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The Coming Crisis of Student Speech

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Abstract. Debates involving free speech on America's college campuses have recently ignited a firestorm of disputation, dominating newspaper headlines in a fashion not witnessed in several decades. The First Amendment's import as appearing in the nation's elementary and secondary schools has, however, received comparatively little public scrutiny. This relative paucity of attention is lamentable, as our public school system is the foremost government entity that shapes Americans' everyday lives.

This Essay explores three twenty-first century doctrinal developments that fuse to portend an emerging crisis for student speech. First, it examines *Mahanoy Area School District v. B.L. ex rel. Levy* and contends that the opinion unwisely authorizes educators to punish an especially critical form of off-campus speech. Second, the Essay demonstrates how a long-dormant aspect of *Tinker v. Des Moines Independent Community School District*—involving speech that "collid[es] with the rights of others"—recently awoke from its slumber and now poses a grave threat to student speech. Third, it contends that the Supreme Court's embrace of adolescent neuroscience in the Eighth Amendment context could spell doom if imported into the student speech setting.

This Essay aims to increase awareness of the storm clouds quickly gathering on the First Amendment horizon and encourages jurists to redouble their commitment to protecting student expression. Rather than protecting unpopular statements of students, as judges have long aspired, courts today seem increasingly poised to protect students from unpopular statements.

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Introduction

Over the last several months, debates about free speech on America's college campuses have ignited a firestorm of disputation. Not since Berkeley's Free Speech Movement of the 1960s has the subject so thoroughly dominated national headlines, transporting the topic beyond its usual confines of the faculty lounge to the congressional hearing room.[1] Testimony before Congress assessing the First Amendment's reach on campus played a significant role in the ouster of two prominent university presidents.[2] At their core, these debates can be broadly construed as evaluating whether—for First Amendment purposes—Harvard Yard should be indistinguishable from Boston Common.[3] The free speech debates now engulfing university campuses demonstrate no signs of abating anytime soon. Rather, they seem only to be intensifying, as each successive week brings new waves of outrage and recrimination.[4]

While concerns regarding free speech in educational arenas have recently assumed center stage, the topic's import as it appears in the elementary and secondary school context plays—at most—a bit part.[5] This relative paucity of attention is deeply regrettable. Though the media lavishes seemingly endless energy on higher education, it is important to recognize that those rarefied matters directly affect only a fraction of the population compared to our nation's public schools. The U.S. public school system educates more than fifty million students, rendering it without question *the* dominant government unit

1. *See generally* THE FREE SPEECH MOVEMENT: REFLECTION ON BERKELEY IN THE 1960S (Robert Cohen & Reginald E. Zelnik eds., 2002). For helpful examinations of these issues, see ERWIN CHEMERINSKY & HOWARD GILMAN, FREE SPEECH ON CAMPUS (2017); and SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (2017).

2. *See* Randall Kennedy, *Browbeating*, LONDON REV. BOOKS (Jan. 25, 2024), https://perma.cc/S255-JH5U (analyzing the December 2023 congressional testimony of President Claudine Gay of Harvard University and President Elizabeth Magill of the University of Pennsylvania, both of whom resigned their posts within a month of testifying).

3. For a law professor's claim that universities ought not be so protective of free speech, see Claire O. Finkelstein, Opinion, *To Fight Antisemitism on Campus, We Must Restrict Speech*, WASH. POST (Dec. 10, 2023, 7:00 AM EST), https://perma.cc/D48C-6G34.

4. *See, e.g.*, Sharon Otterman, *Barnard College's Restrictions on Political Speech Prompt Outcry*, N.Y. TIMES (Jan. 24, 2024), https://perma.cc/6QDL-TH26; Colbi Edmonds, Anna Betts & Anemona Hartocollis, *What to Know About the Campus Protests over the Israel-Hamas War*, N.Y. TIMES (updated Apr. 28, 2024), https://perma.cc/D6M7-KGH2; Alan Blinder, *What the First Amendment Means for Campus Protests*, N.Y. TIMES (May 1, 2024, 12:22 PM ET), https://perma.cc/5CRR-9U4Q.

5. *See* Kevin Coe & Paul J. Kuttner, *Education Coverage in Television News: A Typology and Analysis of 35 Years of Topics*, 4 AM. EDUC. RSCH. ASS'N OPEN, Jan.-Mar. 2018, at 2, https://perma.cc/GPM2-YRZL.

shaping Americans' everyday lives.[6] As Justice Stevens once pressed the point, "The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life."[7] Justice Stevens's statement, of course, also implicates college students. Thus, even if one is primarily concerned about free speech in university settings, it seems shortsighted to disregard the preceding foundational years of education that students bring with them to campus. The upstream K-12 free speech environment, that is, ineluctably appears in the downstream university experience.[8]

Today, the public school forms an especially urgent First Amendment site because the twenty-first century has in rapid succession posed several ominous threats to the continued, robust protection of student speech. One might readily identify various cultural developments that have arisen to imperil student speech, including the rise of helicopter parenting and the ubiquity of trauma narratives.[9] But my immediate focus in this Essay is on three doctrinal developments—doubtless informed by the larger culture[10]—that augur ill for the future of student speech. Indeed, it is not too much to say that these three developments—all arising in only the last twenty years—fuse to portend an emerging crisis for student speech. First, I explore the Supreme Court's latest opinion involving student speech, *Mahanoy Area School District v. B.L. ex rel. Levy*,[11] which I suggest unwisely authorizes educators to punish a particularly valuable form of off-campus speech. Second, I examine how a long-dormant aspect of *Tinker v. Des Moines Independent Community School District*[12]—involving speech that "collid[es] with the rights of others"[13]—awoke from its

6. *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 9 (2018).

7. New Jersey v. T.L.O., 469 U.S. 325, 385-86 (1985) (Stevens, J., dissenting).

8. I am grateful to the late Robert Zimmer, former President of the University of Chicago, for impressing this point upon me over a memorable breakfast several years ago. For extensive treatment of the downstream effects of the K-12 free speech environment, see generally Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365 (2019).

9. *See generally* Parul Sehgal, *The Case Against the Trauma Plot*, NEW YORKER (Dec. 27, 2021), https://perma.cc/26E5-J5FV (identifying and critiquing the ubiquity of the "trauma plot" in modern popular culture).

10. *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8-9 (2003) (arguing that culture and constitutional developments "are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture").

11. 141 S. Ct. 2038 (2021).

12. 393 U.S. 503 (1969).

