

D. Justice Thomas's Dissent

Justice Thomas, alone in dissent, wrote a brief defense of schools' historical broad latitude in action when standing *in loco parentis* and accused the majority of ignoring history and precedent in its rush to triangulate a solution.[262] He argued that the Court ought to adhere to a series of cases stemming from an 1859 Vermont Supreme Court decision where a teacher was vindicated in whipping a student because the student called him names to other students while at home within earshot of the teacher.[263] Justice Thomas made clear that courts ought to use the *Lander* test of judging the "*effect* of speech, not its location," and speculated that if the Court took the doctrine of *in loco parentis* seriously, schools could have more, not less, control over student speech, since social media can magnify the effect of the speech.[264] While Justice Thomas's dissent makes for an interesting example of the Court's somewhat arbitrary and tenuous respect for *stare decisis*, it has no bearing on the result.

E. The Importance of Safeguarding First Amendment Rights

Both the Supreme Court majority and the concurrence were content to allow lower courts the flexibility to determine whether off-campus student speech falls under First Amendment protection on a case-by-case basis, regardless of the guiding principle for which each jurist advocated. The *B. L.* case was unusual in that the punishment levied on Levy was unrelated to a foundational and persistent point of controversy in the First Amendment case law. However, because the Third Circuit's ruling and the question presented, in the Supreme Court's eyes, wrongly implicated that controversy, the Supreme Court granted certiorari to address the issue regardless.

Unfortunately, this series of events led to a Supreme Court decision that merely created negative space. This decision primarily repudiated the Third Circuit decision, but it failed to articulate a definitive alternative for addressing the regulation of off-campus student speech. Additionally, the majority opinion sidestepped giving any guidance regarding the modern distinction between on- and off-campus speech, while still contending that courts should give students First Amendment leeway when speech is off-campus.

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[259] *Id.* at 2055–56.
[260] *Id.* at 2056–57.
[261] *Id.* at 2057–58.
[262] *Id.* at 2059.
[263] *Id.* (citing to Lander v. Seaver, 32 Vt. 114, 120 (1859)).
[264] *Id.* at 2062.

The analysis upon which the majority opinion rests remains confused so long as it relies on an unclear definition of terms. Justice Breyer waffled on whether it matters that offending speech was off-campus throughout the opinion, but still took care to admonish the Third Circuit for daring to step out on a limb and create a bright-line rule.[265] First Amendment rights are some of the most important rights Americans have. It is, quite literally, the very first amendment to the Constitution that "Congress shall make no law . . . abridging the freedom of speech."[266] It is critical to safeguard and clarify those rights at every available juncture. When the Supreme Court declines to clarify and safeguard civil rights of people in America outside of the already clearly delineated contexts provided by the Court to limit those rights, everyone suffers.

The Supreme Court owed students, parents, and American residents clarity, at a minimum, to ensure the continued protection of one of their most fundamental rights. Instead, Justice Breyer's mushy attempt at judicial restraint empowers lower courts to legislate policy within tiny court fiefdoms, resulting in continued inconsistency among circuits. This circuit split "resolution" resolves nothing and will continue to cultivate confusion under the cover of evaluating student speech on a case-by-case basis. The "test" Justice Breyer provides is not even so strong as a factor test or a balancing test. Rather, it is a mere "features" test, which only serves to give individual jurists more power over students. Justice Breyer's considerations are so vague as to provide cover for any line of reasoning a judge may desire to pursue on a whim. This decision serves more as a lever for increasing judicial influence than as a sound judicial ruling.

Justice Alito attempted to shape an alternative framework around which to analyze whether schools can regulate off-campus student speech without relying on the on-/off-campus distinction. However, the concurrence was not the controlling opinion. The majority stated that because the speech was off-campus, the First Amendment was more likely to protect the speech, but whiffed on defining the on-/off-campus distinction. Given multiple opportunities to clarify a segment of case law fraught with confusion which has the potential to conflict with many established laws,[267] the highest Court failed to provide clarity in *Morse*, and failed to provide clarity in *B. L.* as well.

CONCLUSION

Faced with law that created confusion and discord,[268] the Third Circuit offered definitive answers to the thorny questions surrounding off-campus student speech, which it likely hoped would encourage the Supreme Court to take up the issue.[269] While the Third Circuit's approach offered clarity with its bright-line rule, Justice Breyer and an 8-1 majority rejected its reasoning, citing the need for practical nuance in determining whether schools can regulate off-campus student speech.[270]

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[265] *Id.* at 2048.
[266] U.S. CONST. amend. I, § 3.
[267] Petition for a Writ of Certiorari, Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 976 (No. 20–255) (filed Aug. 28, 2020), *23–25.
[268] *See* discussion *supra* Part II.A.
[269] *See generally* B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020).
[270] Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2043 (2021).

The school district, in its petitioner's brief, took the opportunity to characterize the Third Circuit's approach as an irresponsible and untenable one, given the questions it left open for school districts within the Third Circuit and across the country.[271] However, the Supreme Court's decision serves students no better than the Third Circuit's does schools. While the majority's ruling preserves power for both administrators and jurists, it remains an open question whether the flexibility granted here will effectively protect the First Amendment rights of students in difficult cases. The vague "features" test outlined and employed by Justice Breyer may serve as no more than a fig leaf in schools' attempts to retain the authority to regulate student speech. However, lest we forget, most importantly for Brandi Levy, her "superfluous" off-campus student speech will serve as an example of what remains outside *Tinker*'s reach.[272]

[271] *See* discussion *supra* Part IV.
[272] *Mahanoy*, 141 S. Ct. at 2048.