Stanford Law Review

Volume 76 Symposium

ESSAY

Integrating the Marketplace of Ideas: A New Constitutional Theory for Protecting Students' Off-Campus Online Speech

Laura McNeal*

Abstract. The recent Supreme Court decision in *Mahanoy Area School District v. B.L. ex rel. Levy* expanded the authority of school leaders to censor student off-campus online speech under certain circumstances. However, the Court failed to articulate the contexts in which censorship is constitutionally permissible. The absence of a clear constitutional standard leaves school leaders with unbridled discretion to censor off-campus speech, thereby increasing the likelihood of viewpoint discrimination. The expansion of school leaders' authority to censor student speech is occurring during a renaissance of political and social activism in K-12 schools as students, especially those from marginalized populations, advocate for myriad controversial issues affecting their communities such as gun control, reproductive rights, and LGBTQI+ rights. This is occurring during a broader backlash against progressive political speech: anti-CRT; "Don't Say Gay"; and the weaponization of the "woke" trope to suppress speech and maintain the subordination of marginalized groups. This Essay offers a path toward safeguarding students' First Amendment rights to engage in online expressive activities, political speech, and symbolic speech off campus through the adoption of a new constitutional standard, the Integrated Contextual Disruption (ICD) Test. This proposed new standard strikes the necessary balance between a school's regulatory interest in maintaining an environment conducive to learning and the competing value of student free-speech rights.

* Professor of Law at the University of Louisville Brandeis School of Law. I am grateful for the invaluable comments and insights of my colleagues Erwin Chemerinsky at the UC Berkeley School of Law and Caroline Corbin at the University of Miami School of Law. A special thanks to Cedric Merlin Powell at the Howard School of Law for your unyielding support and encouragement in the completion of this Essay. I am truly grateful. I dedicate this article to my mother. Thank you for always believing in me.

Table of Contents

Introduction

> *If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.*
>
> —Justice William Brennan, Jr.[1]

The recent Supreme Court decision in *Mahanoy Area School District v. B.L. ex rel. Levy* expanded the authority of school leaders to regulate student speech by acknowledging that off-campus speech can be regulated under special circumstances.[2] The Court, however, declined to clearly define the contexts in which the exercise of school discretion to regulate student off-campus online speech is constitutionally permissible.[3] The absence of a constitutional standard leaves school leaders with unbridled discretion to regulate off-campus online speech. This increases the likelihood that students' First Amendment rights will be violated if their expression is unpopular or controversial. While it is important for school leaders to have the authority to regulate speech to maintain an environment conducive to learning, such authority should have constitutionally defined limits. Ideally, public schools, which foster democratic values and ideals of good citizenship, should encourage a marketplace of ideas that embraces diverse perspectives and teaches students how to civically engage and fully participate in our democratic process. This is especially pertinent in light of the ongoing social, cultural, and political debates permeating today's society, often undermining and disrupting the educational mission of our K-12 school systems.

The expansion of school leaders' authority to regulate student speech is occurring during a period of political upheaval and progressive social activism in K-12 schools as students, especially those from marginalized populations, advocate for myriad controversial issues affecting their communities such as gun control, reproductive rights, and LGBTQI+ rights.[4] Students have played a

1. Texas v. Johnson, 491 U.S. 397, 414 (1989).

2. 141 S. Ct. 2038, 2045-46 (2021).

3. *Id.*

4. *See* David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1124-25 (2020); Hunter Foist, Note, *Keep Saying Gay: How Nationwide "Don't Say Gay" Bills Violate the First Amendment, Chill Protected Speech, and Hinder Public Health Outcomes*, 21 IND. HEALTH L. REV. 177, 185 (2024); Emily Brown, *Walking Out On Student Speech: The Erosion of* Tinker *and How* Pickering *Promises to Restore It*, 19 FIRST AMEND. L. REV. 1, 10 (2020); Bridget Fetsko, *The Role of K-12 Students in Protests Against Racism and Police Brutality*, EDUCATIONWEEK (June 17, 2020), https://perma.cc/QD92-VL5B; Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), https://perma.cc/H39R-FR74; Nadine El-Bawab, *Students at More than 50 Schools, Universities Stage Reproductive Justice Protests*, ABC NEWS (Oct. 6, 2022), https://perma.cc/548Q-2F42.