13. *Id.* at 513.

slumber in 2006 and now poses a grave threat to student speech. Finally, I observe how the Supreme Court's embrace of adolescent neuroscience in the Eighth Amendment context beginning in 2005 could spell doom if it were exported into the student speech context.[14]

In this Essay, I aim primarily to sound the First Amendment alarm regarding student speech. Readers hoping for tidy three-part tests designed to resolve the many intricate, challenging cases in these three doctrinal areas will need to look elsewhere. I do hope, however, that this Essay plays some small role in helping to raise awareness of the storm clouds quickly gathering on the First Amendment horizon and that it encourages other members of the legal community—including jurists—to redouble their commitments to protecting student expression.[15] Rather than protecting unpopular statements of students, I fear that courts are increasingly poised to protect students from unpopular statements.

More than eight decades ago, in *West Virginia State Board of Education v. Barnette*, the Supreme Court highlighted the transcendent importance of protecting students' free speech rights: "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[16] For scholars toiling in the field of education law, those words have long served simultaneously as a ray of inspiration and a note of caution. One quarter of our way into the twenty-first century, though, I fear that American society stands at the precipice, and that "strangl[ing] . . . free minds" is waxing and "scrupulous protection" is waning.[17]

I. *B.L.*'s Inadequate Protection for Speech Criticizing School Officials

An ominous, insidious threat to student speech arises from the Supreme Court's recent opinion in *Mahanoy Area School District v. B.L. ex rel. Levy*.[18] That high-profile decision—involving a crestfallen cheerleader's vulgar Snapchat message—recognized that schools could, in at least some instances, violate

14. *See infra* Part III.

15. I have learned a great amount from illuminating legal scholarship exploring these student speech developments. *See, e.g.*, Mary-Rose Papandrea, Mahanoy v. B.L. *&* *First Amendment "Leeway,"* 2021 SUP. CT. REV. 53, 55; Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 15 (2009); CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS (2015).

16. 319 U.S. 624, 637 (1943).

17. *Id.*

18. 141 S. Ct. 2038 (2021).

students' First Amendment rights when they sanction students for off-campus speech.[19] *B.L.* initially elicited celebration from some staunch protectors of student speech rights,[20] and candor requires acknowledging that I might be construed as one of the celebrants. Indeed, immediately after *B.L.* came down in 2021, I published a guest essay in the *New York Times* appraising the decision that appeared under the following headline: "A Cheerleader Lands an F on Snapchat, but a B+ in Court."[21] Perhaps bespeaking our era of pervasive grade inflation, the headline's B+ mark offered, in my view, a somewhat rosier evaluation than my piece actually contained, as I lodged serious criticism alongside genuine praise. Nevertheless, upon sustained reflection, I would now like to submit a substantially revised, lowered grade. The Court's refusal to afford meaningful protection to a particularly essential type of off-campus speech means that *B.L.* cannot receive anything higher than a Gentleman's C.

In *B.L.*, the Supreme Court weighed whether a high school could suspend a student from participating on the cheerleading squad for one year because of a vulgar Snap that she posted from a convenience store parking lot one Saturday afternoon.[22] When Brandi Levy learned that she had been cut from Mahanoy's varsity cheerleading squad that fateful weekend day, the decision left her feeling less than cheery. The cheerleading cut represented the latest blow in a string of disappointments for Levy, and she vented her frustrations with the following eight-word Snap: "Fuck school fuck softball fuck cheer fuck everything."[23] Snapchat messages are meant to disappear, but this one proved indelible, as another Mahanoy student took a screenshot of the vulgar post and showed it to a coach. The Mahanoy coaching staff responded by imposing the one-year cheerleading suspension on Levy.[24]

Did Levy's cheer suspension violate her First Amendment rights? In an 8-1 decision, Justice Breyer wrote an opinion for the Court in *B.L.* answering that question affirmatively.[25] At oral argument, Justice Breyer expressed a strong preference for the Court to issue a narrowly written decision—one that avoided providing answers to the questions involving off-campus speech, or

19. *See id.* at 2043, 2047-48.

20. ACLU Legal Director David Cole stated: "Protecting young people's free speech rights when they are outside of school is vital and this is a huge victory for the free speech rights of millions of students who attend our nation's public schools." Adam Liptak, *Supreme Court Rules for Cheerleader Punished for Vulgar Snapchat Message*, N.Y. TIMES (June 23, 2021), https://perma.cc/Q8XP-2VXK.

21. Justin Driver, Opinion, *A Cheerleader Lands an F on Snapchat, but a B+ in Court*, N.Y. TIMES (June 25, 2021), https://perma.cc/9TSB-WESW.

22. *B.L.*, 141 S. Ct. at 2043.

23. *Id.*

24. *Id.*

25. *Id.* at 2042-43.

even definitively resolving what expression should be categorized as off-campus speech. "I'm frightened to death of writing a [governing legal] standard," Justice Breyer stated.[26] "I can't write a treatise on the First Amendment in this case," he observed, floating the idea of "treat[ing] [the *B.L.* case] as an example. . . . Look at the record and then decide."[27]

Predictably, then, Justice Breyer's opinion in *B.L.* assumed an intensely fact-driven form. "[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off-campus' speech," he wrote, "and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community."[28] *B.L.* observed that educators' authority over student speech stands at its apex when pupils are in school settings, instances where "schools . . . stand *in loco parentis*, *i.e.*, in the place of parents."[29] Nevertheless, Justice Breyer maintained: "The school's regulatory interests remain significant in some off-campus circumstances."[30] Assorted off-campus speech "that may call for school regulation," Justice Breyer wrote, included "harassment targeting particular individuals" and "threats aimed at teachers or other students."[31] Hewing closely to *B.L.*'s particular facts, Justice Breyer concluded that Mahanoy's sanction of Levy violated her First Amendment rights. Not only did Levy send her Snap outside of school hours and away from school grounds, he emphasized: "She did not identify the school in her posts or target any member of the school community with vulgar or abusive language."[32] Finally, in the opinion's most memorable, soaring passage, Justice Breyer noted that educators should be invested in protecting students' unpopular statements—particularly when those statements do not occur on school grounds: "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the marketplace of ideas. . . . That protection must include the protection of unpopular ideas, for popular ideas have less need for protection."[33]

In my *New York Times* essay, I praised the fact that *B.L.* prevailed at all, noting that no elementary or secondary student had won a Supreme Court case

26. Transcript of Oral Argument at 74, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255) [hereinafter *B.L.* Transcript].

27. *Id.* at 43.

28. *B.L.*, 141 S. Ct. at 2045.

29. *See id.* at 2044-45.

30. *Id.* at 2045.

31. *Id.*

32. *Id.* at 2047.

