MAHANOY AREA SCHOOL DISTRICT V. B.L.: KEEPING OFF-CAMPUS SPEECH OFF LIMITS

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INTRODUCTION

An old Talmudic adage on the power of gossip provides: "The gossiper stands in Syria and kills in Rome."[2] In other words, regardless of where a speaker is physically situated, the effects of their words can be heard and felt from a distance away.[3] This aphorism captures the impact the digital revolution has had on the way people communicate and interact with one another in the modern era.[4] Digital technology and social media have enabled millions to engage with one another through a plethora of virtual fora irrespective of their geographic location.[5] These modern inventions have been particularly instrumental during the COVID-19 pandemic, where they have provided individuals with the means to connect with others during a time of remote interaction and social distancing.[6]

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[2] RABBI JOSEPH TELUSHKIN, JEWISH WISDOM: ETHICAL, SPIRITUAL, AND HISTORICAL LESSONS FROM THE GREAT WORKS AND THINKERS 66 (1994).

[3] *See id.* at 66–67.

[4] Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 844–45 (2016); Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 CAMPBELL L. REV. 1, 1–3 (2013).

[5] Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-Campus Online Speech in the Age of Social Media*, 52 WILLIAMETTE L. REV. 405, 409–10 (2016); Joshua Rieger, Note, *Digitizing the Schoolhouse Gate: Protecting Students' Off-Campus Cyberspeech by Switching the Safety on* Tinker*'s Trigger*, 70 FLA. L. REV. 695, 730 (2018); Steve Varel, Comment, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 424–25 (2013).

[6] *See* Colleen McClain, Emily A. Vogels, Andrew Perrin, Stella Sechopoulos, & Lee Rainie, *The Internet and the Pandemic*, PEW RSCH. CTR. (Sept. 1, 2021), https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/ (finding that 90% of adults considered Internet access important during the pandemic).

Nowhere have the effects of the digital revolution been more profound than on the lives of teenagers.[7] Internet memes, TikTok videos, and wittily-titled hashtags have become emblematic phenomena of youth culture in the 21st century.[8] In 2022, 95% of teenagers had access to a smartphone, 97% "use[d] the Internet daily," and 46% used the Internet "almost constantly," all of which represented increases since the mid-2010s.[9] Social media usage also surged during the height of the COVID pandemic as teenagers turned to online platforms as substitutes for in-person interaction.[10]

Given the prevalent use of social media among teenagers and the ever-growing pervasiveness of the Internet, educational institutions have had to grapple with the intricate task of managing student speech that takes place online.[11] On the one end, social media has served as an invaluable conduit for student expression, providing teenagers with the opportunity to voice their opinions on issues of decisive import.[12] However, social media has also provided some students with a platform to bully, harass, and intimidate others.[13] Moreover, online discussions regarding controversial topics or school-related issues can potentially spill over into the physical

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[7] Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1032 (2008).

[8] Jennifer L.W. Fink, *The Role of Memes in Teen Culture*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/well/family/memes-teens-coronavirus-wwiii-parents.html; Patrick St. Michel, *TikTok Video App Has Become a Petri Dish for Youth Culture*, JAPAN TIMES (Aug. 25, 2018), https://www.japantimes.co.jp/news/2018/08/25/national/media-national/tiktok-video-app-become-petri-dish-youth-culture/.

[9] Emily A. Vogels, Risa Gelles-Watnick, & Navid Massarat, *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/.

[10] Brief of National School Boards Association et al. as Amici Curiae in Support of Petitioner on Petition for Writ of Certiorari at 18, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255); Sophia Greiper, *Teen Spotlight: In Pandemic Times, Social Media Fills the Void*, SNOWMASS SUN (Feb. 24, 2021), https://www.aspentimes.com/snowmass/teen-spotlight-in-pandemic-times-social-media-fills-the-void/.

[11] Varel, *supra* note 5, at 425.

[12] Brief of The Electronic Frontier Foundation et al. as Amici Curiae Supporting Respondents at 14–15, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) [hereinafter Brief of The EFF et al.].

[13] Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 414–15 (2011).

school environment.[14] Hence, the attempt to thoroughly flesh out when school officials can exercise their authority over students' off-campus cyberspeech has proven to be a difficult endeavor.

In the seminal case *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that students do not relinquish their First Amendment rights when passing through the schoolhouse gate.[15] However, recognizing that schools possess "special characteristics" that other forums do not, it also held that students' speech rights can be circumscribed in limited circumstances.[16] With the advent of digital technology, lower courts scrambled to establish standards for when school officials could properly regulate student speech that occurred off-campus.[17] In its first ruling on the issue, the Supreme Court narrowly held in *Mahanoy Area School District v. B.L.* that a high school violated a student's First Amendment rights when it suspended her from the school's cheerleading team for posting a profanity-laced Snapchat post while the student was away from school.[18] Although the Court arrived at a reasonable conclusion, its decision provides little assurance that students' speech rights will remain protected in future cases. The Court should have held that off-campus speech, i.e., speech that is made outside of the school's supervisory authority, is entitled to full First Amendment protection. While it is unquestionable, as the aforementioned Talmudic passage cautions, that words can have "profound unsettling effects,"[19] they still constitute a fundamental form of human expression. That attribute should guarantee their rigorous protection from undue attempts to curtail or penalize their usage.

Part I of this Comment provides an overview of the Supreme Court's student speech cases and the various approaches lower courts had taken prior to *B.L.* in addressing off-campus student speech. In Part II, this Comment reviews the Supreme Court's ruling in *B.L.* In Part III, this

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[14] *Id.* at 408; Rieger, *supra* note 5, at 730 ("The increasing rates of wireless-technology ownership and use make off-campus cyberspeech only that much easier to access and bring inside the schoolhouse gate.").
[15] 393 U.S. 503, 506 (1969).
[16] *Id.* at 513 (holding that student expression can be regulated if it causes a substantial disruption to the school environment).
[17] *See infra* Section I.B; *see also* Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 578 (2009).
[18] 141 S. Ct. 2038, 2043 (2021).
[19] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

Comment argues why the Supreme Court should have held that a student's off-campus speech is entitled to complete First Amendment protection.

I. BACKGROUND

This Part provides an overview of the development of the Supreme Court's student speech case law. Section I.A discusses the major student speech cases decided by the Court prior to its ruling in *B.L.* Section I.B details how lower courts had gone about resolving issues pertaining to off-campus student speech.

A. The Supreme Court and Student Speech: A History of Jurisprudential Tinkering

1. *Tinker v. Des Moines Independent Community School District* (1969)

The Supreme Court's foray into the realm of student speech began in the landmark case *Tinker v. Des Moines Independent Community School District*.[20] In *Tinker*, a group of students were suspended from their respective schools for wearing black armbands signaling their opposition to the United States' involvement in the Vietnam War.[21] In its renowned ruling, the Court proclaimed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[22] While recognizing that students' First Amendment rights must be applied "in light of the special characteristics of the school environment,"[23] the Court simultaneously stressed that students are free-thinking individuals entitled to the constitutional guarantees of the First Amendment.[24] According to the Court, the students' symbolic expression was the type of "pure speech" that typically received paramount protection under the First Amendment.[25] The Court also placed particular emphasis on the silent and passive nature of the students' conduct, remarking that their expressive activity, aside from sparking conversation outside of the classroom, did not result in any substantial interference with school operations.[26]

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[20] 393 U.S. 503 (1969).
[21] *Id.* at 504.
[22] *Id.* at 506.
[23] *Id.*
[24] *Id.* at 511.
[25] *Id.* at 505–06.
[26] *Id.* at 508.

Furthermore, the Court held that a school's ability to regulate student expression cannot be predicated solely on a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[27] To the contrary, a student's expressive conduct must "materially and substantially disrupt the work and discipline of the school" to justify discipline by school authorities.[28] Although the school officials argued that they feared the students' conduct would generate a substantial disturbance, the Court perceived their apprehension as more indicative of an attempt to avoid the discomfort associated with the expression of a controversial viewpoint than of a genuine fear of substantial disruption to school functions.[29] Thus, the Court held that unless school officials can reasonably forecast a substantial disruption to school operations, a student's expressive conduct is protected under the First Amendment.[30]

2. *Bethel School District No. 403 v. Fraser* (1986)

While the Court's ruling in *Tinker* firmly established that students do not forfeit their First Amendment rights when attending school, the Court's subsequent student speech cases began carving out additional exceptions to that rule. In *Bethel School District No. 403 v. Fraser*, the Court ruled that a school could discipline a student for making a speech containing sexual innuendos during a school assembly.[31] In reaching its conclusion, the Court engaged in an extensive discussion regarding the critical role schools play in molding the civic character of young, highly-impressionable adolescents.[32] It noted that public schools are responsible for inculcating students with the values necessary for a functioning democratic society.[33] Although the Court acknowledged that schools must tolerate differing viewpoints and unpopular speech, it also noted that schools cannot ignore the "sensibilities of fellow students."[34] Thus, the Court held that a school must balance a student's ability to espouse controversial viewpoints "against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[35]