unique role in political and social movements throughout our nation's history.[5] During the Civil Rights era, for example, students marched in protest of segregation, participated in sit-ins, and challenged racism through various other forms of advocacy.[6] Today's students demonstrate the same unyielding commitment to advocacy as past generations. For instance, recently, students attending high schools and universities in more than twenty-five states organized numerous protests to advocate for reproductive rights in response to the Supreme Court's overturning of *Roe v. Wade*.[7] Additionally, students throughout the country organized school walkouts in response to Florida's "Don't Say Gay" law[8] and the "Stop WOKE Act,"[9] which collectively have advanced the weaponization of woke tropes to suppress speech and maintain the subordination of marginalized groups.[10] Student protests about controversial political issues demonstrate how the politicization of education has transformed many schools into battlegrounds for the ongoing culture wars permeating our social, cultural, and political systems.[11]

The internet and social media have become critical components of students' social activism because these technologies serve as ubiquitous methods of communication when students speak to their peers, families, and

5. *See* Steven Mintz, *Student Protests, Past and Present: Placing Today's Student Protests into Historical Perspective*, INSIDE HIGHER ED (Jan. 24, 2021), https://perma.cc/LJ9F-ULXR.

6. Joseph M. Lawler, Student Protests During the Civil Rights Movement (May 2023) (student project, Providence College), https://perma.cc/4QH5-UYTM.

7. El-Bawab, *supra* note 4.

8. Matt Lavietes, *Florida Students Stage School Walkouts over 'Don't Say Gay' Bill*, NBC NEWS (Mar. 3, 2022, 3:30 PM PST), https://perma.cc/248L-BTF9; *Students Fight Anti-LGBTQ Policies with Nationwide Walkouts*, GLAAD (Sept. 28, 2022), https://perma.cc/BE57-7ND7.

9. *See generally* Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463, 471 (2023) (discussing Florida's "Stop WOKE Act," which "declares it to be prohibited 'discrimination on the basis of race' for any student in the state to be exposed to 'training or instruction that espouses, promotes, advances, inculcates, or compels such student . . . to believe any' of a list of concepts, including that members of one race are 'morally superior' to members of another; that a person's 'status' is 'either privileged or oppressed' as a result of their race or sex" (quoting FLA. STAT. § 1000.05(4)(a) (2022)); Joe McLean & Aleesia Hatcher, *Florida Students Walk Out of Classrooms to Protect Education Policies; DCPS Students Not Allowed to Participate*, NEWS 4 JAX (updated Apr. 21, 2023, 11:06 PM EST), https://perma.cc/T4EQ-2ZWG.

10. Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 535, 538 (2023). Indeed, many readily took up the anti-"wokeness" mantle, using "CRT" rhetoric as a political tool to transform the term from an academic framework to any discussion about racial inequity, particularly inequity that implicated white people in originating and facilitating racial oppression.

11. *See, e.g.*, Kathryn Palmer, *Punishments Rise as Student Protests Escalate*, INSIDE HIGHER ED (Apr. 15, 2024), https://perma.cc/LV6E-5PS6.

society in general.[12] Social media allows students to share their opinions and perspectives and has the potential to enable collective action on a local, national, or even global scale.[13] As the pace of social media use by students increased exponentially, students' free-speech rights were jeopardized due to uncertainty regarding whether students' off-campus online speech was afforded the full protections of the First Amendment.[14] The existing constitutional framework governing students' free-speech rights, *Tinker*'s Material and Substantial Disruption Test, allows school officials to regulate student speech that is reasonably forecast to cause a material disruption to the school learning environment.[15] The doctrinal and conceptual tension under the First Amendment consists of balancing the imperatives of free-speech absolutism underlying the marketplace of ideas with the corrosive and disruptive impact of speech that undermines the learning environment. While it is presumptively unconstitutional for a state to regulate the content of speech based on which messages it finds favorable or not,[16] the unique context of the school changes this analysis because while students do not leave their rights at the schoolhouse door, they must be educated in a manner that reflects the educational mission of the school. The Material and Substantial Disruption Test does not explicitly state its applicability to off-campus speech, thereby creating many ambiguities regarding whether off-campus expression is

12. *See generally* Martha McCarthy, *Social Media, Students, and the Law*, LAWS, Oct. 2021, at 1, 2 (noting that a 2015 survey reported that "teens spent an average of 3 h[ours] a day on electronic devices other than for school work and that approximately two-thirds of the respondents used two or more social media platforms").