33. *Id.* at 2046 (internal quotation marks omitted).

decided on free speech grounds since the 1960s.[34] It was quite conceivable, I argued, that *B.L.* would extend that lengthy drought.[35] In addition, highlighting the arresting "nurseries of democracy" language, I hailed *B.L.*'s recognition that public schools play a major role in citizen formation.[36]

The *Times* piece was not, however, blind to some of *B.L.*'s more glaring frailties. I noted that the opinion was "heavily qualified," and "should not . . . be misunderstood as an unalloyed victory for students' constitutional rights of free speech."[37] I also sharply criticized *B.L.* for unnecessarily and unwisely invoking the *in loco parentis* doctrine, noting that it did so a staggering four times in an opinion that did not stretch eleven pages.[38] The *in loco parentis* doctrine, I emphasized, threatens the vitality of students' rights because parents, of course, cannot violate their children's First Amendment rights or any aspect of the Bill of Rights.[39] But if educators truly occupy "the place of parents" when students are in school, as Justice Breyer stated, that logic suggests that students' constitutional rights might be poised for a sharp contraction.[40] In *Morse v. Frederick*, the Supreme Court's previous student speech case, Justice Alito in 2007 wrote an incisive concurring opinion that warned against construing educators as acting *in loco parentis*: "Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials . . . as if they were private, nongovernmental actors standing *in loco parentis*."[41]

Regrettably, some of my early concerns about *B.L.* have been realized, as jurists have seized upon *B.L.*'s numerous *in loco parentis* invocations. Indeed, though the case purported to assess constitutional protections for off-campus speech, perhaps *B.L.*'s most notable legacy will be its promotion of the idea that educators enjoy even greater authority over on-campus speech. One can get some flavor of this development by considering a recent, closely scrutinized district court opinion that authorized educators to suppress on-campus speech. Citing *B.L.*, the district court reasoned: "[Schools'] interest in regulating speech is at its strongest when the speech occurs under the school's supervision, where the school stands *in loco parentis* towards all students, and of lesser interest

34. *See* Driver, *supra* note 21.

35. *See id.*

36. *See id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. *See id.*

41. 551 U.S. 393, 424 (2007) (Alito, J., concurring); *see also* Driver, *supra* note 21 (quoting Justice Alito's statement from *Frederick*).

where the speech or expression occurs outside of school."[42] To be sure, the district court did not hold—or even suggest—that *B.L.* had undercut or modified *Tinker*. But *B.L.*'s elevation of *in loco parentis* provides a significant atmospheric, one that surely will not redound to the benefit of student speakers.

My early appraisal of *B.L.*, though, should also have emphasized that the decision affords insufficient protection to off-campus student speakers who criticize school officials using harsh, even vulgar language. Recall that Justice Breyer seemed to hinge *B.L.* on the fact that Levy directed her curse-laden Snap toward neither her Mahanoy school nor particular school officials, but instead toward the generalized "cheer" program.[43] Justice Breyer emphasized that Levy avoided "targeting particular individuals,"[44] including educators, and further noted that she steered clear of "identify[ing] the school in her posts or target[ing] any member of the school community with vulgar or abusive language."[45]

At first blush, this logic possesses a certain intuitive appeal. On this theory, Levy's message would have seemed far more confrontational, controversial, and outré had she named the school or the coach in her message. Suppose, though, that Levy's had in fact posted "fuck Mahanoy cheer," or even directed some rough language toward the particular coach who cut her from the varsity squad. Would that *necessarily* have meant that Mahanoy's one-year cheer suspension did not violate Levy's rights?

That approach—which *B.L.* invites—would succeed in stifling a tremendously large volume of off-campus expression from elementary and secondary school students. Some of that speech, moreover, is quite valuable, as young people often begin to find their civic voices by registering sharp objections to what they regard as overweening educators who abuse their authority. Adolescents have a highly developed sense for discerning what they deem injustice. "That's not fair" is a young person's anthem that never goes out of style. Adolescents routinely direct their irritation about the injustices they encounter toward the place where they spend many of their waking hours, toward school and school officials—particularly when they are away from campus. Those off-campus objections often assume the form of casual teenager vernacular, which is to say the language is rife with profanity and otherwise charged talk that would be unusual in many (though by no means all) white-collar professional settings. In my view, it would be profoundly misguided to give educators a free pass to punish students for speaking their minds about

42. L.M. v. Town of Middleborough, No. 23-cv-11111, 2023 WL 4053023, at *5 (D. Mass. June 16, 2023) (citing Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046).

43. *See B.L.*, 141 S. Ct. at 2047 (2021).

44. *Id.* at 2045, 2047.

45. *Id.* at 2047. For a provocative, recent complication of the *in loco parentis* template, see Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 447-86 (2023).

school misgivings in their native tongue when they are off campus if they happen to mention their school or school personnel. *B.L.* threatens to do exactly that, and speech that the First Amendment should protect—and in some instances has protected—may now be pervasively both chilled and disciplined.

Justice Sotomayor perceptively illustrated the importance of this idea in a pair of disparate comments that she made during *B.L.*'s oral argument. First, she noted that students dedicate abundant—some might say obsessive—energy to discussing school events and school injustices with each other. "Kids basically talk to their classmates," Justice Sotomayor stated, "Most of their conversation is about school. Most of their exchanges have to do with their perceptions of the authoritarian nature of their teachers and others."[46] Second, Justice Sotomayor stated that her law clerks informed her that teenagers routinely swear as often as possible when speaking with each other, using profanity as a sort of "badge of honor."[47] Treating those two propositions as a logical syllogism means, of course, that teenagers are often going to use vulgar language in off-campus settings as they decry educators' authoritarianism. *B.L.* should not have given principals a free hand over these ubiquitous forms of student expression.

The strongest evidence that *B.L.* takes a wrong turn in the field of student speech arises from considering two prominent federal circuit court opinions assessing off-campus speech that is critical of educators. The best method for tracing the contours of *B.L.*'s future demands examining the past. Both cases—*Doninger v. Niehoff*[48] and *J.S. ex rel. Snyder v. Blue Mountain School District*[49]—were decided prior to *B.L.*, garnered significant attention in education law circles, and involved student speech that should have received First Amendment protection.

In *Doninger v. Niehoff*, the Second Circuit in 2008 refused to find that a high school had violated a student's First Amendment rights when it punished an off-campus statement that should have—properly understood—been constitutionally protected.[50] Avery Doninger, like Levy after her, grew frustrated with her high school about events stemming from an extracurricular activity. In her capacity as an elected member of the student council, Doninger's duties included planning an annual battle-of-the-bands concert called Jamfest.[51] After her high school had postponed Jamfest three

46. *B.L.* Transcript, *supra* note 26, at 20.

47. *Id.*

48. 527 F.3d 41 (2d Cir. 2008).

49. 650 F.3d 915 (3d Cir. 2011) (en banc).

50. *See* 527 F.3d at 43-45.

