Mahanoy Area School District v. B.L.: The Court Protects Student Social Media but Leaves Unanswered Questions

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Fifty years ago, the U.S. Supreme Court reasoned that the state of California could not criminally punish Paul Robert Cohen for wearing a jacket bearing the words "Fuck the Draft" in a Los Angeles County courthouse.[1] Justice John Marshall Harlan II began his majority opinion with the memorable line: "This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance."[2] Fifty years later, the Court addressed another case involving a speaker who used the f-word multiple times in what some might view as trivial expression. But, as in *Cohen*, the Court delivered another significant free-speech victory in *Mahanoy Area School District v. B.L.*, ruling that a public school could not impose discipline upon one of its student for posting a fusillade of f-bombs on social media.[3]

In *Mahanoy*, the Court limited the ability of school officials to police student social media expression that is posted off campus. The Court not only addressed student social media expression but also reaffirmed the vitality of the Court's seminal student speech decision in *Tinker v. Des Moines Independent Community*

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[1] Cohen v. California, 403 U.S. 15 (1971).

[2] *Id.* at 15.

[3] 141 S. Ct. 2038 (2021).

School District.[4] However, the decision leaves much room for future litigation to flesh out the broad parameters of the Court's ruling.

Part I of this article provides a brief overview of the Court's previous rulings on public school student speech in the K–12 context. Part II discusses the Court's decision in *Mahanoy*. Part III outlines some unanswered questions from the *Mahanoy* decision.

I. Student Speech (K–12) and the U.S. Supreme Court

For the 19th century and a good portion of the 20th, public school students had no First Amendment free-speech rights. Teachers taught and students listened. It was not until the Court's famous flag-salute case in *West Virginia Board of Education v. Barnette* that students possessed some level of free-speech rights in public schools.[5]

The case involved sisters Marie and Gathie Barnett (their last name was misspelled in the case caption), who attended Slip Hill Grade School near Charleston, West Virginia.[6] They and their father, Walter, were devout Jehovah's Witnesses who believed that saluting the flag was akin to idol worship and sanctifying graven images.[7] West Virginia had a law on the books that mandated students salute the flag and recite the Pledge of Allegiance or face expulsion. Not only did students face expulsion, but their parents could face up to 30 days in jail for such nonconformity.

The Barnetts sued, asserting that such action violated their First Amendment rights under the Free Exercise and Free Speech Clauses of the First Amendment. But the timing did not seem propitious for such a lawsuit: the Supreme Court in 1940 had upheld a similar Pennsylvania law from a challenge by students expelled for similar conduct in *Minersville School District v. Gobitis*.[8]

[4] 393 U.S. 503 (1969).

[5] 319 U.S. 624 (1943).

[6] David L. Hudson, Jr., "Woman in Barnette Reflects on Flag Salute Case," Freedom F., Apr. 29, 2009, https://bit.ly/3ysatcx.

[7] *Id.*

[8] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

Gobitis had caused many to question the patriotism of Jehovah's Witness students and led to much violence perpetrated against the religious minority.[9] But three justices—William O. Douglas, Hugo Black, and Frank Murphy—had publicly questioned the *Gobitis* decision and candidly admitted that they had made a mistake:

> Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided. Certainly our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be.[10]

The time was ripe for another flag-salute case. Enter the Barnetts.

In the *Barnette* decision, the Court ruled that public school officials violated the First Amendment when they punished the Barnett sisters in a West Virginia elementary school for refusing to salute the flag and recite the Pledge of Allegiance. The Court famously proclaimed that "[i]f 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."[11] The Court further emphasized the importance of teaching students the value of constitutional freedoms, writing: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[12]

The decision not only established a constitutional baseline that students possess some level of First Amendment rights in

[9] Garret Epps, "America's New Lesson in Tolerance," The Atlantic, Sept. 1, 2016, https://bit.ly/3lzGagq.

[10] Jones v. Opelika, 316 U.S. 584, 623–24 (1942) (Black, Douglas, and Murphy, JJ., dissenting).