13. *See* MONICA ANDERSON & JINGJING JIANG, PEW RSCH. CTR., TEENS AND THEIR EXPERIENCES ON SOCIAL MEDIA 4, 9 (2018), https://perma.cc/3H66-52NX. In the 1960s and 1970s, high school students participated extensively in anti-Vietnam War protests, turning many public schools into cultural battlegrounds for the anti-war movement. *See* Aaron G. Fountain, Jr., *The War in the Schools: San Francisco Bay Area High Schools and the Anti-Vietnam War Movement, 1965-1973*, CAL. HIST., Summer 2015, at 22, 22-39. The omnipresence and global reach of social media can have an amplifying effect on similar student protests today.

14. *See* Bret M. Thixton, Comment, *Rap Lyrics, Schools, and Free Speech: Examining the Limits of Free Speech of Students Outside of Schools and on Social Media*, 41 S. ILL. U. L.J. 463, 464-65 (2017); Mary-Rose Papandrea, *Mahanoy v. B.L. & First Amendment "Leeway,"* 2021 SUP. CT. REV. 53, 66 ("Although *Mahanoy* leaves both students and school officials equally unsure about how to apply its ad hoc approach, this uncertainty greatly benefits school officials and simultaneously undermines student speech rights significantly. It is hard to imagine a more dramatic chilling effect on the speech of minors." (footnotes omitted)). The lack of a clear constitutional standard governing students' off-campus online speech left school administrators to rely on their own interpretations of their regulatory authority which promoted a lack of uniformity and increased the likelihood of violations of students' free-speech rights. *See id.*

15. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509-13 (1969).

16. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

protected speech or outside the scope of a school's disciplinary reach.[17] The doctrinally incoherent body of circuit court interpretations presented seemingly insurmountable challenges for school officials as they attempted to regulate off-campus speech in the absence of established constitutional precedent.[18] Moreover, students' free-speech rights were often usurped by overzealous school officials exploiting the lack of legal precedent and censoring off-campus speech not for a pedagogical reason, but because the speech was unpopular or controversial.[19]

The Supreme Court's acceptance of the Mahanoy Area School District's petition for certiorari set the stage to settle the debate regarding the applicability of the *Tinker* test to off-campus speech.[20] However, this highly anticipated decision left school officials with more questions than answers. To much dismay, the Court in *Mahanoy Area School District v. B.L. ex rel. Levy* declined to articulate a clear constitutional standard for regulating students' off-campus speech.[21] Instead, the Court acknowledged that public schools have a special interest in regulating some off-campus speech but failed to articulate the constitutional boundaries of that authority.[22] This hesitancy is due to the Court's reluctance to set a clear bright-line rule for off-campus speech

17. *See* 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, 909 (2012).

18. *Compare* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (acknowledging that *Tinker*'s Material and Substantial Disruption Standard can apply to off-campus speech), *and* Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 48-50 (2d Cir. 2008) (noting "the Supreme Court has yet to speak on the scope of a school's authority to regulate expression that . . . does not occur on school grounds" and adopting the Reasonably Foreseeable Test permitting censorship of off-campus online student speech with a foreseeable risk of disrupting the school learning environment), *with* Lovell *ex rel.* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371-73 (9th Cir. 1996) (describing *Tinker* as affecting only students' on-campus free-speech rights and instead applying a "true threat" analysis to off-campus speech).

19. *See* Laura Rene McNeal, *Hush Don't Say a Word: Safeguarding Students' Freedom of Expression in the Trump Era*, 35 GA. ST. U. L. REV. 251, 289 (2019); Justin T. Peterson, Comment, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 3 MICH. ST. L. REV. 931, 932 (2005) (asserting that students' First Amendment rights are being violated because school officials are afforded "too much discretion to censor student speech with which officials subjectively disagree").