51. *See id.* at 44.

different times, Doninger decided to take her disappointment public.[52] Using a home computer one evening, Doninger wrote a blog post on a platform that was unrelated to her school, encouraging students and their parents to contact the school district's "douchebag[]" leadership about Jamfest, and noting that district superintendent "Paula Schwartz is getting a TON of phone calls and emails and such."[53] The post included Schwartz's contact information and included a note that Doninger's mother had "sent to Paula [Schwartz] . . . to get an idea of what to write if you want to write something or call her to piss her off more."[54] After the principal became aware of the blog post, she prohibited Doninger from running for Senior Class Secretary.[55]

The Second Circuit in *Doninger* legitimated the school's punishment, reasoning that the blog post "foreseeably create[d] a risk of substantial disruption within the school environment."[56] In reaching this conclusion, *Doninger* contended that the student's language—*douchebags*, and *piss off*—"was not only plainly offensive, but also potentially disruptive," "vulgar and . . . potentially incendiary," and thus "hardly conducive to cooperative conflict resolution."[57] Fortifying its conclusion that the message created a substantial disruption, *Doninger* noted: "Schwartz and [the school principal] had received a deluge of calls and emails, causing both to miss or be late to school-related activities."[58]

Doninger was a profoundly wrongheaded decision. First, the notion that calls and emails to administrative offices qualify as "a foreseeable risk of substantial disruption"[59] to the school environment seems highly dubious. Student speech cases almost invariably focus upon potential disturbances of the classroom environment and student experience and student safety issues—not mere administrative inconvenience. And with good reason. In addition, Doninger's language—which she used off campus—is certainly not the most refined, but it also seems quite tame as assessed on the spectrum of adolescent expression. To younger people, "douchebag" is a garden-variety insult, and "piss off" is synonymous with irritate. *Doninger*'s pearl-clutching response—going so far as to deem such language "potentially incendiary"[60]—betrays an alarming lack of familiarity with standard teenage vernacular.

52. *Id.*

53. *See id.* at 44-45, 49.

54. *Id.* at 44-45 (alteration in original).

55. *Id.* at 43, 46.

56. *Id.* at 50 (alteration in original) (quoting Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007)).

57. *Id.* at 50-51.

58. *Id.* at 51.

59. *Id.* at 53.

60. *Id.* at 51.

After *B.L.*, however, those distressing features of *Doninger* seem likely to be deemed immaterial. Because Doninger encouraged people to contact superintendent Schwartz directly about Jamfest—and used salty language in doing so—federal courts interpreting *B.L.* today would not hesitate to uphold the school's punishment of off-campus speech. That is so because, unlike Levy, Doninger can be construed as having "target[ed] [a] member of the school community with vulgar or abusive language."[61] It would not matter one whit that Doninger was—in no small sense—doing the very job that she had been elected to do: using her voice to rally people around an issue that they deemed important. In Doninger's student council position, directing people to contact the superintendent about their grievances was not some gratuitous swipe, as *B.L.* appears to conceive of it when students name educators' names. Instead, Doninger's "targeting" of superintendent Schwartz was among the very best ways to ensure that her message was heard, and it proved effective. But that she communicated using the voice of a typical teenager during off-hours—to communicate with her fellow teenagers—renders that message plainly punishable under *B.L.* Decisions like *Doninger* teach dangerous lessons to young Americans about what happens to those who dare to challenge governmental authority.

The Third Circuit's opinion in *J.S. v. Blue Mountain School District* suggests that *B.L.* may succeed in transforming at least some off-campus student speech victories into losses. In *J.S.*, a Pennsylvania middle school student used her home computer outside of school hours to create a mock, vulgarity-ridden MySpace profile of her principal.[62] Although J.S. did not use Principal James McGonigle's actual name for the profile, she did use his official school photo and described him as an "Alabama middle school principal named 'M-Hoe.'"[63] The profile indicated that M-Hoe was a "sex addict, fagass, put on this world with a small dick PRINCIPAL," and listed his general interests as including "detention, being a tight ass, . . . spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents."[64] Principal McGonigle was unamused and issued J.S. a ten-day suspension.[65] The Third Circuit, however, deemed the profile constitutionally protected speech, reasoning in large part that its satire was so patently absurd that no one would take it seriously.[66] After *B.L.*, however, is it at least possible

61. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2047 (2021).

62. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc).

63. *Id.*

64. *Id.* at 920-21.

65. *Id.* at 922.

66. *Id.* at 930-31 ("The profile was so outrageous that no one could have taken it seriously, and no one did.").

that because J.S. used McGonigle's official photo and described him as a "middle school principal" (even one from a different state) that the profile would now be construed as having targeted a school official with vulgar and abusive language? I fear that the answer is yes. *Doninger* and *J.S.* did not somehow manage to fly under the radar in *B.L.*; to the contrary, those opinions received analysis in various briefs filed at the Court, including that of Mahanoy Area School District itself.[67] That suggests Justice Breyer intentionally crafted the opinion in *B.L.* with an eye toward making this specific type of speech—off-campus, vulgar speech that mentions particular educators or schools—punishable. So, while it is certainly possible to blame the ostensible narrowness of *B.L.* for abandoning the Court's guidance function,[68] it provided all too clear guidance on at least this front. One does not need to believe that anything goes in off-campus speech to understand that, along this particular dimension, *B.L.* failed the nation's students and our democracy.

II. *Tinker*'s Colliding Prong on a Collision Course with Free Speech

The conventional blackletter test that emerged from *Tinker* permits educators to punish students for speech if they can "reasonably . . . forecast substantial disruption of or material interference with school activities."[69] But *Tinker* also included language suggesting that students were permitted to express themselves provided their speech avoided "colliding with the rights of others."[70] Following *Tinker*, some educators in lower courts occasionally sought to justify punishments on this "colli[ding] with the rights of others" prong.[71] But courts rebuffed those claims, construing this language to encompass an incredibly narrow set of highly unusual student actions.[72] That stinting approach is wise because educators invoke the "colliding" prong when they cannot make out a plausible claim that the controverted speech provided educators with reasonable basis for predicting a disruption of school activities.

67. *See, e.g.*, Brief for Petitioner at 20 n.1, 27 n.2, 40, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 736151 (analyzing *Doninger* and *J.S.*); Brief for Massachusetts et al. as Amici Curiae in Support of Neither Party at 21 n.48, 23, *B.L.*, 141 S. Ct. 2038 (No. 20-255), 2021 WL 859697 (same).

68. *See* Papandrea, *supra* note 15, at 80 (noting *B.L.* "offers little guidance for future cases"); *cf.* Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 207 (2008) ("[T]here is a growing tendency on the part of the Court to avoid issuing a clear, general, and subsequently usable statement of the Court's reasoning or the Court's view of the implications of its decision.").

69. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

70. *Id.* at 513.

71. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

72. *Id.* ("Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.").