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[27] *Id.* at 509.
[28] *Id.* at 513.
[29] *Id.* at 509–10.
[30] *Id.* at 509.
[31] 478 U.S. 675, 685 (1986).
[32] *Id.* at 681.
[33] *Id.*
[34] *Id.*
[35] *Id.*

Furthermore, the Court maintained that just because an adult could have made the same speech in another setting without any constitutional strictures did not entail that Fraser was free to deliver his lewd speech at a school assembly and expect the First Amendment to immunize his conduct.[36] As the Court recognized, the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[37] and because of the unique societal interests that a school must advance, it can "prohibit the use of vulgar and offensive terms in public discourse."[38] The Court reasoned that if schools allowed students to use crude language under their guise, that permissiveness would interfere with their ability to teach students how to cultivate the "habits and manners of civility."[39] Therefore, rather than applying the "substantial disruption" standard formulated in *Tinker*, the Court held that student speech containing lewdness or vulgarity is undeserving of First Amendment protection when made in a school setting.[40]

3. *Hazelwood School District v. Kuhlmeier* (1988)

The Court yet again chipped away at the protections for students' speech rights in *Hazelwood School District v. Kuhlmeier*.[41] In this case, the Court held that a principal was justified in refusing to publish two student articles for the school newspaper because the articles failed to comply with the school's journalistic standards and discussed topics that were deemed inappropriate for younger students.[42] The Court determined that the school newspaper was not a public forum that the school had opened for indiscriminate public use.[43] Therefore, the school could implement reasonable restrictions to ensure that the forum was being used for its intended scholastic function.[44]

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[36] *Id.* at 682.
[37] *Id.*
[38] *Id.* at 683.
[39] *Id.* at 681, 683.
[40] *Id.* at 683, 685.
[41] 484 U.S. 260, 274 (1988).
[42] *Id.* Specifically, the school's principal testified that one of the articles, which discussed teen pregnancy, did not adequately protect the privacy rights and identities of the students mentioned in the article. *Id.* Furthermore, in an article discussing divorce, the principal believed it would be unfair to allow the student who was interviewed to criticize her father without providing the latter with a fair opportunity to respond to the comments made. *Id.* at 275.
[43] *Id.* at 270.
[44] *Id.* at 268–70.

In addition, the Court drew a distinction between speech that a school has to tolerate on its premises and speech that it affirmatively promotes.[45] According to the Court, the armbands in *Tinker* represent the former, while school-sponsored activities, such as managing a school newspaper, fall into the latter category.[46] Because school-sponsored activities bear the imprimatur of the school and "may fairly be characterized as part of the school curriculum," the Court concluded that schools should have greater leeway to regulate student speech disseminated through school-supervised channels.[47] So long as the school's regulations are "related to legitimate pedagogical concerns," the Court held that schools can regulate speech conveyed through a school-supervised medium.[48] Thus, *Kuhlmeier* represented another instance where the Court refrained from applying *Tinker*'s "substantial disruption" test to the student speech in question and opted instead for exempting speech that takes place in a school-sponsored activity from full First Amendment protection.[49]

4. *Morse v. Frederick* (2007)

The final case in the Court's quartet of on-campus student speech decisions is *Morse v. Frederick*, where the Court categorically excluded student speech that promotes the use of illegal drugs from the First Amendment's ambit of protection.[50] In this case, a school allowed students to leave school and attend a school-approved class trip to witness the Olympic Torch Relay.[51] A group of students, standing across the street from the school, displayed a large banner reading: "BONG HiTS 4 JESUS."[52] The school principal, who was standing on the opposite side of the street, approached the students and requested that they remove the sign because the banner's message violated the school's policy on illicit drug use.[53]

Unlike in the Court's previous cases, the conduct here did not occur at the school itself or through a school-sponsored publication, but across the street from the school and during an event sanctioned by school officials.[54] Although the Court acknowledged that there existed "some uncertainty at

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[45] *Id.* at 270–71.
[46] *Id.* at 271.
[47] *Id.*
[48] *Id.* at 273.
[49] *Id.* at 272–73.
[50] 551 U.S. 393, 403 (2007).
[51] *Id.* at 397.
[52] *Id.*
[53] *Id.* at 398.
[54] *Id.* at 397.

the outer boundaries as to when courts should apply school speech precedents," it was clear in this case that the school could require Frederick to take down the banner.[55] Frederick engaged in the expression during school hours and during a school-supervised trip, where the school still retained authority over his conduct.[56] Moreover, the banner was directed towards the school, where it was visible to other students and teachers.[57]

Regarding the substance of the speech itself, the Court concluded that it was reasonable for the school to read the banner as promoting the consumption of marijuana as opposed to merely being a "meaningless and funny" phrase used in a lighthearted attempt to gain attention from those viewing the procession.[58] Elaborating on why schools could regulate this specific type of speech at all, the Court recognized the debilitating effects drug use can have on adolescents, and it acknowledged that schools have a substantial interest in conveying that pertinent information to students.[59] In light of these weighty interests, the Court held that school administrators can punish students for engaging in speech that can reasonably be perceived as advocating for the use of illegal drugs.[60]

B. Circuit Circus: Multi-Jurisdictional Approaches to Off-Campus Speech

While the Supreme Court prescribed rules for student speech that occurred at the school itself or when the school retained supervisory authority over a school-related function or activity, it provided little guidance on how its precedents applied when a student's speech was made off-campus.[61] Thus, lower courts in the pre-*B.L.* era were left to improvise with the Court's case law when adjudicating off-campus speech cases, resulting in the concoction of a diverse assortment of legal tests by multiple

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[55] *Id.* at 401. Even though the speech did not occur on physical school grounds, the Court nevertheless decided to treat the speech as if it did occur on-campus, thereby avoiding the question of whether the Court's student speech cases extended to speech that occurred off-campus. Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of* Tinker *in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 904 (2012).
[56] *Morse*, 551 U.S. at 400–01.
[57] *Id.* at 401.
[58] *Id.* at 402.
[59] *Id.* at 408.
[60] *Id.* at 410.
[61] Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 730 (2018); Lindsay Foley, Note, *Tinkering with Student Speech: Balancing the Protection of Students' First Amendment Rights with a School's Duty to Protect*, 52 SUFFOLK U. L. REV. 459, 470 (2019).

jurisdictions.[62] In particular, the prolific use of social media and new communicative technologies among students compounded the issue by obscuring the geographic-based divide between on-campus and off-campus speech.[63] Thus, the emergence of off-campus cyberspeech posed a daunting challenge for lower courts attempting to define the precise parameters within which schools could exercise their authority over students' off-campus speech.[64]

For the circuit courts that addressed this issue prior to the Court's ruling in *B.L.*, most agreed that *Tinker*'s "substantial disruption" test was the appropriate standard to apply when determining whether a student could be punished for their off-campus speech.[65] However, the courts disagreed

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[62] Foley*, supra* note 61, at 472; David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1130 (2020); John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying* Tinker *in the Internet Age*, 39 PEPP. L. REV. 939, 941 (2012); Marc J. Herman, Note, *"Super Schools"—A New Generation of Narcissism and Unlawful Attempts to Police Students' Off-Campus Speech*, 32 QUINNIPIAC L. REV. 389, 405 (2014).

[63] Ceglia, *supra* note 62, at 940. Prior to the widespread popularity of digital media, many off-campus speech cases involved issues such as off-campus student publications. *See* William Calve, Comment, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L.J. 377, 384 (2016) (discussing two circuit court cases involving the dissemination of students' off-campus writings). Courts were much more likely to rule in favor of students when school administrators attempted to extend their authority to off-campus speech. *Id.* at 384–85; *see also* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020) ("The consensus in the analog era was that controversial off-campus speech was not subject to school regulation . . . ."). However, the ubiquitous nature of the Internet significantly altered the way in which courts approached off-campus speech cases. *See* Samantha M. Levin, Note, *School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students' Online Speech*, 38 FORDHAM URB. L.J. 859, 870–71 (2011) ("Due to the advent of the Internet, lower court opinions have shifted away from a bright line standard according to which off campus speech is afforded full First Amendment protection, to a broader approach not limited by the physical characteristics of the speech."); Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Speech*, 82 FORDHAM L. REV. 3395, 3418–19 (2014) (discussing how modern technology has challenged the traditional on-campus/off-campus approach lower courts had previously taken).

[64] *See* Papandrea, *supra* note 7, at 1029 ("Around the country, increasing number of courts have been forced to confront the authority of public schools to punish students for speech on the Internet."); Herman, *supra* note 62, at 411 ("With social networking continuing to become a hallmark of twenty-first century society, the law pertaining to off-campus expression is becoming increasingly important.").