20. Noah C. Chauvin, *Replacing* Tinker, 56 U. RICH. L. REV. 1135, 1136 (2022).

21. *See* 141 S. Ct. 2038, 2045-46 (2021) ("Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.").

22. *Id.*

expressed through digital platforms[23]—the setting is not in the school, the speech could be inherently private, yet the speech could reach into the school and disrupt the classroom, the curriculum, and the environment of the school. Thus, the Court expanded the discretionary authority of school leaders to regulate off-campus online speech, without any constitutional limits on the scope of that authority.[24] How can students be protected from viewpoint discrimination by school administrators without a constitutional framework governing the context, category, and content in which off-campus online speech may be regulated? How far beyond the schoolhouse door does the disciplinary arm of school officials reach? What are the constitutional boundaries for delineating protected versus unprotected off-campus online speech? The *Mahanoy* Court's failure to articulate a clear constitutional standard leaves students vulnerable to school officials censoring their online speech under the guise of maintaining an orderly school environment.

Mahanoy is a doctrinal paradox, affirming student expressive rights for the first time since *Tinker*, yet expanding the discretionary power of school administrators to regulate speech with no definable limits.[25] There is no test, and this absence portends a series of ad hoc decisions based on subjective judgments unmoored from bedrock First Amendment principles, leaving students at risk for unconstitutional infringements on their First Amendment rights. By contrast, this Essay offers a path toward safeguarding students' First Amendment rights to engage in online expressive activities, political speech, and symbolic speech off campus through the adoption of a new constitutional standard: the Integrated Contextual Disruption (ICD) Test. The proposed new standard strikes the necessary balance between a school's regulatory interest in maintaining an environment conducive to learning and the competing value of student free-speech rights. Under the proposed ICD Test, students' off-campus online speech is not protected if:

(1) The speech occurs off campus and through an online platform;

(2) The actor/speaker intends to convey a message that targets a member of the school community in a negative manner;

---

23. *See id.* at 2045 ("Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list [of exceptions to the Third Circuit majority's ruling below that *Tinker* does not apply to off-campus speech]. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment 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.").

24. Papandrea, *supra* note 14, at 54, 66.

25. *See id.* at 54, 59-60.

(3) The message is disseminated in an open, accessible online or other medium; *and*

(4) There is a strong basis in evidence, supported by the factual record, that such a message has caused or is reasonably foreseeable to cause a substantial or material disruption.

The proposed constitutional test maintains the core tenets of *Tinker*'s Material and Substantial Disruption Test, providing school leaders with the necessary authority to maintain the appropriate discipline and operation of the school, while still preserving students' constitutional rights to the greatest extent possible. The ICD Test is unique because it encompasses a balancing test that is anchored by a strong basis in evidence test that cabins the discretionary authority of school officials to help safeguard students' free-speech rights without undermining school discipline. While no balancing framework is perfect under the First Amendment, the ICD Test preserves the learning environment by allocating discretionary authority tempered by the values of free speech.

This Essay seeks to make an important contribution to free-speech jurisprudence by providing a clear constitutional test to evaluate whether regulating off-campus online student speech infringes on students' First Amendment rights. Part I provides an overview of the pre-*Mahanoy* free-speech jurisprudence in K-12 schools. Part II highlights the deep divide among circuit courts regarding the proper constitutional test for assessing whether school administrators can regulate off-campus online speech. Part III offers a critique of the *Mahanoy* decision and its failure to adequately protect students' free-speech rights from overzealous school administrators. The Court's failure to provide a constitutional framework to govern off-campus online speech undermines one of the primary educational missions of schools, which is to prepare students to be public citizens. To this end, it is imperative that student expression that occurs off campus through an online platform is protected, even if unpopular. Part IV proposes the adoption of a new constitutional standard, the ICD Test, which strikes the appropriate balance between protecting students' off-campus freedom of expression communicated online and the school's interest in preserving a school environment that is conducive to learning and does not interfere with the efficient operation of the school. This Essay concludes with a brief discussion of the importance of schools maintaining their commitment to preparing students to fully participate in our democratic processes and encouraging, as opposed to censoring, a marketplace of ideas.