[11] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[12] *Id.* at 637.

public school.[13] It also created the no-compelled-speech doctrine: that the First Amendment often prohibits the government from forcing individuals to recite, believe or affirm certain expression.[14]

But the Court in *Barnette* did not establish a legal test to determine when school officials violate students' First Amendment rights.[15] Furthermore, there was some question as to whether the decision was more rooted in the Free Exercise Clause or the Free Speech Clause.[16] It took more than two and a half decades for the Court to create such a legal test in the *Tinker* case.[17] That case involved the wearing of black peace armbands by Mary Beth Tinker, her brother John, Christopher Eckhardt, and a few other students to protest U.S. involvement in the Vietnam War, to support Robert Kennedy's Christmas truce, and to mourn those who had died in the conflict. School officials learned of the impending black armband protest and imposed a rule that selectively targeted and prohibited black armbands.

The Tinkers still wore their armbands and faced suspensions from school. A federal district court ruled against them, a decision affirmed by a deadlocked Eighth Circuit. The Tinkers' last shot was at the Supreme Court. They prevailed by a 7-2 vote in a decision that remains the seminal student speech decision.[18]

The Court ruled that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[19] While the Court acknowledged that such rights should be interpreted "in light of the special characteristics of the school environment,"[20] the decision was filled with language

[13] Stuart Leviton, Is Anyone Listening to Our Students?: A Plea for Respect and Inclusion, 21 Fla. St. U. L. Rev. 35, 40 (1993).

[14] David L. Hudson, Jr., Let the Students Speak!: A History of the Fight for Freedom of Expression in American Schools 35 (2011).

[15] *Id.* at 45.

[16] David L. Hudson, Jr., Thirty Years of Hazelwood and Its Spread to College and University Campuses, 61 How. L.J. 491, 494 (2018).

[17] Tinker, 393 U.S. at 503.

[18] David L. Hudson, Jr., Losing the Spirit of Tinker v. Des Moines and the Urgent Need to Protect Student Speech, 66 Clev. St. L. Rev. Et Cetera 1, 1 (2018).

[19] Tinker, 393 U.S. at 506.

[20] *Id.*

about the value of freedom of expression for young persons.[21] Consider the following passages from Justice Abe Fortas's majority opinion:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble.[22]
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> . . .
>
> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[23]
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> . . .
>
> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution.[24]
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> . . .
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> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[25]

The Court also established a legal test to determine when student speech qualified for First Amendment protection, reasoning that such speech was protected unless school officials could reasonably forecast that the student speech would cause a substantial

[21] Hudson, Losing the Spirit of Tinker, *supra* note 18, at 4.

[22] Tinker, 393 U.S. at 508.

[23] *Id.* at 508–09 (citation omitted).

[24] *Id.* at 511.

[25] *Id.*

disruption or material interference of school activities[26] or that the student speech would infringe or invade the rights of others.[27] The Court explained that "our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[28]

The Court also explained that school officials needed to be able to point to articulable evidence or at least some facts of disturbance rather than censor or punish student speech based on "undifferentiated fear or apprehension of disturbance."[29] While school officials do not have to wait for an actual riot, they must have some real evidence before censoring student speech.

The *Tinker* decision was the high-water mark of student First Amendment rights.[30] In the 1980s, the Court first carved out an exception for student speech that was vulgar and lewd in *Bethel School District v. Fraser*.[31] The case involved a student who delivered a speech before the school assembly nominating a fellow student for vice president.[32] The speech read in part:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary . . . he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.[33]

[26] *Id.* at 509.

[27] *Id.* at 508.

[28] *Id.* at 509.

[29] *Id.* at 508.

[30] Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1534 (E.D. Va. 1992).

[31] 478 U.S. 675 (1986).

[32] *Id.* at 687 (Brennan, J., concurring).

[33] *Id.* (ellipses omitted).