[65] Allison N. Sweeney, Note, *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 (2018).

on the underlying conditions needed to trigger *Tinker*'s application.[66] Several circuit courts made *Tinker*'s applicability contingent on the fulfillment of a general threshold standard.[67] Specifically, a school needed to show that it possessed regulatory authority over the student's off-campus speech by establishing a sufficient link between the speech in question and the school environment.[68] For instance, both the Second and Eighth Circuits employed a "reasonable foreseeability" test, whereby the court examined whether there was a reasonably foreseeable risk that a student's off-campus speech would find its way to the school or come to the attention of school officials.[69] Once this prerequisite had been satisfied, the court then looked to whether the speech was "substantially disruptive."[70] The Fourth Circuit also required a general threshold to be met before *Tinker* could apply to off-campus speech; however, it adopted a "close nexus" test, which required that the off-campus speech be "sufficiently connected" to the school's pedagogical interests before the "substantial disruption" standard could be applied.[71] The Ninth Circuit initially refrained from adopting any particular threshold standard used by these courts, instead taking an accommodationist route and incorporating both the "reasonable foreseeability" and "close nexus" tests into its fact-specific methodology.[72] However, the court eventually settled on a "sufficient nexus" test, relying on a set of factors to

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[66] Rieger, *supra* note 5, at 709; Calve, *supra* note 63, at 386.
[67] Foley, *supra* note 61, at 470–72.
[68] *Id.* at 470–71.
[69] Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–39 (2d Cir. 2007) (holding that it was reasonably foreseeable that a student's AOL instant messaging icon containing a drawing depicting one of his teachers being shot would come to the attention of school officials); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) (holding that it was reasonably foreseeable that a student's incendiary blog post regarding the alleged cancellation of a school event would come to the attention of school administrators); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012) (holding that school officials could punish two brothers who wrote blog posts containing offensive and racist remarks about other students on a website they created because it was reasonably foreseeable that the posts would reach the school).
[70] *Wisniewski*, 494 F.3d at 40; *Doninger*, 527 F.3d at 50–52; *S.J.W.*, 696 F.3d at 778.
[71] Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (holding that a school was justified in suspending a student for creating a MySpace discussion group used to denigrate another student because of the strong link between the online group and the school's interest in overseeing the well-being of the student body).
[72] Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (holding that both threshold tests were met when a student wrote disturbing messages on his MySpace account about committing a mass shooting); C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016) (holding that both threshold standards were satisfied when a student mocked and sexually harassed two students with disabilities while walking home from school).

determine when a school possessed authority over a student's off-campus speech.[73]

In contrast to the "general threshold" jurisdictions, other circuit courts took a case-by-case approach to off-campus speech cases, recognizing the difficulty in constructing an all-encompassing standard that courts could apply across a broad slew of cases.[74] In these jurisdictions, courts typically identified a particular category of off-campus speech that warranted *Tinker*'s application.[75] For example, the Fifth Circuit held that *Tinker* applied in situations where a student "intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher . . . ."[76] Similarly, the Ninth Circuit found that off-campus speech that contained an identifiable threat of school violence was subject to *Tinker*.[77] Although the Ninth Circuit later adopted a standard akin to those in the "general threshold" jurisdictions, it held that speech containing a "credible, identifiable threat of school violence" would always serve as a sufficient nexus between a student's off-campus speech and the school environment.[78]

Finally, the Third Circuit took an altogether different approach from its sister circuits. In a case involving a student who was punished for creating an unflattering MySpace profile of her principal from her home computer,[79] the court assumed, without deciding, that *Tinker* applied to the student's speech.[80] The school district in that case conceded that there was no actual disruption at the school, and the court found that there was no factual basis to support the school district's contention that it could have

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[73] McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019). Those factors included: "(1) the degree and likelihood of harm to the school caused or augured by the speech . . . (2) whether it was reasonably foreseeable that the speech would reach and impact the school . . . (3) and the relation between the content and context of the speech and the school . . . ." *Id.* (citations omitted).

[74] *See Wynar*, 728 F.3d at 1069 ("One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech.").

[75] *See* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (en banc) ("[I]n holding *Tinker* applies to the off-campus speech in this instance, because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits.").

[76] *Id.* (holding that a school could punish a student for creating a rap containing threats to two coaches at the student's school and uploading the recording onto his Facebook page).

[77] *Wynar*, 728 F.3d at 1069.

[78] *McNeil*, 918 F.3d at 707–08.

[79] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011).

[80] *Id.* at 926.

reasonably forecasted a disruption because of the account.[81] Thus, the court bypassed the question of whether *Tinker* extended to off-campus speech because it determined that, even if it did apply, the "substantial disruption" standard was not satisfied.[82] However, in its appellate ruling in *B.L. v. Mahanoy Area School District*, the Third Circuit definitively concluded that *Tinker* did not apply to off-campus speech.[83] The court defined off-campus speech as speech that occurs "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[84] If a student's speech met this definition, then traditional First Amendment standards would apply instead of *Tinker*.[85] However, whether *Tinker* applied to off-campus speech that constituted a threat or harassment was a question the court evaded and left to be resolved for another time.[86]

II. *MAHANOY AREA SCHOOL DISTRICT V. B.L.*

This Part discusses the Supreme Court's ruling in *B.L.* Section II.A provides an overview of the facts of the case and the procedural history. Section II.B discusses the majority opinion's decision. Section II.C discusses the concurring opinion's analysis, and Section II.D discusses the dissenting opinion's arguments.

A. Facts and Procedural History

Like any aspiring high school athlete, B.L., a cheerleader at Mahanoy Area High School in Northeastern Pennsylvania, was eager to make her school's varsity team.[87] B.L. was a member of the junior varsity cheerleading team as a freshman, and she hoped to move up the ranks as a sophomore.[88] She was frustrated to learn, however, that she did not make the top team, and she was further upset by the fact that a freshman had made the team instead of her.[89] The Saturday after receiving this disappointing news, B.L. and a friend visited the Cocoa Hut, a store frequented by

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[81] *Id.* at 928.
[82] *See id.*
[83] 964 F.3d 170, 189 (3d Cir. 2020).
[84] *Id.*
[85] *Id.*
[86] *Id.* at 186.
[87] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019).
[88] *Id.*
[89] *Id.* at 432–33.

students in the area.[90] To vent her frustration, B.L. took to Snapchat, a social media app used for taking photos and sharing them with friends.[91] She and her friend took a selfie where they raised their middle fingers to the camera.[92] B.L. also added the following caption to her photo: "f--- school f--- softball f--- cheer f--- everything."[93] B.L. proceeded to post the photo on her Snapchat account, which could only be viewed for a limited amount of time by the 250 friends she had on the app.[94] B.L. posted a subsequent photo on her account, this time with the caption: "Love how me and my friend get told we need a year of jv before we make varsity but that doesn't matter to anyone else?"[95]

Many of B.L.'s friends on the app were fellow students and cheerleaders.[96] One such friend showed the photo to her mother, who happened to be one of the two coaches for the junior varsity cheerleading team.[97] Other students also voiced their consternation with the posts to the two coaches.[98] The coaches eventually decided to suspend B.L. from the team for the year for violating the team's policy prohibiting students from disparaging other team members.[99] While B.L.'s father appealed B.L.'s suspension to the school board, the board refused to inject itself into the controversy, prompting B.L.'s father to file suit on behalf of his daughter in federal district court for declaratory and injunctive relief.[100]

The district court ruled in favor of B.L., finding that the posts did not create a substantial disruption at her school.[101] The Third Circuit Court of Appeals affirmed the district court's decision, holding that the "substantial disruption" test did not apply to off-campus speech.[102] The court determined that B.L.'s speech took place off-campus and therefore could

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[90] *Id.* at 433.
[91] *Id.*
[92] *Id.*
[93] *Id.* The expletives have been removed and replaced with hyphens.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 433.
[101] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043–44 (2021).
[102] *Id.* at 2044.

not be regulated by school officials.[103] The school petitioned the Supreme Court to hear the case, and the Court granted certiorari.[104]

B. Majority Opinion

Justice Breyer delivered the opinion for the Court.[105] Chief Justice Roberts, along with Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett, joined in the opinion.[106] Although the Court disagreed with the Third Circuit's reasoning for why the school exceeded its authority in suspending B.L. from the team, it nonetheless agreed with the lower court's conclusion that the school had violated B.L.'s First Amendment rights.[107]

The Court began its analysis with an overview of its student speech jurisprudence.[108] The Court identified the categories of speech that a school could properly regulate without running afoul of the First Amendment, emphasizing that these exceptions are justified because of the "special characteristics" associated with the school environment.[109] The Court held that these unique attributes do not simply vanish because a student's speech is made off-campus, and it recognized that there are instances when a school may have a legitimate reason for regulating speech outside of the school setting.[110] However, the Court was careful to emphasize that it was not intending to craft a general rule that could be applied to all cases of off-campus speech given that such expression can assume a myriad of forms.[111]

The Court then highlighted three distinct features that differentiate off-campus speech from its on-campus counterpart.[112] First, while school officials stand *in loco parentis*, or "in place of the parent," when a student is at school, the authority to regulate off-campus conduct typically resides with the student's parents.[113] Second, if schools could regulate off-campus