The reasonable forecast standard, of course, endows educators with much greater authority for censoring student speech than typically exists in non-school settings. Courts have therefore historically evinced hesitation about providing schools with still greater authority to censor student speech. The Third Circuit in *J.S.* captured the conventional, skeptical view of the colliding prong, labeling it "arguably dicta" and noting, "[T]here is a danger in . . . the . . . argument [because] if that portion of *Tinker* is broadly construed, an assertion of virtually any 'rights' could transcend and eviscerate the protections of the First Amendment."[73]

Although some judges in the twenty-first century have construed the colliding prong as empowering educators to censor speech that students may deem upsetting,[74] that understanding collides with *Tinker* itself. In *Tinker*, public school students in Des Moines, Iowa, famously wore black armbands to protest the Vietnam War. Those armbands, according to *Tinker*, were "a silent, passive expression of opinion" and caused no "collision with the rights of other students to be secure and to be let alone."[75] In so doing, *Tinker* rejected the school district's assertion that the armbands would be too upsetting for some Des Moines high school students to encounter. From the vantage point of 2024, the notion that pieces of black cloth worn around the bicep would constitute an affront may seem absurd. But in December 1965, long before opposition to the Vietnam War swelled, some students and teachers viewed the armbands as an aggressive provocation and an embrace of Communism.[76] The school district's brief, moreover, noted that some Des Moines high school students would see the armbands as an attack on the memory of their deceased classmate who sacrificed his life in the war: "A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of demonstration existed, it might evolve into something which would be difficult to control."[77] But *Tinker* rejected the notion that these concerns should carry the day. When students state ideas, "even on controversial subjects," those expressions form "an important part of the educational process" itself, *Tinker* reasoned.[78] The United States is a "relatively permissive, often disputatious, society," *Tinker* stated, and schools in our society

73. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 n.9 (3d Cir. 2011) (en banc).

74. *See infra* text accompanying notes 99-127 (discussing *Harper v. Poway Unified School District* and *L.M. v. Town of Middleborough*).

75. 393 U.S. at 508.

76. *See* DRIVER, *supra* note 6, at 85.

77. Brief for Respondents at 11, *Tinker*, 393 U.S. 503 (No. 21), 1968 WL 94384.

78. 393 U.S. at 512-13.

cannot censor student speech out of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[79]

In this vein, *Tinker* quoted with approval a recently decided Fifth Circuit student speech opinion called *Burnside v. Byars*[80] for the proposition that "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"[81] The Fifth Circuit's opinion in *Burnside* alongside its companion opinion, *Blackwell v. Issaquena County Board of Education*,[82] furnished *Tinker* with the language making clear that student speech is not constitutionally protected when it "collid[es] with the rights of others."[83] That pair of cases—arising from the civil rights era—merits examination because it helps to flesh out what animated *Tinker*'s invocation of the collision prong regarding student speech. The fact patterns in *Burnside* and *Blackwell* were virtually identical: Both cases involved students wearing buttons promoting racial equality to all-Black public schools in 1960s Mississippi, and principals in both cases informed the students that wearing the civil rights buttons was impermissible on school grounds.[84]

The Fifth Circuit resolved the strikingly similar disputes in strikingly disparate fashions, upholding the school's restriction in *Burnside* and invalidating it in *Blackwell*. Why? The answer turns on the fact that the button wearers in *Burnside* and *Blackwell* comported themselves in divergent manners. Whereas in *Burnside* the button wearers acted in an orderly fashion befitting the school environment,[85] the story in *Blackwell* could not have been more different. Among other transgressions, *Blackwell*'s button wearers: "accosted other students by pinning the buttons on them even though they did not ask for one"; "tried to put a button on a younger child who began crying"; "threw buttons into the [school] building through the windows"; and "entered a classroom while class was in session, ignored the teacher and without permission importuned another student to leave class."[86] It was in the context of this bedlam, which *Blackwell* termed "a complete breakdown in school discipline," that the Fifth Circuit was motivated to observe, "There was an

79. *Id.* at 508-09.

80. 363 F.2d 744 (5th Cir. 1966).

81. *Tinker*, 393 U.S. at 511 (quoting *Burnside*, 363 F.2d at 749).

82. 363 F.2d 749 (5th Cir. 1966).

83. *Tinker*, 393 U.S. at 513. My discussion of *Burnside* and *Blackwell* profited from Professor Bowman's incisive scholarship. *See* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U. L. REV. 1129, 1132-48 (2009). For my prior treatment of these cases, see DRIVER, note 6 above, at 88-91.

84. *See Burnside*, 363 F.2d at 746-47; *Blackwell*, 363 F.2d at 750-52.

85. *See Burnside*, 363 F.2d at 748.

86. *Blackwell*, 363 F.2d at 751-52.

unusual degree of commotion, boisterous conduct, [and] *a collision with the rights of others*."[87] The intense physicality of the student conduct in *Blackwell*—sticking sharp objects onto other people's clothing without consent, throwing items through school windows, and barging into classrooms—helps to account for its usage of the highly tactile word *collision*, which conjures two objects crashing into each other.[88]

Admirably, some courts have refused to expand *Tinker*'s colliding prong by rejecting assertions that student speech promoting gay equality will clash with the sensibilities of their classmates. In *Fricke v. Lynch*[89]—one of my favorite student speech cases in American judicial history—a district court judge in 1980 considered whether a Rhode Island high school could prevent a student named Aaron Fricke from bringing another young man as his date to prom without violating the First Amendment.[90] The school suggested that it might be difficult to maintain order with a gay couple at prom, noting that a student had recently punched Fricke on account of his sexual orientation, an attack that required Fricke to receive five stiches and resulted in him being given "a special parking space closer to the school doors and . . . an escort (principal or assistant principal) between classes."[91] Nevertheless, the district court concluded that Fricke possessed a valid First Amendment right to communicate his sexual orientation by bringing a male to prom:

> [S]ome people might say that Aaron Fricke's conduct would infringe the rights of the other students, and is thus unprotected by *Tinker*. This view is misguided, however. Aaron's conduct is quiet and peaceful; it demands no response from others and—in a crowd of some five hundred people—can be easily ignored. Any disturbance that might interfere with the rights of others would be caused by those students who resort to violence, not by Aaron and his companion, who do not want a fight.[92]

Fricke's unwillingness to cave into the demands of homophobic high school students—who would surely claim that seeing a gay prom couple clashed with their rights to avoid such unseemly spectacles—deserves to be saluted.

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87. *Id.* at 753-54 (emphasis added).

88. For a thoughtful, expansive analysis of what *Tinker*'s second prong entails, see ROSS, note 15 above, at 160-61, 194-95. Courts sometimes refer to *Tinker*'s second prong as involving the "invasion of the rights of others." *Tinker*, 393 U.S. at 513. If anything, the term *invasion* may conjure physicality even more readily than *collision*.