The speech contained sexual references and caused giggles among the student body—but no real disruption. Nevertheless, school officials suspended the offending student, Matthew Fraser. Fraser prevailed before a federal district court and federal appeals court, but school officials appealed and prevailed before the Supreme Court by a 7-2 vote. The Court ruled that public school officials can teach students "the boundaries of socially appropriate behavior"[34] and that includes teaching students not to utter vulgar and lewd language at school.[35] The decision distinguished the political speech of *Tinker* from what it termed the "sexual" speech of Matthew Fraser.

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court created another exception for so-called school-sponsored student speech, such as the expression in many school newspapers, school plays, or school curricular activities.[36] The case involved a school principal censoring two stories that dealt with teen pregnancy and the impact of divorce upon teens.[37] Principal Robert Eugene Reynolds feared that the article on teen pregnancy would lead to social ostracism for the school's pregnant students and was concerned that the divorce article contained quotes from teens about their parents.[38] He ordered the two articles excised from the school's newspaper, to the consternation of the students, including female student editors Cathy Kuhlmeier, Lee Ann Tippett-West, and Leslie Smart.[39]

The Court held that public school officials can censor school-sponsored student speech when they have a legitimate educational reason to do so.[40] Justice Byron White proclaimed, "we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[41] The Court seemingly took this rational

[34] *Id.* at 681.

[35] *Id.*

[36] 484 U.S. 260 (1988).

[37] *Id.* at 263.

[38] *Id.*

[39] William H. Freivogel, "Supreme Court's Rulings Limit Rights of Students," St. Louis Post-Dispatch, Jan. 17, 1988, at 8C.

[40] Hazelwood, 484 U.S. at 273.

[41] *Id.* at 272.

basis–type standard from one of its cases the year before, *Turner v. Safley*.[42] In this prisoner case, the Court proclaimed that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[43] One year later in *Hazelwood*, the Court seemingly substituted "pedagogical" for "penological" and, thus, student First Amendment rights are based on prisoner rights.[44]

This very broad standard in *Hazelwood* included concerns such as avoiding poorly written articles; articles that are inadequately researched; and articles that are prejudiced, vulgar, or "unsuitable for immature audiences."[45] In response, several states passed so-called anti-*Hazelwood* statutes that provide greater statutory protection for students' First Amendment rights.

Nearly 20 years later, the Court established another exception to the *Tinker* standard in *Morse v. Frederick*, an unusual case involving a high school student from Alaska who displayed a "Bong Hits 4 Jesus" banner on a public street right near his high school.[46] Joseph Frederick decided to conduct his ultimate free-speech experiment. He skipped school and went across the street from his public high school where he knew the Olympic Torch Relay was passing. Frederick and several other students displayed the unusual banner with the words "Bong Hits 4 Jesus" written in duct tape. Principal Deborah Morse was less than pleased and rushed across the street, ordering the students to drop the banner. All but Joseph Frederick complied.

Later that day, Frederick went to Principal Morse's office as instructed, where she imposed a five-day suspension. He allegedly quoted Thomas Jefferson to her: "speech limited is speech lost." Morse then doubled the suspension to 10 days.[47]

The Court ruled that public school officials can prohibit student speech that they reasonably regard as advocating the illegal use of drugs.[48]

[42] 482 U.S. 78 (1987).

[43] *Id.* at 89.

[44] Hudson, Let the Students Speak, *supra* note 14, at 99.

[45] Hazelwood, 484 U.S. at 271.

[46] 551 U.S. 393 (2007).

[47] Hudson, Let the Students Speak, *supra* note 14, at 109.

[48] Morse, 551 U.S. at 409.