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[103] *Id.*
[104] *Id.*
[105] *Id.* at 2040.
[106] *Id.*
[107] *Id.* at 2043.
[108] *Id.* at 2044–45.
[109] *Id.* at 2045.
[110] *Id.* For instance, the Court noted that a school should be able to punish a student for threatening others on social media or for breaching school devices, regardless of whether such conduct occurred outside of school hours and away from the campus. *Id.*
[111] *Id.*
[112] *Id.* at 2046.
[113] *Id.*

speech in addition to on-campus speech, then, from a student's standpoint, it would appear that school officials could govern "all the speech a student utters during the full 24-hour day," thereby precluding students from engaging in a wide array of expressive activities.[114] Finally, the Court emphasized that a school has an interest in protecting unpopular speech, especially when the speech takes place outside of the school's zone of control.[115] Given these three important features, the Court held that a school's ability to regulate off-campus speech is diminished in comparison to its ability to regulate on-campus speech since the former typically lacks the "special characteristics" associated with the school environment.[116]

The Court proceeded to focus on the specific facts of B.L.'s case.[117] First, it noted that while B.L.'s first post contained profane language, the comment amounted to nothing more than mere criticism of the school, and it "did not involve features that would place it outside the First Amendment's ordinary protection."[118] In addition, when considering the geographic and temporal features of her speech, the Court highlighted that B.L. posted the photos outside of school hours and away from school grounds.[119] Furthermore, she did not call out or target specific students or mention her school directly.[120] Finally, B.L. posted the photos through her own cell phone, not through a channel controlled by the school, and a limited group of people would see the posts for a limited period of time.[121] Given all these attributes of B.L.'s speech, the Court could not conceive how this case implicated the "special characteristics" of the school environment.[122]

The Court then addressed the arguments the school raised to justify B.L.'s punishment.[123] The school's main contention was that it possessed an interest in "prohibiting students from using vulgar language to criticize a school team or its coaches . . . ."[124] The Court divided this argument into

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* (discussing how her speech did not constitute "fighting words" or obscenity as the Court has defined those terms).
[119] *Id.* at 2047.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*

three parts.[125] First, the Court held that while schools may have an interest in "punishing the use of vulgar language aimed at part of the school community," the fact that B.L.'s speech occurred away from the school and "on her own time" diminished this interest.[126] Furthermore, because B.L.'s speech was made outside of the school's supervision, her parents were the proper authorities to police her speech, not the school.[127] The Court also noted that the school did not take any measures to prevent students from using vulgar language outside of school, calling into question the significance of the school's purported interest.[128]

Second, while the school asserted that it was attempting to prevent a substantial disruption from occurring in a school-sponsored extracurricular program, the Court found no evidence that B.L.'s posts did in fact cause such a disturbance.[129] Finally, while the school argued that B.L.'s posts could have negatively impacted team spirit, the Court countered that there was little evidence that the comments dampened morale to such a point where they substantially interfered with the "school's efforts to maintain team cohesion."[130]

Although the Court rejected the invitation to develop a broad standard to be applied in all cases involving off-campus speech, it found that B.L.'s case was too far removed from the school context to permit school officials to regulate her speech, and it found the school's reasons for disciplining B.L. uncompelling.[131] Although the Court recognized that B.L.'s vulgar posts may not be the sort of speech deserving of heightened constitutional protection, it recognized that it is "sometimes . . . necessary to protect the superfluous in order to preserve the necessary."[132]

C. Concurring Opinion

Justice Alito, along with Justice Gorsuch, issued a concurring opinion.[133] Noting that B.L.'s case represented the first time the Court

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 2048.
[131] *Id.*
[132] *Id.*
[133] *Id.* (Alito, J., concurring).

issued a decision regarding off-campus speech, Justice Alito stressed the need to clarify the breadth of the Court's decision.[134]

Justice Alito first inquired into why public schools could abridge students' First Amendment speech rights.[135] He noted that if B.L. were a student at a private school, the government would have lacked the legal authority to regulate her speech in the same manner as a public school.[136] Furthermore, he highlighted that the Court has simply assumed throughout its jurisprudence that the "special characteristics" of the learning environment justify the regulation of student speech without specifying why those characteristics imbue schools with censorial powers at all.[137] From a practical standpoint, Justice Alito answered that it would be nearly impossible to maintain order in schools if students were allowed to engage in any sort of expressive conduct they pleased, and he explained that school officials must possess the requisite authority to restrict student conduct that would unduly interfere with the school's ability to carry out educational instruction.[138]

However, it is not equally obvious why a student's enrollment in a public school would also affect their First Amendment rights when they are away from campus.[139] For Justice Alito, the issue ultimately boils down to the degree of consent that parents provide to school authorities to regulate certain types of student conduct while the student is under the school's supervision.[140] He noted that this issue has typically been evaluated through the lens of the common law doctrine of *in loco parentis*, whereby a parent delegates a portion of their parental authority to a school official for specific purposes.[141] In the context of modern public schooling, Justice Alito surmised that "parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission."[142]

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[134] *Id.* at 2048–49.
[135] *Id.* at 2049–50.
[136] *Id.* at 2050.
[137] *Id.*
[138] *Id.* For instance, Justice Alito noted that teachers must have the authority to prevent students from interrupting each other and to answer questions posed by the teacher. *Id.*
[139] *Id.* at 2050–51.
[140] *Id.* at 2051.
[141] *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765)).
[142] *Id.* at 2052.

However, while a parent may permit school officials to regulate student conduct while a student is at school, Justice Alito contended that it is hardly the case that parents provide those officials with the unilateral authority to regulate student conduct when the student is not under the school's supervision.[143] He recounted how the Court has emphasized on numerous occasions that parents, not the state, bear the primary responsibility of raising and rearing their children.[144] Therefore, the decisive question to ask when determining whether a school can punish a student for speech made off-campus should be whether a student's parents could have "reasonably [been] understood to have delegated to the school the authority to regulate the speech in question."[145]

Justice Alito proceeded to identify the categories of off-campus speech that could potentially be regulated by school officials.[146] The first category includes student expression that occurs in any "temporal or spatial extension of the regular student program," such as the bus ride to and from school or participation on a school field trip.[147] Justice Alito recognized that parents would indisputably consent to school supervision of student conduct in these areas because of the connection between a student's conduct and the school environment.[148] Conversely, off-campus speech involving political, religious, or social matters would likely be beyond the regulatory authority delegated by parents to school officials.[149] In addition, Justice Alito noted that speech containing threats could be punished since threats are generally not protected under the First Amendment.[150] In contrast, whether schools could punish students for criticizing the school or members of the school community was contestable.[151] Finally, Justice Alito noted the difficulty of defining the contours permitting regulation of speech that is hurtful to others or constitutes bullying.[152]

Justice Alito noted that B.L.'s speech did not fall into any of these categories, and the justifications put forth by the school for punishing her were not persuasive.[153] Aside from upsetting a few students, the posts

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[143] *Id.* at 2053.
[144] *Id.*
[145] *Id.* at 2054.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 2055.
[150] *Id.* at 2056.
[151] *Id.* at 2057.
[152] *Id.*
[153] *Id.* at 2058.

produced no substantial disruption to the learning environment.[154] Moreover, Justice Alito stressed that whatever one thought about B.L.'s choice of words, her vulgarity was to be subjected to her parents' disciplinary authority, not the school's.[155]

D. Dissenting Opinion

Justice Thomas penned a lone dissent.[156] He criticized the majority for straying from the historical doctrines used for governing off-campus student speech and asserted that the majority's opinion represented an inexplicable departure from the traditional legal standard.[157] He argued that if the majority had reviewed the historical record, it would have found that the school was within its right to punish B.L. for her posts.[158]

Justice Thomas began with a historical inquiry into whether the people at the time of the ratification of the Fourteenth Amendment would have recognized a school's ability to punish students for off-campus speech.[159] He cited a nineteenth century case where a state supreme court upheld a school's punishment of a student for an insult the student made to a teacher while away from school because the speech had a "direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination."[160] Justice Thomas explained that this rule was widely accepted and endorsed by numerous legal authorities at the time, and it was the standard used to punish students for both off-campus speech and truancy.[161]

According to Justice Thomas, the majority provided no constitutional explanation for departing from this rule, and he argued that he would have applied it in this case.[162] Specifically, he would have found that B.L.'s speech was meant to degrade the cheer team and "subvert the cheerleading coach's authority."[163] Although one could argue that the school's punishment was disproportionate to B.L.'s offense, Justice Thomas responded that it was the duty of the state courts and the local political

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[154] *Id.*
[155] *Id.*
[156] *Id.* at 2059 (Thomas, J., dissenting).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at 2060 (quoting Lander v. Seaver, 32 Vt. 114, 120 (1859)).
[161] *Id.*
[162] *Id.* at 2061.
[163] *Id.*

process, not the federal courts, to prescribe reasonable and appropriate punishment for the apparent misdoing.[164]