I. The Pre-*Mahanoy* K-12 First Amendment Landscape

Historically, the intersection of student free-speech jurisprudence and K-12 schools has presented a formidable task for courts as they struggle to balance

students' free-speech rights with school officials' responsibility to maintain an environment conducive to learning. The legal framework governing students' free-speech rights is based upon a series of Supreme Court cases beginning with the 1943 landmark *West Virginia State Board of Education v. Barnette* decision.[26] This case is significant because it substantiated students' free-speech rights in public schools and prohibited school officials from forcing students to adhere to a particular viewpoint.[27] Following *Barnette*, the Court remained silent for more than twenty-five years before developing a more modern First Amendment jurisprudence to govern student freedom of expression rights in public schools in *Tinker v. Des Moines Independent Community School District*.[28] *Tinker* created the foundational standard for on-campus student free-speech rights in public schools by declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[29] This landmark case provided a significant contribution to free-speech jurisprudence through the establishment of the Material and Substantial Disruption Test, which created the first constitutional analysis for evaluating students' free-speech rights in public schools.[30]

A. *Tinker v. Des Moines Independent Community School District*

Tinker was decided during a tumultuous time in our nation's history.[31] Protests for and against the Vietnam War permeated almost every sector of society, including K-12 schools.[32] School leaders attempted to address disruptions to school learning environments caused by student protests without any constitutional precedent regarding whether students' free-speech rights are coextensive with the rights of adults in other settings.[33] In *Tinker*, the Supreme Court provided additional constitutional guidance regarding the extent of students' First Amendment rights in K-12 public schools. The issue in *Tinker* was whether a junior high school's suspension of students for wearing armbands in protest of the Vietnam War violated students' free-speech

26. 319 U.S. 624, 642 (1943); McNeal, *supra* note 19, at 269.

27. McNeal, *supra* note 19, at 269.

28. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507-14 (1969).

29. *See id.* at 506.

30. *See id.* at 509-13.

31. *See id.* at 504.

32. *See generally* Fountain, *supra* note 13; Michelle Hunt, Comment, *Outside* Tinker's *Reach: An Examination of* Mahanoy Area School District v. B. L. *and Its Implications*, 17 NW. J. L. & SOC. POL'Y, no. 2, 2022, at 145, 148 ("The Vietnam War and ensuing protests in public schools brought a new student free speech doctrine to the Supreme Court.").

33. Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RSRV. L. REV. 153, 165-66 (2009).

rights.[34] The students filed suit alleging that the disciplinary sanctions they received violated their First Amendment rights.[35] The Court ruled in favor of the students and developed a constitutional test, the Material and Substantial Disruption Test, to help assess when school officials may regulate student speech without violating their First Amendment Rights.[36] The Material and Substantial Disruption Test was designed to balance students' free-speech rights with school leaders' need to promote an environment conducive to learning.[37] Under this test, schools may censor student expression only if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[38] Justice Fortas emphasized that the vindication of the rights of public school students in the adoption of this standard was necessary to safeguard state-operated schools from becoming "enclaves of totalitarianism."[39] Although *Tinker* provided students with broad constitutional free speech protections, the Court began to limit those protections in *Bethel School District No. 403 v. Fraser*.[40]

B. *Bethel School District No. 403 v. Fraser*

Nearly twenty years after *Tinker*, the Court retreated from its earlier expansive approach to students' freedom of expression rights through a series of cases that limited the scope of student's free-speech rights and expanded the discretionary power afforded to school administrators to regulate student speech.[41] In the first case, *Bethel School District No. 403 v. Fraser*, the Court considered whether school officials may censor lewd and offensive student

34. *Tinker*, 393 U.S. at 503-05.

35. *See id.* at 504-05.

36. *Id.* at 507-14.

37. *See* Kristopher L. Caudle, *On-Campus or Off-Campus?—That Is Still the Question:* Mahanoy Area Sch. Dist. v. B.L. *and the Supreme Court's New Digital Frontier*, 44 CAMPBELL L. REV. 165, 167 (2022) ("[T]he United States Supreme Court has managed to balance two competing First Amendment principles: (1) that students do not 'shed' all of their free speech rights at the 'schoolhouse gate,' and (2) that public school officials have a special interest in regulating certain aspects of student speech that may cause a 'material' and 'substantial disruption' to the school environment." (footnotes omitted) (first quoting *Tinker*, 393 U.S. at 503; and then quoting B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 184 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021))).