Thus, the Court created a broad protective standard for student speech in *Tinker* and then gradually carved out three exceptions to that ruling. The question was whether the Court would create another exception for student social media expression created off campus. It was a question that the Court had assiduously avoided for years, leading to some division in the circuits.[49] Some courts applied the *Tinker* test as long as they found a clear enough "nexus" or connection between school activities and a student's social media post. Other courts seemingly applied a reasonable foreseeability test. And ultimately, one circuit—the Third Circuit—determined that the *Tinker* test did not apply at all to such speech.[50]

II. *Mahanoy Area School District v. B.L.*

A high school freshman known in court papers as "B.L." (later voluntarily identified as Brandi Levy) was upset at failing to make her varsity cheerleading squad and for not earning the position of choice on a local softball team not affiliated with her high school.[51] One Saturday afternoon, B.L. was with a friend outside a local convenience store when she learned she had not made the varsity squad. She posted a picture on Snapchat of her and a friend with middle fingers raised and the following message: "Fuck school fuck softball fuck cheer fuck everything."[52] She also posted a blank image with the caption, "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?"[53]

A student who saw the post took pictures of the post and showed it to her mother, who was a cheerleading coach.[54] Ultimately, the coaches and other school officials determined that B.L. should be suspended from the cheerleading squad for a year.[55] Even though

[49] See David L. Hudson, Jr., Time for the Supreme Court to Address Off-Campus, Online Student Speech, 91 Or. L. Rev. 621 (2012).

[50] See Benjamin A. Holden, Tinker Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech, 28 Fordham Intell. Prop. Media & Ent. L.J. 233 (2018).

[51] Mahanoy, 141 S. Ct. at 2041.

[52] *Id.* at 2043.

[53] *Id.*

[54] *Id.*

[55] *Id.*

B.L. had apologized, the officials still imposed the harsh penalty. B.L. and her parents sued in federal district court, alleging a violation of her First Amendment free-speech rights. The court ruled in favor of B.L., reasoning that school officials failed to show that the social media post would cause a substantial disruption under *Tinker*.[56] The district court judge reasoned that "[t]he interest that a school or coach has in running a team does not extend to off-the-field speech that, although unliked, is unlikely to create disorder on the field."[57]

On appeal, the Third Circuit affirmed but ruled that the *Tinker* standard did not apply to off-campus student speech.[58] The Third Circuit wrote, "We hold today that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[59] One judge on the panel concurred in the result, finding that school officials failed to show that the post would cause a substantial disruption under *Tinker*.[60]

The school district appealed, contending that the Third Circuit went too far in categorically ruling that *Tinker* did not apply to off-campus student speech. The Supreme Court agreed that the Third Circuit went too far but still ruled in favor of B.L. Writing for the majority, Justice Stephen Breyer explained that the school retains some regulatory interests in off-campus student speech. He wrote:

> The school's regulatory interests remain significant in some off-campus circumstances. . . . These include serious or severe bullying or harassment targeting specific individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.[61]

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

[57] *Id.* at 443.

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

[59] *Id.* at 189.

[60] *Id.* at 197 (Ambro, J., concurring in the judgment).

[61] Mahanoy, 141 S. Ct. at 2045.

Interestingly, Breyer did not "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community."[62]

However, Breyer identified "three features of off-campus speech" that show school officials have a diminished regulatory interest in such speech. These features include:

(1) Schools do not act in loco parentis with regard to off-campus speech. "Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[63]
(2) School officials would have to serve as monitors of speech that takes place 24 hours a day and that could encompass much political or religious speech that should be protected.[64]
(3) Schools have an interest in protecting unpopular student speech, because "public schools are the nurseries of democracy."[65]

Applying these features, Breyer found that B.L.'s speech amounted to criticism of government officials—the core type of speech the First Amendment is supposed to protect.[66] Furthermore, B.L. spoke outside of school hours from a location outside of school.[67] She also did not identify her school in her posts or target any specific individual.[68]

School officials argued they had a strong interest against vulgarity, but the Court reasoned that this "anti-vulgarity interest is weakened considerably by the fact that B.L. spoke outside the school on her own time."[69] The Court noted that "the school has presented no

[62] *Id.*
[63] *Id.* at 2046.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 2046–48.
[67] *Id.* at 2047.
[68] *Id.*
[69] *Id.*

evidence of any general effort to prevent students from using vulgarity outside the classroom."[70]