Justice Thomas proceeded to castigate the Court for preferring simple pragmatic solutions over historical analysis, especially as it pertained to the Court's "longtime failure to grapple with the historical doctrine of *in loco parentis*."[165] According to Justice Thomas, publicly funded schools were not considered ordinary state actors under the Fourteenth Amendment because their function was to stand in place of the child's parent when the child attended school.[166] Therefore, public schools were not constrained by the same limitations imposed on other state actors.[167] Instead of providing any constitutional reasons for departing from the historical rule, Justice Thomas charged the Court with blindly deferring to *Tinker*, a case he believed was untethered to any solid historical or textual grounding.[168]

Justice Thomas then distinguished *Tinker* from B.L.'s case by highlighting that the latter involved speech which could be transmitted to multitudinous locations due to technological advancements.[169] However, because the Court in *Tinker* failed to identify the legal source outlining the scope of students' speech rights in the school context, that lack of foundation needlessly complicated the Court's analysis here.[170] First, Justice Thomas noted that "the historical test suggests that authority of schools over off-campus speech may be greater when students participate in extracurricular programs."[171] Here, B.L. chose to participate in a school-sponsored extracurricular activity, and because of her involvement, she could inflict greater harm on the team with her derisions than if an ordinary student had made the same comments.[172] Second, Justice Thomas argued that the Court did not consider whether a school would have greater authority to regulate off-campus speech that occurred over social media.[173] Because these outlets possess enhanced capabilities that allow for the instantaneous transmission of messages to a large audience of people, Justice Thomas contended that speech conveyed through a social media platform "will have a greater proximate tendency to harm the school

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[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 2062.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

environment."[174] Finally, Justice Thomas noted that the majority erred in simply assuming that B.L.'s speech occurred off-campus, considering that speech is mobile.[175] Just because the speech originated off-campus did not imply that it would stay that way, and it was possible that the speech could have found its way onto school grounds.[176] Although Justice Thomas agreed that B.L.'s speech should have been treated as off-campus since there was little evidence that it made its way onto the physical campus, he contended that the majority should not have made this assumption.[177]

III. ANALYSIS

Although the Court's decision in *B.L.* undoubtedly deserves cheers for its vindication of students' off-campus First Amendment rights, the Court did not go far enough to ensure that those rights remain protected in future cases. This Part argues that the Court should have adopted the Third Circuit's approach and recognized that off-campus student speech—particularly speech that takes place over the Internet—is subject to the full protections afforded by the First Amendment and its concomitant limitations. Section III.A discusses how this approach aligns with the historical and constitutional tradition of allowing parents to raise their children with minimal interference by the state. Section III.B discusses how this approach is consistent with the Court's extant student speech cases. Finally, Section III.C provides the policy reasons for granting full First Amendment protection to off-campus speech.

A. The Exclusive Right of Parents to Supervise Off-Campus Student Behavior

There is perhaps no tradition in the United States so widely revered as that of a parent's right to raise and educate their child as they see fit.[178]

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[174] *Id.*
[175] *Id.* at 2063.
[176] *Id.*
[177] *Id.*
[178] *See* Meyer v. Nebraska, 262 U.S. 393, 400 (1923) (holding that a Nebraska statute prohibiting the teaching of German in public schools was unconstitutional because it interfered with the "natural duty of the parent to give [their] children education suitable to their station in life"); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (ruling that an Oregon statute making attendance at public schools compulsory violated a parent's right "to direct the upbringing and education of children under their control"); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that Amish parents could be exempted from the provisions of a Wisconsin statute requiring students to attend school until age sixteen); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the

These rights, rooted in the "history and culture of Western civilization,"[179] have been described as "perhaps the oldest of the fundamental liberty interests recognized by [the] Court,"[180] and their status as fundamental rights deserving of heightened protection has been "established beyond debate."[181] The Court has pointed to the Fourteenth Amendment's Due Process Clause as the source of protection for these rights, recognizing them to be "liberty interests" under the Constitution.[182] The majority in *B.L.* acknowledged the significance of these rights, noting that the regulation of off-campus student speech will "normally fall within the zone of parental, rather than school-related responsibility."[183] In his concurring opinion, Justice Alito propounded a standard for off-campus speech cases that would have placed parents as the locus of the inquiry by asking whether a parent would have reasonably consented to the regulation of the speech in question.[184] As he expressed, "In our society, parents, not the [s]tate, have the primary authority and duty to raise, educate, and form the character of their children."[185]

Parents have played a prominent role in managing teenagers' online activities.[186] Parents have been proactive in devising guidelines for their

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custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

[179] *Yoder*, 406 U.S. at 232.

[180] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[181] *Yoder*, 406 U.S. at 232.

[182] *Troxel*, 530 U.S. at 65–66.

[183] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

[184] *Id.* at 2054 (Alito, J., concurring).

[185] *Id.* at 2053.

[186] *See* Amanda Lenhart, Mary Madden, Aaron Smith, Kristen Purcell, & Kathryn Zickuhr, *Teens, Kindness and Cruelty on Social Network Sites Part 4: The Role of Parents in Digital Safekeeping and Advice-Giving*, PEW RSCH. CTR. (Nov. 9, 2011), https://www.pewresearch.org/internet/2011/11/09/part-4-the-role-of-parents-in-digital-safekeeping-and-advice-giving/ [hereinafter 2011 Pew Research Study] (noting that "parents are the most often cited source of advice and the biggest influence on teens' understanding of appropriate and inappropriate digital behavior"); *Study Finds 50% of Parents Use Parental Control Apps*, KASPERSKY (Dec. 2, 2021), https://usa.kaspersky.com/about/press-releases/2021_study-finds-50-of-parents-use-parental-control-apps (noting that 82% of survey respondents indicated that "parents and the family bear the main responsibility for regulating the behavior of children in the digital space").

children's Internet use,[187] and their involvement has overall been effective.[188] In 2016, 94% of parents spoke to their child about what content was suitable to share on the web, and 92% discussed the boundaries of appropriate online behavior.[189] In addition, parents utilize numerous mechanisms to ensure that their child's use of digital devices meets their expectations,[190] and most parents are apt to punish their child for engaging in inappropriate online behavior.[191] In 2016, 65% of parents reported that they had "digitally grounded" their child, whereby they revoked their child's phone and Internet privileges for engaging in misconduct online.[192] Thus, parents are capable of regulating their children's online behavior in an effective manner and have been doing so for some time.

Furthermore, parental rules on what a child is allowed to say or view on the Internet is often influenced by the parent's own personal beliefs and values.[193] As a passage from the Talmud poignantly recites, "What the child says in the street is [their] father's words or [their] mother's."[194] Parents may permit and prohibit a range of activities that their child can engage in

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[187] *Study Reveals Parents' Top Concerns About Social Media*, DIGITAL INFO. WORLD (Sept. 8, 2020), https://www.digitalinformationworld.com/2020/09/58-percent-of-parents-think-social-media-has-a-net-negative-effect-on-their-teens.html (noting that over 80% of parents prescribed rules and penalties for social media and phone use). The discussed study also found that "parents were successful in enforcing those rules." *Id.*

[188] *See* Monica Anderson, *Parents, Teens and Digital Monitoring*, PEW RSCH. CTR. (Jan. 7, 2016), https://www.pewresearch.org/internet/2016/01/07/parents-teens-and-digital-monitoring/ [hereinafter Anderson 2016 Study]; Monica Anderson, *How Parents Feel About—and Manage—Their Teens' Online Behavior and Screen Time*, PEW RSCH. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/how-parents-feel-about-and-manage-their-teens-online-behavior-and-screen-time/ (noting that 59% of teenagers reported that their parents did "an excellent or good job at addressing cyberbullying," compared to 42% who gave the same rating for teachers).

[189] Anderson 2016 study, *supra* note 188.

[190] 2011 Pew Research Study, *supra* note 186 (discussing how more than half of parents reported that they used parental controls to manage their child's Internet use).

[191] Anderson 2016 Study, *supra* note 188.

[192] *Id.*

[193] Brief of Teachers, School Administrators, and the National Council of Teachers of English as Amici Curiae Supporting Respondents at 15–16, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) (discussing how different households vary in the disciplinary measures they impose for the use of vulgar language) [hereinafter Brief of Teachers]; Brief of Law and Education Professors as Amici Curiae Supporting Respondents at 13, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) (discussing how the religious upbringing of a child may affect how they use social media) [hereinafter Brief of Law and Education Professors]; *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

[194] TELUSHKIN, *supra* note 2, at 158.

based on what they perceive to be appropriate and acceptable conduct.[195] If school officials were allowed to regulate what a student posts on the Internet, they would essentially be promoting the values of the state in place of the parent's, thereby making school administrators the "arbiters" of permissible off-campus conduct.[196] To avoid punishment, students may subscribe to the school's conception of acceptable expression, even if those beliefs may conflict with what is tolerated at home.[197] In effect, a parent's teachings would have to yield to the prerogatives of the state.[198] However, as the Court has emphasized, parents are not required to "align [their] choices with the state's desire . . . to foster a homogenous people with American ideals."[199] All parents raise their children in unique ways, and the private familial decisions involved in the child-rearing process—such as what a child can say or view when away from school—should remain free from outside interference to the reasonable extent possible.