38. *See Tinker*, 393 U.S. at 513.

39. Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 838-39 (2008) (quoting *Tinker*, 393 U.S. at 511); *see also Tinker*, 393 U.S. at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.").

40. 478 U.S. 675 (1986).

41. *See* Caudle, *supra* note 37, at 171-75.

speech, even if it does not cause a material disruption to the school learning environment.[42] *Fraser* involved a student who was suspended for using lewd and offensive language in a high school speech.[43] The Court upheld the suspension, holding that "indecent," "lewd," or "vulgar" speech is not protected speech in the school context.[44] Additionally, the Court distinguished the case from *Tinker*, classifying the speech at issue in *Fraser* as distinct from the purely political speech in *Tinker*.[45] Therefore, the Court declined to apply *Tinker*'s Material and Substantial Disruption Test.[46] *Fraser* is significant in First Amendment jurisprudence because it is the beginning of the paradigm shift from affording students unbridled free-speech rights in public schools, with the caveat that their expression does not cause a material disruption to the school learning environment or interfere with the rights of others, to placing limitations on those protected rights.

C. *Hazelwood v. Kuhlmeier*

The next limitation on student free-speech rights in public schools was established in *Hazelwood School District v. Kuhlmeier*.[47] The Court distinguished the speech at controversy in *Hazelwood* from the speech in *Tinker* and *Fraser* since the speech was communicated through a school-sponsored entity, the school newspaper, as opposed to independent student speech.[48] The central

42. *Fraser*, 478 U.S. at 677; *see infra* note 46.

43. *Fraser*, 478 U.S. at 677-78.

44. *Id.* at 685.

45. *Id.*; Courtney Klaus, Note, *Put* Mahanoy *Where Your Mouth Is: A Closer Look at When Schools Can Regulate Online Student Speech*, 98 NOTRE DAME L. REV. 935, 942 (2022); Caudle, *supra* note 37, at 172.

46. *See Bethel Sch. Dist. No. 403*, 478 U.S. at 685-86; Caudle, *supra* note 37, at 172 ("In its holding, the Court declined to apply *Tinker*'s substantial disruption test, finding the purely political and symbolic speech at issue in *Tinker* distinguishable from a 'pervasive sexual innuendo' that was 'plainly offensive to both teachers and students.'" (quoting *Bethel Sch. Dist. No. 403*, 478 U.S. at 683)); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988) (arguing that *Fraser*'s First Amendment analysis was distinct from *Tinker*).

47. 484 U.S. 260 (1988).

48. *Id.* at 267-273 (noting that a school-sponsored newspaper, as part of the curriculum, is distinct from independent student speech and is not entitled to the same First Amendment protections); *id.* at 270-71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear

footnote continued on next page

issue in this case was whether school leaders may assert editorial control and censor content published in a school-sponsored newspaper, which was written as part of the school's journalism curriculum.[49] In considering this issue, the Court elected not to apply the *Tinker* standard, and carved out another exception to *Tinker*'s Material and Substantial Disruption Test for school-sponsored speech.[50] This further limited *Tinker*'s reach and reified the notion that student speech within public schools is not absolute.

D. *Morse v. Frederick*

Morse v. Frederick provides the most guidance with respect to the appropriate constitutional analysis in determining whether school officials may censor off-campus student speech.[51] *Morse* also marked the first time the Supreme Court addressed the regulation of off-campus speech. There, the Court ruled that student speech that occurs off campus may still be considered "at school" and thus subject to censorship if such speech occurs during a school-sponsored activity.[52] Essentially, the *Morse* Court asserted that any speech occurring during a school-sponsored event is analogous with "at school" speech and thus may be censored.[53] This is the first time the Court expanded the disciplinary reach of school officials beyond the schoolhouse door.[54] Prior to this decision, student free-speech jurisprudence was only applied in the context

---

the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.").

49. *Id.* at 262.

50. *See id.* at 272-73.

51. *See* Morse v. Frederick, 551 U.S. 393, 396-97 (2007).