The Court also focused on the fact that the post simply did not create a substantial disruption at school, identifying the deposition testimony of a cheerleading coach who when asked if the post created such a disruption, responded "no."[71] The school had argued that such a post could substantially disrupt team morale, but there was no evidence of a "serious decline" in team morale.[72]

Justice Samuel Alito, joined by Justice Neil Gorsuch, authored a concurring opinion that emphasized the importance of parental rights, writing, "Parents do not implicitly relinquish all that authority when they send their children to a public school."[73] Alito agreed that there is some student social media speech for which school officials retain regulatory interests. Perhaps most interesting, however, he warned that "[b]ullying and severe harassment are serious (and age-old) problems, but . . . are not easy to define with the precision required for a regulation of speech."[74]

Justice Clarence Thomas was the Court's lone dissenter—no surprise given that he previously authored a concurring opinion in *Morse v. Frederick* calling for the overruling of *Tinker*, writing that it "is without basis in the Constitution."[75] According to Thomas, "in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order."[76]

Justice Thomas once again cited older student speech cases for the principle that, historically, public school officials could punish students even for off-campus speech. He mentioned at some length an 1859 Vermont Supreme Court decision, *Lander v. Seaver*,[77] involving a student who was whipped by a teacher for calling the teacher names

[70] *Id.*

[71] *Id.* at 2048.

[72] *Id.*

[73] *Id.* at 2053 (Alito, J., concurring).

[74] *Id.* at 2057.

[75] Morse, 551 U.S. at 410 (Thomas, J., concurring).

[76] *Id.* at 412 (Thomas, J., concurring).

[77] 32 Vt. 114 (1859).

outside of school.[78] The Vermont high court reasoned that school officials can punish students for off-campus speech that has "merely a remote and indirect tendency to harm."[79]

III. Unanswered Questions

The Court's decision leaves many unanswered questions. For one, the Court never really defined off-campus speech or explained precisely the boundaries between on-campus and off-campus speech. Obviously, B.L.'s speech took place off campus—outside the Cocoa Hut on a Saturday afternoon. But there exists the possibility that speech created off campus might come on campus or be treated as on-campus speech. For example, a student could post on social media while off campus, then others actively distribute or share the post while on campus.

More litigation over these boundaries is likely. Free-speech expert Catherine J. Ross explains:

> The Supreme Court's failure to define off-campus speech and to provide guidance to school administrators and lower courts about whether, when, and on what grounds schools may regulate and punish students for what they say on their own time from their own equipment, is likely to lead to much additional litigation—and to even more incidents in which schools punish off-campus expression that never reach a court.[80]

Another unsettled question is how to handle Breyer's "three features" of student speech. Lawyers are familiar with multifactor or multiprong tests, but that is not what Breyer delivered in his opinion. He specifically referred to three features. One would think that the three features mean that many school districts will take a more hands-off approach when it comes to much online, off-campus student speech. That certainly would appear to be a primary lesson of Breyer's opinion, but only time will tell if that's the case.

However, Breyer—as mentioned earlier—did explain that school districts retain regulatory authority over several types of speech.

[78] 141 S. Ct. at 2060 (Thomas, J., dissenting).

[79] Lander, 32 Vt. at 20–21.

[80] Catherine J. Ross, "One 'Vulgar' Cheerleader Vindicated—But Other Students May Still Face Discipline for Off-Campus Speech," First Amend. Watch, July 6, 2021, https://bit.ly/3ypTxU9.

The first category mentioned was "serious or severe bullying or harassment targeting particular individuals."[81] Most states have laws that require schools to address both bullying and cyberbullying in their codes of conduct.[82] One question is when such bullying or harassment is considered "serious or severe." Another is what does it take to target a particular individual. One could conceive of student social media posts that mainly address grievances or the venting of frustration but that also may name a particular individual. In other words, student social media speech could mainly be protected unpopular expression but also might involve the specific targeting required to constitute bullying or harassment. Justice Alito offered another trenchant observation regarding laws or policies targeting bullying and harassment, noting that it is quite difficult to draft such laws with the required precision.