Finally, as a practical matter, it is much more feasible for parents—who are intimately aware of their child's individual circumstances[200]—to set appropriate rules and penalties for off-campus misconduct than for schools to do the same for hundreds of students, many of whom they may know little about outside of the school setting. Schools would need to expend considerable amounts of resources to effectively monitor speech that occurs outside of the learning environment,[201] often at the risk of diverting their attention away from their primary pedagogical obligations.[202] Even if the means to perform this hefty task were available, it is not obvious that delegating this responsibility to school officials would be desirable. It would

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[195] *See* Brief of Law and Education Professors, *supra* note 193, at 11–14 (discussing how parents may encourage their children to use social media outlets for creative purposes or to express political or religious views).
[196] Brief of Teachers, *supra* note 193, at 14.
[197] *See id.* at 16.
[198] *See* Brief of Law and Education Professors, *supra* note 193, at 11 ("Granting schools a roving commission to police speech on social media would effectively strip parents of their ability to teach their children how to behave in a vast and growing swathe of public life.").
[199] *Id.* at 9 (quoting Meyer v. Nebraska, 262 U.S. 393, 402 (1923)) (internal quotation mark omitted).
[200] *Id.* at 6; Goldman, *supra* note 13, at 415–16.
[201] *See* Brief for VanHo Law as Amicus Curiae in Support of Respondent at 10–12, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) (noting how schools "lack the manpower and legal authority necessary to investigate incidents that occur off school premises").
[202] Brief of Teachers, *supra* note 193, at 13–14 ("If schools were expected to monitor all off-campus speech that is 'directed at' or 'concerns' the school community . . . they would have neither the time nor resources to focus on the most egregious student speech, let alone other important issues at school.") (citations omitted).

essentially require teachers to act in a capacity akin to law enforcement, turning digital platforms into virtual beats in need of patrolling.[203] However, it is "common sense that the relationship between a student and [their] teacher is very different from that between a citizen and the police,"[204] and the line between educator and police officer should be stringently preserved.[205] Relatedly, charging school administrators with this duty would likely result in "regular skirmishes between parents and schools,"[206] creating unnecessary friction within the school community. Thus, to avoid perpetual disputes between parents and school officials, the most prudent solution would be to assign parents the primary responsibility of supervising student behavior that occurs outside of the school environment.

B. Granting Full First Amendment Protection to Off-Campus Speech Accords with the Supreme Court's Student Speech Jurisprudence

Granting full First Amendment protection to off-campus speech is also consistent with the Supreme Court's prior student speech decisions. The Court has continually suggested that school authorities cannot regulate student expression that occurs outside of the school's purview.[207] In *Tinker*, the Court made clear that students retain their First Amendment rights when attending school, emphasizing that students are persons under the Constitution both in and outside of school.[208] Thus, students do not automatically forfeit their constitutional rights merely by passing through

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[203] *See id.* at 16 (discussing how school officials would become "roving inspectors of decency" if required to regulate potentially disruptive off-campus student speech).
[204] Ohio v. Clark, 576 U.S. 237, 249 (2015).
[205] *See* Goldman, *supra* note 13, at 416 ("If schools start policing and punishing off-campus speech, students' views of schools, teachers, and administrators may be altered in a manner that interferes with the learning process itself.").
[206] Brief of Teachers, *supra* note 193, at 17.
[207] Brief of The EFF et al.*, supra* note 12, at 7; Goldman, *supra* note 13, at 410.
[208] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). The Court has affirmed this view on other occasions as well. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975) ("Minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.") (citation omitted); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794 (2011) (noting that the government's general interest in protecting children from harm "does not include a free-floating power to restrict the ideas to which children may be exposed"). Relatedly, Professor Clay Calvert has observed that the First Amendment's text "makes no distinction between children and adults," conveying that there is little support for the idea that adults are more entitled to these protections than minors. Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. SCI. & TECH. L. 243, 271 (2001) (quoting DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 25 (1989)).

the schoolhouse gate.[209] The supposition here is that students possess a greater panoply of protections under the First Amendment when they are outside the school's supervisory authority, and the status quo persists when the student enters the school environment, albeit to a lesser yet narrow degree.[210]

Those in favor of extending *Tinker* to off-campus speech typically cite the following passage in support of the idea that the "substantial disruption" standard is not solely limited to on-campus speech:[211]

> [C]onduct by the student, *in class or out of it*, for which any reason—whether it stems from time, place, or type of behavior—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.[212]

However, the full meaning of this passage can only be understood in conjunction with the sentences immediately preceding it.[213] The Court discussed how students' rights "do not embrace merely the classroom hours," but equally apply when they are in other areas of the school, such as the cafeteria or the playing field.[214] The logical corollary would be that a school official's ability to punish a student for substantially disruptive conduct is not confined to the classroom alone, but extends to other areas of the campus as well.[215] Therefore, the passage merely conveys that a school official's authority to punish substantially disruptive speech reaches the entire campus; it does not insinuate that the school's authority extends to off-campus areas.[216] If the passage were to be construed as granting schools that authority, then the Court would have plainly contravened the

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[209] *Tinker*, 393 U.S. at 506.
[210] Tabor, *supra* note 17, at 578.
[211] *See* Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 122 (2009) ("The first inkling that off-campus student speech is subject to the same standards as that occurring on-campus can be found in *Tinker* itself."); *see also* Susan S. Bendlin, *Far From the Classroom, the Cafeteria, and the Playing Field: Why Should the School's Disciplinary Arm Reach Speech Made in a Student's Bedroom?*, 48 WILLIAMETTE L. REV. 195, 197 (2011) (noting how "some of the confusion" over whether school officials can discipline students for off-campus speech "stems from this passage").
[212] *Tinker*, 393 U.S. at 513 (emphasis added).
[213] Goldman, *supra* note 13, at 411; Bendlin, *supra* note 211, at 197.
[214] *Tinker*, 393 U.S. at 512–13.
[215] *See* Goldman, *supra* note 13, at 411.
[216] *Id.*

spirit of its opinion, which boldly signified that students are presumptively entitled to the benefits and protections afforded by the First Amendment.[217]

Although the Court's subsequent student speech decisions began carving out additional categories of speech that school authorities could regulate, it nonetheless reaffirmed *Tinker*'s premise that school authority over student speech is limited to the immediate school context.[218] In his concurring opinion in *Fraser*, Justice Brennan intimated that just because a student could be disciplined for certain types of speech made within the school environment did not imply that school officials had the authority to regulate the same speech elsewhere, and he stressed that the Court's opinion "[did] not suggest otherwise."[219] A majority of the Court "reiterated this point two decades later" in its holding in *Morse*.[220] Similarly, the Court in *Kuhlmeier* acknowledged that while a school does not have to "tolerate student speech that [is] inconsistent with its 'basic educational mission,'" the government does not have the authority to "censor similar speech outside the school."[221]

In *Morse*, the Court once again upheld *Tinker*'s central holding.[222] Interestingly, it began its analysis by first investigating whether the case fell within its student speech framework since the expression in question did not occur at the school itself.[223] As a number of legal authorities have observed, the fact that the Court engaged in this inquiry implies that a different legal standard would have applied had the Court decided that the student's speech did not take place under the school's supervision.[224] In other words, if the Court's precedents equally applied to both on-campus and off-campus speech, then there would have been no need for the Court to explain why

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[217] *Tinker*, 393 U.S. at 511 ("In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."); *see also* Tabor, *supra* note 17, at 578–79 ("If *Tinker* was intended to apply to all off-campus student speech, 'the schoolhouse gates' would be meaningless; students would have the same free speech rights at home as they would at school regardless of which side of the 'gate' they were on.").

[218] *See* Brief of The EFF et al., *supra* note 12, at 5–7.

[219] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring).

[220] Brief of The EFF et al., *supra* note 12, at 6; *see also* 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.").

[221] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

[222] *Morse*, 551 U.S. at 422 (Alito, J., concurring).

[223] *Id.* at 400 (majority opinion).