89. 491 F. Supp. 381 (D.R.I. 1980).

90. *Id.* at 382-84.

91. *Id.* at 384.

92. *Id.* at 388. For another judicial decision refusing to find that pro-gay speech collided with the rights of high school students, see *Gillman ex rel. Gillman v. School Board for Holmes County*, 567 F. Supp. 2d 1359, 1372 (N.D. Fla. 2008).

The First Amendment's traditional anathema for viewpoint discrimination suggests, of course, that schools must permit students to express themselves on both sides of the debate regarding gay equality. Sauce for the goose, sauce for the gander, and all that. As recently as 2005, this understanding appeared relatively uncontroversial, as evidenced by a district court's opinion in *Nixon v. Northern Local School District Board of Education*.[93] In that case, an Ohio student named James Nixon wore a T-shirt to Sheridan Middle School that stated on the front "Jesus said . . . I am the way, the truth and the life. John 14:6," and on the back: "Homosexuality is a sin!"[94] The school authorities sought to prevent Nixon from wearing the T-shirt, even though the underlying record did not suggest that the garment created a reasonable forecast of a substantial disruption.[95] The district court judge in *Nixon* viewed the dispute as, in effect, *Tinker* redux. "[T]here is no evidence that [the student's] silent, passive expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone," *Nixon* concluded.[96] Given that Nixon's shirt had elicited no negative reactions, the court contended that, as in *Tinker*, "the school's decision to ban [the] T-shirt was more than likely caused by 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'"[97] The court noted the school "point[ed] to no authority interpreting what [*Tinker*'s colliding prong] really entails," and allowed that it was "not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school's regulation of student speech."[98]

One year after *Nixon*, however, that state of affairs changed dramatically. In *Harper v. Poway Unified School District*,[99] the Ninth Circuit confronted a fact pattern arising from southern California that echoed *Nixon*. Poway High School's Gay-Straight Alliance hosted a "Day of Silence," an event designed to promote gay equality that highlights society's marginalization of the queer community.[100] In response, a student named Tyler Harper wore a T-shirt to Poway that stated on the front, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," and on the back: "HOMOSEXUALITY IS

93. 383 F. Supp. 2d 965 (S.D. Ohio 2005).

94. *Id.* at 967.

95. *Id.* at 973.

96. *Id.* at 974.

97. *Id.* at 973-74 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

98. *Nixon*, 383 F. Supp. 2d at 974.

99. 445 F.3d 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

100. *See Harper*, 445 F.3d at 1171.

SHAMEFUL 'Romans 1:27.'"[101] Poway's authorities repeatedly refused to permit Harper to attend classes wearing the T-shirt.[102] Writing for the Ninth Circuit, Judge Reinhardt concluded that Poway had not violated the First Amendment, asserting: "Harper's wearing of his T-shirt colli[des] with the rights of other students in the most fundamental way."[103] Judge Reinhardt's opinion concluded that *Tinker*'s colliding prong afforded students protection from "psychological attacks," but only if those students are minorities.[104] "Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn," Judge Reinhardt wrote.[105] "The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development."[106]

I wish to be very clear that I detest Harper's homophobic T-shirt. I view his T-shirt as resisting one of the greatest social transformations of my lifetime—America's embrace of the movement for gay equality.[107] Yet I also harbor profound doubts that school censorship of that message—as validated in *Harper*—was the correct First Amendment response. To begin, Harper's T-shirt surely did not collide with his classmates' rights "in the *most* fundamental way."[108] Among the many, many *more* fundamental ways that Harper could have collided with others' rights would have occurred if he printed his message on buttons and then attempted to pin them onto nonconsenting classmates. Not so very long ago, Harper's T-shirt would have been regarded as a "silent, passive expression of opinion."[109]

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101. *Id.*

102. *Id.* at 1172.

103. *Id.* at 1170, 1178 (internal quotation marks omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

104. *Harper*, 445 F.3d at 1170, 1178, 1182 & n.27.

105. *Id.* at 1178.

106. *Id.* at 1178-79.

107. *See generally* WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020) (chronicling the history of the American marriage-equality debate); Justin Driver, Opinion, *Why This Supreme Court Could Be the Best Hope for Gay-Marriage Advocates*, WASH. POST (June 24, 2011, 8:28 PM EDT), https://perma.cc/4WW5-AP6A (arguing in 2011 that the time was ripe for gay-marriage advocates to bring a case before the Supreme Court).

108. *Harper*, 445 F.3d at 1178 (emphasis added).

109. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); *see also* Nixon v. N. Loc. Sch. Dist. Bd. Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

Given that Poway agreed to sponsor the Day of Silence and that these events occurred in a Southern California high school in the 2000s, moreover, it hardly seems extravagant to maintain that Harper's religion-based position communicated an unpopular, minority viewpoint. Indeed, it requires precious little imagination to understand how Harper might construe himself as deserving protection under the minority-based test that Judge Reinhardt announced in this very case. While Christianity surely is not a minority faith in the United States, the percentage of adolescent Christians invoking biblical passages to condemn homosexuality in Southern California in the 2000s seems likely to be modest.[110] It seems quite plausible that Harper would have regarded the school's endorsement of the "Day of Silence" as amounting to "an attack" on his "minority" understanding of Christianity,[111] and he would likely contend that his fellow believers have endured the types of subordination that Judge Reinhardt identified. On this account, being called, say, a "Jesus Freak" or a "Bible thumper" would make students in Harper's shoes feel "inferior" and "intimidate[d]" and "damage their sense of security."[112] Poway's sponsoring the "Day of Silence," Harper might contend, made him feel both religiously marginalized and compelled to announce that he does not share the majority's view regarding homosexuality.

It seems important to note, moreover, that Harper did not avail himself of homophobic epithets to express his view that homosexuality is sinful. Indeed, I have difficulty thinking of any words that Harper could have selected to articulate his core message without running afoul of school censors.[113] His religious-based message is not one of "Straight Pride."[114] Outside of the school context, the First Amendment has been interpreted to protect the most overtly hateful, virulent, epithet-ridden homophobic statements—even in the context of military funerals.[115] For those who believe, with *Tinker*, that students exchanging ideas on contentious topics is an invaluable part of the educational process, we should be hesitant about reflexively squelching students' ideas we find noxious. Had Harper been permitted to wear his T-shirt to Poway uninhibited, I believe that his classmates would have eventually given him an

110. Judge Kozinski's dissent in *Harper* pressed the majority opinion regarding at what level minority status should be ascertained. National? State? Local? School? *See* 445 F.3d at 1201 (Kozinski, J., dissenting).

111. *Id.* at 1182 n.27 (majority opinion).

112. *Id.* at 1178.