A related unsettled question is when does student speech invade or infringe on the rights of others. Presumably, speech that constitutes severe harassment would fall into this category, but the Court has never explained or fleshed out this language from *Tinker*.[83] A few lower courts have delved into this issue, but it remains the "forgotten" part of *Tinker*.[84] Then-Judge Alito of the Third Circuit expressed it well when he wrote, "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear."[85]

Another unanswered question concerns student social media speech that does have more of an impact on a team or extracurricular activity. Justice Breyer made much of the fact that one of B.L.'s cheerleading coaches candidly acknowledged that her post did not cause a substantial disruption. But what if coaches or team members claim that a student's post did cause much more of a disruption of team morale?

[81] Mahanoy, 141 S. Ct. at 2045.

[82] David L. Hudson, Jr., Freedom of Speech and Cyberbullying, 50 N.M. L. Rev. 287, 292 (2020).

[83] David L. Hudson, Jr., Unsettled Questions in Student Speech Law, 22 U. Pa. J. Const. L. 1113, 1121 (2020).

[84] *Id.* at 1121. See also David L. Hudson, Jr., "Tinkering with Tinker Standards?," Freedom F., Aug. 9, 2006, https://bit.ly/2TSembG (referring to the invasion of the rights of others as the "forgotten part" of the *Tinker* case).

[85] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d. Cir. 2001).

Still another unanswered question concerns a school that has made combatting vulgarity and profanity part of its mission, even vulgarity and profanity uttered off campus. Justice Breyer emphasized that there was no evidence that the school district in *Mahanoy* had emphasized problems of off-campus vulgarity. But what if a school district has started some anti-profanity campaign? Would that lead to a different result?

Conclusion

While critics may contend that Justice Breyer's opinion in *Mahanoy* left much to be desired, it remains a victory for student rights. It remains the first pure student speech case in which the U.S. Supreme Court has ruled in favor of the student litigant since *Tinker* itself. Furthermore, Justice Breyer's opinion recognizes the animating spirit of the *Tinker* decision, that free-speech protection "must include the protection of unpopular ideas, for popular ideas have less need for protection."[86]

Justice Breyer's opinion quoted Justice Fortas's language in *Tinker* about students not losing their free-speech rights at the schoolhouse gate, recognized that school officials must be able to point to student speech causing a substantial disruption before censoring it, and emphasized that school officials must rely on actual facts rather than "undifferentiated fear or apprehension of disturbance."[87]

The decision also can be viewed as a victory for parental rights. The Court ultimately determined that it was B.L.'s parents who should have the primary disciplinary authority over her offensive postings on social media rather than school officials. Both Justice Breyer's majority opinion and Justice Alito's concurring opinion mention that most social media speech posted off campus falls within the zone of parental, rather than school, authority.

The Supreme Court identified several areas of student speech—even off campus—that will still arguably fall within the zone of school officials' regulatory authority. Some may question the wisdom of the Court's decision to protect a speaker who, like Paul Robert Cohen 50 years earlier, used profanity to convey a message.

[86] Mahanoy, 141 S. Ct. at 2046.

[87] David L. Hudson, Jr. "Students, Parents, and Free Speech Win in Cheerleading Case," Freedom F., June 30, 2021, https://bit.ly/37lFTWc.

But the Court's decision in *Mahanoy* holds true to what Justice Fortas famously proclaimed back in *Tinker*:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[88]

Mahanoy, whatever its shortcomings, remains a victory not only for student and parental rights but also for individual liberty and the hazardous freedom spoken of in *Tinker*. A decision in favor of the school district could have led to an Orwellian, 24-hour-a-day monitoring of student social media posts, and turned school officials into the social media police.

[88] Tinker, 393 U.S. at 508–09 (citation omitted).