[224] Goldman, *supra* note 13, at 410; J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 938 (3d Cir. 2011) (Smith, J., concurring).

its previous on-campus speech decisions were controlling.[225] The fact that the Court engaged in this assessment strongly suggests that it did not intend the distinction between on-campus and off-campus speech to be conceptually vacuous.[226] Moreover, in his concurring opinion, Justice Alito noted that school administrators can regulate more categories of "in-school student speech" than would be constitutionally permissible in other settings.[227] He also stressed that the Court did not "endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'" explaining that such an argument "can easily be manipulated in dangerous ways."[228] The dissent also emphasized that had the student displayed his banner in another setting, the First Amendment would have unquestionably protected his speech,[229] and the other Justices did not contest this point.[230]

The Court's decision in *B.L.* represents an unfortunate departure from *Tinker*'s "unimpeachable proposition,"[231] and it inverts this longstanding principle by suggesting that students shed some of their constitutional rights when outside of the metaphoric schoolhouse gate.[232] While there have undoubtedly been significant technological developments since *Tinker* was decided, the Court has adamantly stressed that "the basic principles of freedom of speech . . . do not vary when a new and different medium for communication appears."[233] Especially given the broad protections that have been afforded to speech that takes place over the Internet,[234] there should be an even greater reluctance to adjust the boundaries of the schoolhouse gate. Technology has and will continue to change, but the speech-protective principles espoused in *Tinker* should remain immutable.

C. Policy Reasons Counseling in Favor of Full First Amendment Protection for Off-Campus Speech

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[225] Goldman, *supra* note 13; at 410; *Snyder*, 650 F.3d at 938 (Smith, J., concurring).
[226] *See* Goldman, *supra* note 13, at 410.
[227] *Morse*, 551 U.S. at 422 (Alito, J., concurring).
[228] *Id.* at 423.
[229] *Id.* at 434 (Stevens, J., dissenting).
[230] *Snyder*, 650 F.3d at 937 (Smith, J., concurring).
[231] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring).
[232] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021) ("The school's regulatory interests remain significant in some off-campus circumstances.").
[233] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)) (internal quotation mark omitted).
[234] Packingham v. North Carolina, 582 U.S. 98, 104 (2017).

1. Affording Full First Amendment Protection to Off-Campus Speech Encourages Students to Participate in the Marketplace of Ideas Without Fear of Retribution

In his renowned dissent in *Abrams v. United States*, Justice Holmes articulated what has perhaps become the defining rationale of the First Amendment's protection of freedom of speech: the marketplace of ideas.[235] The theory posits that the free exchange of ideas and reasoned interlocution, as opposed to invocation of the state's censorial capabilities, is the most effective way of arriving at the truth of matters.[236] The Court in *Tinker* recognized the importance of this precept in the educational context,[237] and it reaffirmed in *B.L.* that "representative democracy only works if we protect the marketplace of ideas."[238]

Social media has made the public square more accessible to students than ever before.[239] Students can share their ideas and opinions on a vast array of issues with one another, and the widespread interconnectivity afforded by these platforms enables students to reach a larger audience, thereby increasing their exposure to new ideas.[240] These outlets have been particularly instrumental for student activists, who have utilized social media to raise awareness on contemporary political and social issues.[241]

The most important issues, whether they are discussed on social media or elsewhere, naturally tend to be the most controversial, and there is no doubt that these conversations can potentially spill over into the school environment.[242] However, just because robust discourse on a consequential issue may involve members of the school community should not be an open

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[235] 250 U.S. 616, 630–61 (1919) (Holmes, J., dissenting).
[236] *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829–31 (2008).
[237] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).
[238] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) (internal quotation marks omitted).
[239] Brief of HISD Student Congress et al. as Amici Curiae Supporting Respondents at 8, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) [hereinafter Brief of HISD Student Congress et al.]; Brief of The EFF et al., *supra* note 12, at 14.
[240] Brief for The Independent Women's Law Center as Amici Curiae Supporting Respondents at 16–17, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) [hereinafter Brief for The Independent Women's Law Center].
[241] *Id.* at 12–15 (discussing how young women have used social media to amplify their voices on various issues including abortion, racial justice, and the #MeToo movement); Brief of Teachers, *supra* note 193, at 9; Brief of The EFF et al., *supra* note 12, at 13–14.
[242] *See* Brief for The Independent Women's Law Center, *supra* note 240, at 4–5.

invitation for regulation by school officials.[243] It is readily conceivable that school authorities may label speech that is critical of the school or politically unpopular as being substantially disruptive to the learning environment.[244] While some may contend that it is an exaggeration to suggest that schools will take dramatic action against students for off-campus speech that neither threatens others nor poses a genuine risk of substantial disruption, there have been numerous instances where schools have punished students for either criticizing their educational institution or engaging in otherwise protected speech.[245] In one recent example, a high school student in Georgia was suspended when she posted an image and video on her Twitter account showing crowded hallways in her school during the height of the COVID-19 pandemic.[246] The purpose of the posts was to showcase the lack of precautions her school was taking at the time in response to the public health crisis, yet the school deemed her off-campus criticism violative of school policies.[247]

The drawback of imbuing school authorities with broad latitude to regulate off-campus student speech is that it creates a chilling effect on student expression.[248] If students fear being sanctioned by school officials

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[243] Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 32 (1st Cir. 2021) ("[Schools are] not permitted to punish a student merely because [their] speech causes argument on a controversial topic.").

[244] Tabor, *supra* note 17, at 595–96 ("It is natural that officials would seek to silence expression that is critical of them even if it is not harmful to students or disruptive."); Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 155 (2007) ("[S]chool officials are likely to be biased in favor of censorship to suppress controversy, which is contrary to our First Amendment jurisprudence encouraging more speech, not less speech."). In addition, courts already give significant deference to school officials when punishing students for speech that the latter perceive to be substantially disruptive. Papandrea, *supra* note 7, at 1102 ("[M]any courts are far too deferential to schools' assertions that the challenged expressive activity was substantially and materially disruptive to schoolwork or discipline.").

[245] Brief of Foundation of Individual Rights in Education et al. as Amici Curiae Supporting Respondents at 14–18, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) [hereinafter Brief of FIRE et al.] (discussing various cases where high school students were punished for online speech that did not satisfy *Tinker*); Brief for The Independent Women's Law Center, *supra* note 240, at 19–24.

[246] Brief for The Independent Women's Law Center, *supra* note 240, at 21–22; Brief of The EFF et al., *supra* note 12, at 21–22.

[247] Brief for The Independent Women's Law Center, *supra* note 232, at 22; Brief of the EFF et al., *supra* note 12, at 22.

[248] *See* Brief of Teachers, *supra* note 193, at 11; Brief of HISD Student Congress et al., *supra* note 239, at 27 ("[E]ven minor punishments can chill protected speech.") (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002)).

for off-campus speech that is merely critical or controversial, they may become reluctant to share their opinions on decisive matters.[249] However, society loses a great deal when individuals engage in self-censorship because it deprives the public of potentially valuable viewpoints.[250]

Moreover, public schools play a critical role in preparing students for their participation in a democratic society.[251] In particular, educators assume the indispensable duty of serving as role models for the students they instruct.[252] However, persistent monitoring and punishment for controversial or critical off-campus speech are not the sort of actions that society should hope for students to replicate.[253] There is "dissonance, if not hypocrisy, in teaching students that free speech matters when school officials themselves provide virtually no protection for student speech."[254] As the Court made clear in *B.L.*, it is unpopular and controversial speech that is most in need of protection under the First Amendment,[255] and it is this type of speech that sparks productive debate in the marketplace of ideas. The most effective way of teaching students the importance of free speech is by allowing them to put those ideals into practice.[256] By permitting

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[249] Brief of FIRE et al., *supra* note 245, at 33 (discussing how constant surveillance of students' off-campus speech would gravely affect their ability to exercise their First Amendment rights).

[250] Varel, *supra* note 5, at 467–68; Tabor, *supra* note 17, at 596; *see also* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 426 (5th Cir. 2015) (en banc) (Dennis, J., dissenting) ("Courts have long recognized that the First Amendment protects not only the right to speak but also the right to receive speech from others.").

[251] Papandrea, *supra* note 7, at 1077–78; Brief of Teachers, *supra* note 193, at 6; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society.").

[252] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[253] Brief of FIRE et al., *supra* note 245, at 33; Brief for Americans for Prosperity Foundation and The Rutherford Institute as Amici Curiae in Support of Respondents at 21, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) ("[P]ermitting schools to scrutinize private out-of-school communication educates the next generation that this is the kind of relationship citizens should expect with their government.").

[254] Brief of Teachers, *supra* note 193, at 8 (quoting Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 826 (2009)).

[255] B.L. v. Mahanoy Area Sch. Dist., 141 S. Ct. 2038, 2046 (2021).