113. *See* DRIVER, *supra* note 6, at 128-29.

114. *See generally* Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001) (evaluating a student's First Amendment claim regarding a sweatshirt reading "Straight Pride").

115. *See* Snyder v. Phelps, 562 U.S. 443, 454, 458, 463 (2011) (finding statements reading "Fag Troops," "Semper Fi Fags," and "Thank God for Dead Soldiers" to merit constitutional protection, with only Justice Alito dissenting).

earful—registering their severe disapproval—and that approach seems highly preferable to blotting out the message. *Harper*'s censorship method has numerous baleful consequences, including: elevating the silenced speaker to a martyr; transforming the banned message into an illicit taboo, giving the forbidden message greater currency—particularly among adolescents—precisely because school authorities have deemed it verboten; inviting workarounds because the censored, motivated student can readily identify alternate means—through a symbol, say—for communicating the school-prohibited words; and suggesting that marginalized students' psyches are more vulnerable than the underlying reality merits.[116]

Since *Harper* invigorated *Tinker*'s secondary prong in 2006, federal courts have increasingly identified instances where student messages collide with their classmates' rights. One recent high-profile case that is now working its way through the court system may illuminate the future of *Tinker*'s colliding prong. Last year, in *L.M. v. Town of Middleborough*, a Massachusetts district court judge evaluated whether it was permissible to prevent a student at Nichols Middle School from attending classes who wore a T-shirt asserting "THERE ARE ONLY TWO GENDERS."[117] Judge Talwani, availing herself of *Tinker*'s colliding prong, concluded that the school did not violate the First Amendment by effectively banning the T-shirt.[118] Rather, the school reasonably interpreted the shirt to "communicate that only two gender identities—male and female—are valid, and any others are invalid or nonexistent," Judge Talwani wrote.[119] She further noted: "[S]tudents who identify differently, whether they do so openly or not, have a right to attend school without being confronted by messages attacking their identities."[120] The school—which observes Pride Month and Pride Day—was justified in believing "that a group of potentially vulnerable [LGBTQ+] students will not feel safe," Judge Talwani wrote.[121]

I share *L.M.*'s concern that the shirt in question amounts to—at a minimum—nonbinary erasure. But even those who applaud *L.M.*'s outcome should not overlook several unattractive features of the court's approach. First, Judge Talwani took for granted the legitimacy of Nichols's dress code, which provided *inter alia*: "Any . . . apparel that the administration determines to be unacceptable

116. *See* DRIVER, *supra* note 6, at 130.

117. *See* 677 F. Supp. 3d 29, 33 (D. Mass. 2023).

118. *Id.* at 32, 37-39.

119. *Id.* at 38.

120. *Id.*

121. *Id.*

to our community standards will not be allowed."[122] But, of course, Des Moines school officials determined many moons ago that black armbands were unacceptable in that community. Courts ought to scrutinize school dress codes with much greater intensity than they typically do.[123] Second, Judge Talwani supported the school's ban by noting that "L.M. has been and remains free to convey his message elsewhere."[124] But that slippery justification is, of course, always available in student speech cases, and it paves the road toward eliminating students' First Amendment rights to discuss controverted matters. Students spend an enormous percentage of their time in school settings, and silencing them in that all-important arena must be viewed as no trifling matter. Third, the school's censorship dramatically amplified L.M.'s antiqueer message, as two of L.M.'s classmates donned their own T-shirts with the message after he was punished, and news organizations interviewed L.M. about the controversy.[125] This counterproductive nature of censorship is a staple of student speech litigation.[126] If educators truly wish to diminish an incendiary statement, the best approach often counsels against giving it oxygen. Fourth, Judge Talwani repeatedly suggested that the school had not disciplined L.M. for wearing the shirt.[127] But given that L.M. was not permitted to attend class for wearing the shirt on multiple occasions, the school's decision can effectively be construed as an in-school suspension. And, of course, the silencing of the speaker's preferred message is a type of sanction itself. Regardless of how the First Circuit resolves *L.M.* on appeal, it should explicitly wrestle with some of the difficulties presented by the district court's approach.

III. Negated by Neuroscience?

Beginning in 2005 with *Roper v. Simmons*,[128] the Supreme Court has repeatedly interpreted the Eighth Amendment to prohibit imposing

122. *Id.* at 33 (internal quotation marks omitted). The dress code also prohibited hate speech. *See id.*

123. *See* DRIVER, *supra* note 6, at 131-33 & 132 n.*.

124. *L.M.*, 677 F. Supp. 3d at 40 (minimizing the suppression by observing *L.M.* "may experience some limited restriction in his ability to convey a specific message during the school day").

125. *See id.* at 35, 40.

126. *See* DRIVER, *supra* note 6, at 101-02, 110 (describing how school censorship in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), ultimately amplified the offending messages).

127. *See L.M.*, 677 F. Supp. 3d at 35, 41.

128. 543 U.S. 551 (2005); *see also* Graham v. Florida, 560 U.S. 48, 82 (2010) (prohibiting juvenile life-without-parole sentences for nonhomicide crimes); Miller v. Alabama, 567 U.S. 460, 489 (2012) (prohibiting mandatory life-without-parole sentences for juvenile offenders).

punishments on juveniles that are permissible to impose on adults. *Roper* and its progeny have justified sparing minors from society's harshest penalties by invoking neuroscience and psychology, observing that the adolescent mind functions in significantly different ways than the adult mind. To date, the Eighth Amendment line of cases involving juveniles has proceeded along a parallel track to the Court's free speech jurisprudence. But should the Supreme Court attempt to integrate these currently discrete bodies of law, the result could augur ill for the continued vitality of student speech.[129]

Roper prohibited capital punishment for crimes committed by people younger than eighteen years old.[130] In so doing, the Court identified two reasons of particular relevance here regarding why juveniles should receive categorical protection against the death penalty. First, *Roper* noted—consistent with scientific studies and what "any parent knows"—that juveniles exhibit "[a] lack of maturity and an underdeveloped sense of responsibility" compared to adults, traits that "often result in impetuous and ill-considered actions and decisions."[131] Second, *Roper* found that "juveniles are more vulnerable or susceptible to . . . peer pressure," and that they "have less control, or less experience with control, over their own environment."[132] Bolstering this decision, *Roper* cited the work of psychologist Laurence Steinberg, who has emphasized that juveniles display particularly weak impulse control when they confront uncertain, fast-moving situations—like impulsively deciding to commit a crime or even operating an automobile.[133] Indeed, Steinberg has evocatively likened the adolescent mind's difficulty with emotional regulation to "driving a car with a sensitive gas pedal and bad brakes."[134]

Is it possible that *Roper*'s invocation of adolescent neuroscience will eventually influence how judges conceive of students' constitutional rights more broadly? Outside of this particular context, Judge Jed Rakoff has suggested that scientific understandings will inexorably shape law: "[S]cience and law remain uncomfortable bedfellows; but twin beds are not an option.