[256] Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503, 507 (1969) ("That [schools] are educating the young for citizenship is reason for scrupulous protection of [c]onstitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount the important principles of our government as mere platitudes."); Brief of Teachers, *supra* note 193, at 8 ("[S]chools must not merely teach students lofty academic theories of free speech. They must also model such First Amendment values in practice.").

students to express themselves freely outside of school, they will be instilled with the fundamental democratic values that schools seek to promote as they learn the importance of freedom of expression firsthand.[257]

2. A Categorical Rule for Off-Campus Speech Creates Consistency, Provides Clarity, and Promotes Fairness

A bright-line rule prohibiting school officials from regulating off-campus speech also has the benefit of advancing important legal virtues such as consistency, clarity, and fairness. Before *B.L.*, one of the defining features of this area of law was the widespread inconsistency in how circuit courts adjudicated these types of cases.[258] In one jurisdiction, a student could be punished for writing a fiery blog post,[259] but in another could create a crude social media profile of their principal without any repercussions.[260] This variance made it difficult for both students and teachers to discern when a student's off-campus behavior could be appropriately regulated.[261] Not only does a categorical approach remedy this discrepancy by creating uniformity, but it also enables courts to decide cases more consistently.[262] This consistency in turn allows students and schools to better understand when a student's speech rights can be properly regulated,[263] and it also supplies courts with a more concrete body of law to rely on when deciding off-campus speech cases.[264]

Moreover, a categorical rule provides clarity by precisely defining when a school official can punish a student for expressive conduct. As many have aptly noted, clarity in this legal area is critical for two reasons.[265] First,

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[257] Tabor, *supra* note 17, at 577 ("[S]tudents learn and develop best when they are exposed to a variety of ideas and are free to question their teachers."); Papandrea, *supra* note 7, at 1078 ("Allowing the marketplace of ideas to flourish at school and on the Internet helps prepare students to be participants in democracy that cherishes the free exchange of ideas and diversity of viewpoint.").

[258] *See supra* Section I.B.

[259] Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

[260] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011).

[261] *See* Ceglia, *supra* note 62, at 941.

[262] *See* Brief of the State of Louisiana et al. as Amici Curiae Supporting Respondents at 5, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255) [hereinafter Brief of States] (noting how it would be easier to apply the Third Circuit's test than the legal standards developed by other courts); Brief of Teachers, *supra* note 193, at 27 (discussing how, under a bright-line rule, it would be easier for teachers to determine when they could punish a student for their speech).

[263] *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189–90 (3d Cir. 2020).

[264] *See id.* at 190 (noting that the court's rule for off-campus speech is "much more easily applied and understood" than other proposed standards).

[265] *Id.* at 185; Goldman, *supra* note 13, at 407–08.

a clear rule prevents the onset of a chilling effect on student speech.[266] If students are unable to determine when their off-campus speech might land them in trouble, they may resort to self-censorship,[267] which comes with a host of adverse consequences.[268] Second, a clear rule provides school officials with reasonable notice on the extent of their authority over students' off-campus speech rights, which is important for purposes of qualified immunity.[269] Because school officials are state actors when they regulate students' constitutional rights, they are entitled to qualified immunity for their conduct.[270] Central to the qualified immunity inquiry is whether a government official violated a "clearly established" constitutional right.[271] The Court requires that "the right allegedly violated [] be defined at the appropriate level of specificity,"[272] conveying that there must be a "strict analogy between the factual circumstances in the case at bar with those in precedent cases."[273] Given the fact-intensive nature of off-campus speech cases, it may be difficult to draw strict factual parallels between a present case and past decisions, thereby increasing the likelihood of school officials receiving qualified immunity.[274] The Fifth Circuit has admitted as much, acknowledging that the lack of clarity in this legal area led it to repeatedly grant qualified immunity for school officials.[275] School administrators may therefore perpetually evade liability if there is no clearly defined rule to guide their conduct.[276] A categorical rule provides the requisite clarity by drawing a bright line between on-campus and off-campus speech, giving school officials ample notice on their ability to regulate students' speech rights.

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[266] *B.L.*, 964 F.3d at 185; Goldman, *supra* note 13, at 407.
[267] *B.L.*, 964 F.3d at 185; Goldman, *supra* note 13, at 407.
[268] *See supra* Section III.C.1.
[269] *B.L.*, 964 F.3d at 185; Goldman, *supra* note 13, at 407–08.
[270] New Jersey v. T.L.O., 469 U.S. 325, 336 (1985).
[271] Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004).
[272] Goldman, *supra* note 13, at 408 (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999)).
[273] Samantha Adams, Note, *Constitutional Law: Qualified Immunity and "Factual Correspondence" in New Mexico: The Tension Between Formalism and Legal Realism*, 32 N.M. L. REV. 439, 440 (2002).
[274] *See* Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies from 2009*, 8 FIRST AMEND. L. REV. 86, 89 (2009).
[275] Longoria *ex rel.* M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267–69 (5th Cir. 2019).
[276] *See* Matthew J. Shechtman, *Piercing Pearson: Is Qualified Immunity Curbing Students' Religious Speech Rights?*, 43 STETSON L. REV. 17, 19–20, 24 (2013); Calvert, *supra* note 274, at 89.

In addition to its pragmatic merits, a categorical rule comports with our basic notions of due process and equal treatment under the law. As the Court has recognized, "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[277] Fair notice is an integral component of due process, yet as has been discussed, it is difficult for students to know when their speech rights are subject to limitation when no clear rules are provided.[278] Students may think it fundamentally unfair to be punished for speech that they did not reasonably anticipate would lead to discipline.[279] The clarity that a bright-line rule affords ensures that students receive adequate notice on the scope of their speech rights.[280] Moreover, a categorical rule guarantees equal treatment by applying a single, predictable standard to all students. As the late Justice Scalia remarked, equal justice can be effectively achieved by having a "clear, previously enunciated rule that one can point to in explanation of [a] decision."[281] The application of a straight-forward rule obviates concerns that a court's decision is the byproduct of arbitrary decision-making,[282] the latter of which does not "satisfy [one's] sense of [equal] justice very well,"[283] especially in an area as sensitive as the First Amendment.[284]

The Court in *B.L.* notably refrained from adopting a general rule to apply in all off-campus speech cases, concluding instead that several features of off-campus speech diminish, but do not extinguish, a school's ability to regulate off-campus expression.[285] The Court appeared to endorse a circumstance-dependent approach whereby a court, guided by the three specified features, looks at the totality of the circumstances to determine whether a school official exceeded their authority in punishing a student for the latter's off-campus speech.[286] While judging off-campus speech cases on a particularized basis may seem appealing given the factual complexity of

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[277] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).
[278] Bendlin, *supra* note 211, at 221.
[279] Tracy L. Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1096 (2008).
[280] *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 190 (3d Cir. 2020).
[281] ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW 6 (Jeffrey S. Sutton & Edward Whelan eds., Kindle ed. 2020).
[282] Brief of States, *supra* note 262, at 5.
[283] SCALIA, *supra* note 281, at 6.
[284] *See id.* ("When one is dealing . . . with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution, it does not greatly appeal to one's sense of justice to say: 'Well, that earlier case had nine factors, this one has nine plus one.'").
[285] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045–46 (2021).
[286] *See id.* at 2046.

such issues, this approach will likely generate more confusion and unpredictability than the application of a categorical rule. As a general matter, *ad hoc* decision-making is disfavored in the First Amendment context because of the uncertainty it produces.[287] Under this approach, the outcome of a case largely hinges on how a particular court decides to evaluate the facts and weigh the relevant competing interests, making it difficult to know in advance how a court will rule.[288] For example, the Court in *B.L.* stated that "different potential school-related and circumstance-specific justifications" will determine how much "First Amendment leeway" to grant in a given case,[289] yet it is hard to predict when a court might find a proffered justification sufficiently compelling to deny such leeway. The Court also noted that an off-campus speech case may depend on a slate of variables such as "a student's age, the nature of the school's off-campus activity, or the impact upon the school itself."[290] However, it is not entirely certain how a court will juggle these considerations and when it will deem a set of factors dispositive or of mere ancillary concern. Such an unpredictable methodology does a disservice to students, teachers, and courts by failing to promulgate clear, consistent, and fair principles of law.

CONCLUSION

Although the Court correctly decided *B.L.*, its narrow decision does not guarantee that students' First Amendment rights in off-campus settings will be thoroughly protected. If the Court elects to revisit this issue in a future case, it should adopt a bright-line rule guaranteeing full First Amendment protection for off-campus speech. First, such a rule would be consistent with the constitutional limitations that have been placed on the state's ability to interfere with the parent-child relationship. Second, this rule would comport with the Court's precedents that speech made outside out of the school's supervisory authority is not subject to the same restrictions imposed on on-campus speech. Finally, public policy would counsel in favor of adopting this rule because it would encourage more students to engage in the marketplace of ideas without fear of reprisal, and it would promote key legal norms such as consistency, clarity, and fairness.

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[287] *See* Shulman v. Group W. Productions, Inc., 955 P.2d 469, 486 (Cal. 1998).
[288] *See* Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 913 (1963) (arguing how, under an *ad hoc* balancing test, courts are "cast loose in a vast space, embracing the broadest possible range of issues, to strike a general balance in the light of its own best judgment").
[289] *B.L.*, 141 S. Ct. at 2046.
[290] *Id.* at 2045.

As digital technology continues to blur the lines between students' private lives and their scholastic associations, there remains a pressing need to ascertain the status of their off-campus speech rights. If schools wish for students to learn the values required to maintain a flourishing democratic society, the most effective way of achieving that vital societal interest is not through censorship or surveillance, but through uninhibited exercise of the freedoms guaranteed by the First Amendment.