129. Emily Buss deserves great credit for quickly detecting the threat that a judicial embrace of neuroscience could pose for student speech. *See* Buss, *supra* note 15, at 57-62 (promoting the "developmental effects approach"). Buss and I, however, have reached quite distinct conclusions regarding the correctness of the Court's major post-*Tinker* opinions in this area. *See* DRIVER, *supra* note 6, at 124-39.

130. *Roper*, 543 U.S. at 578.

131. *Id.* at 569 (citation omitted).

132. *Id.*

133. *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

134. LAURENCE D. STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 15 (2014).

We may expect . . . that jumbled together, they will toss and turn for a long time to come."[135] Extending Judge Rakoff's metaphor, if the Court has made neuroscience bedfellows with the Eighth Amendment, it may prove difficult to continue imposing separate sleeping arrangements for neuroscience and the First Amendment. As one perspicacious commentator has posed the question: "*Roper* and its progeny have created a dilemma: can adolescents be considered immature for some purposes, yet mature for others?"[136]

Importing *Roper*-style reasoning into the First Amendment context could well destroy student speech. Indeed, courts could easily avail themselves of neuroscience to conclude that adolescents lack the necessary maturity to exercise free speech rights responsibly in two distinct fashions. First, building on the old adage marveling at what emerges "out of the mouths of babes," judges could contend *student speakers* are simply too young and too impetuous about what they say to deserve *Tinker*'s protections. Notably, this idea stretches back to the *Tinker* litigation itself. One Des Moines educator scolded an armband-wearing student by asserting he "was too young and immature to have too many views."[137] In this vein, Justice Black's dissent in *Tinker* doubted that "school pupils are wise enough" for free speech rights, worrying about "subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."[138] This idea did not, of course, vanish in the 1960s. In 2008, Judge Posner stated that "[t]he contribution that kids can make to the marketplace in ideas and opinions is modest," and therefore "[a] heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense."[139] Now, though, these doubts about the value of student speakers have a scientific foundation.

Second, and relatedly, judges could wield *Roper*-style neuroscience to conclude that *student listeners* are highly susceptible to peer pressure and have insufficient impulse control to withstand the rough-and-tumble world of free expression. On this account, if discussions get even remotely heated, it is asking too much of the racing adolescent mind to slow down and pump the brakes, as we expect of the adult mind. Adolescents are quick to anger and leisurely about regaining their composure, and we ought not ask our younger people to take on tasks for which they are developmentally ill-equipped. This neuroscientific

135. Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 SETON HALL L. REV. 1379, 1393 (2008).

136. Jennifer Rosato, *What Are the Implications of* Roper*'s Dilemma for Adolescent Health Law*, 20 J.L. & POL'Y 167, 173 (2011).

137. DRIVER, *supra* note 6, at 74.

138. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 525 (1969) (Black, J. dissenting).

139. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671 (2008). Elsewhere, Judge Posner dismissed the "granting rights of free speech to school kids" as downright "silly." *See* DRIVER, *supra* note 6, at 139 n.*.

justification would, moreover, be supported by an environmental reality. In no setting are *Roper*'s concerns about peer pressure more acute than in school, where most students exhibit greater concern with saving face in front of their peers than with learning the intricacies of sine and cosine. Thus, *the very last place* that we should expect young people to deescalate a verbal confrontation is in the powder keg of the public school.

None of this is to say that *Roper*'s existence *necessarily* means that *Tinker*'s days are numbered. For one thing, it may be possible to argue that *Tinker*'s reasonable forecast of substantial disruption test has already priced in the fact that the adolescent mind differs from the adult mind. On this view, *Tinker* provides vastly diminished free speech protection in schools than exists in many other realms in American society, and those diminished protections demonstrate sensitivity to the fact that adolescents are not adults. For another thing, it might also be observed that the Supreme Court's jurisprudence involving adolescents does not, when viewed in totality, require anything like a uniform, one-size-fits-all approach. To the contrary, where the Court typically affords students what I have termed "junior-varsity constitutional rights," the Court has also sometimes extended students even greater constitutional protection than exists in non-school settings.[140] Different judicial approaches to different constitutional provisions, this defense of *Tinker* would run, is nothing aberrational, but instead forms a ubiquitous feature of our constitutional order involving adolescents.[141]

No doubt other arguments exist to explain why *Roper* and *Tinker* can be viewed as friends rather than as rivals. Those arguments should be further tested, developed, and refined because what neuroscience gave with one hand to a few adolescents under the Eighth Amendment, it now seems poised to take

140. *See* Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 213-14 (2022).

141. Some readers may object that fears of the current Supreme Court anytime soon embracing adolescent neuroscience to eviscerate students' free speech rights are overblown. On this account, conservative Justices disdained *Roper*, and the preferred judicial methodologies of today's Republican-appointed Justices do not easily coalesce with social science. *See* 543 U.S. 551, 617-18 (2005) (Scalia, J., dissenting). It is important to realize, though, that conservative Justices need not expressly invoke neuroscience in order to roll back student speech rights. Instead, the judicial retrenchment of *Tinker* could implicitly be animated by science but justified on the basis of originalism. In *Morse v. Frederick*, Justice Thomas laid the groundwork for this approach by calling for *Tinker* to be overturned on originalist grounds, asserting that students retained no First Amendment rights at the nation's founding: "[I]n the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order." 551 U.S. 393, 412, 420-22 (2007) (Thomas, J., concurring). To the extent that this originalist vision is understood as distinct from the neuroscience threat, we can consider this a fourth element of the coming crisis on student speech.

with the other hand from millions of adolescents under the First Amendment. And our American democratic society will be much the poorer if that eventuality comes to pass.

Conclusion

The preeminent First Amendment scholar Alexander Meiklejohn once stated: "[D]emocracy is the art of thinking independently together."[142] Meiklejohn understood very well that what he said of democracy applies with equal force to the educational realm.[143] This moment is, as I have suggested, a perilous one for the belief expressed in *Tinker* more than five decades ago that elementary and secondary schools must serve as sites of democratic education and experimentation, places where students learn vital lessons through even ardent disagreements. In another five decades, I fervently hope that we can look back and conclude that today's emerging crisis of student speech has been averted.

142. ADAM R. NELSON, EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN 1872-1964, at 225 (2001) (quoting Alexander Meiklejohn, *Teachers and Controversial Questions*, HARPER'S MAG., June 1938, at 19).

143. *See* NELSON, *supra* note 142, at 225 ("Democratic education, Meiklejohn argued, needed to teach students how to disagree with one another without abandoning the possibility of mutual agreement, or at least open debate, altogether.").