52. The student in this case had displayed a banner with the text "Bong Hits 4 Jesus" during a school-sponsored event in which students observed the 2002 Olympic Torch Relay pass through their hometown. *Id.* at 397. The Court found that since the event was "school-sanctioned" or a "school event," school officials had the authority to discipline the student for expression that violated the school's drug policy. *Id.* at 400-01, 403.

53. *Id.* at 400-01.

54. Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 LEWIS & CLARK L. REV. 27, 29 (2008) ("[T]he Court—for the first time and with virtually no discussion of the topic—signaled that public school authority over student expression extends beyond the schoolhouse gate."); *see also* Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. The Right to Be Let Alone in the Context of Off-Campus "Cyber-Bullying,"* 81 MISS. L.J. 189, 215 (2011) ("In perhaps the first Supreme Court opinion to enclose geographically off-campus expression within the schoolhouse gates, the Court reasoned that, '[the student] cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'" (quoting *Morse*, 551 U.S. at 401)).

of speech occurring *on* campus.[55] The Court reasoned that since school-sponsored events were sanctioned and supervised by school officials, it was constitutionally permissible to extend the school's disciplinary reach to apply in those contexts as well.[56] Although the *Morse* ruling expanded the student free-speech legal framework for public schools to include censorship of speech occurring during school-sponsored activities, the scope of the decision was limited. The *Morse* Court did not articulate the appropriate constitutional analysis for evaluating whether off-campus speech is protected speech or susceptible to regulation or disciplinary action by school administrators.[57] As a result, *Tinker* remained the gold standard for assessing the constitutionality of censoring on-campus student speech on campus, leaving its applicability to off-campus speech indeterminate as circuit courts struggled to issue opinions without a clear constitutional standard.[58] As time progressed, the continued growth of social media platforms further blurred campus boundaries, making it increasingly difficult to delineate the school's disciplinary reach. Thus, *Tinker*'s primacy as an analytical guidepost dwindled as its practical utility as a constitutional test rooted in the classroom in the face of burgeoning technology declined and was outstripped by an electronic marketplace of ideas.[59]

Taken together, *Bethel*, *Hazelwood*, and *Morse* all exemplify the Court's struggle to articulate the applicability of *Tinker* when speech occurs away from the school campus. Privacy interests, personal autonomy, the content of expression, and the category of speech all take on different meanings in the context of schools, which in turn affords increased regulatory power for school administrators that would not apply in adult settings. Therefore, one can infer the state's authority to regulate speech is certainly less when the speech occurs off campus where the school's role as in loco parentis is significantly diminished. Thus, the off-campus speech dilemma encompasses not only the lack of a constitutional test, but also the contextual complexities of off-campus speech.

II. The Off-Campus Speech Dilemma

The lack of clarity regarding whether schools have the constitutional right to regulate off-campus student speech resulted in a split in the circuit courts.

55. *See* Kara A. Schmidt, Comment, *Out of Bounds: Reviving* Tinker*'s Territorial Nexus to Constrain Schools' Disciplinary Power over Student Internet Speech*, 28 GEO. MASON L. REV. 853, 856-58 (2021); *see also supra* note 54.

56. Schmidt, *supra* note 55, at 858.

57. *See* Caudle, *supra* note 37, at 173-75.

58. *Id.* at 175.

59. *See generally id.* at 174-79 (discussing the growth of digital communication following *Morse* and the body of circuit court precedent responding to online student speech).

School administrators struggled to obtain definitive answers surrounding their authority to regulate off-campus student speech, and often looked to the courts for constitutional guidance. As circuit courts attempted to unravel this legal conundrum, three distinct categories of constitutional analysis emerged: the Reasonably Foreseeable Test, the Nexus Test, and the Case-by-Case Analysis Test. Under the Reasonably Foreseeable Test, the *Tinker* analysis is applied to off-campus speech if it was reasonably foreseeable that the student's speech would substantially disrupt the schooling environment.[60] The Nexus Test consists of a more narrow analytical framework that evaluates the constitutionality of regulating off-campus student speech by examining whether the speech has a sufficient "nexus" to the school's pedagogical interests.[61] Finally, the Case-by-Case Analysis Approach—which comprises a mixture of circuit court approaches—examines each case on an individual basis without articulating a governing standard.[62] Under this approach, the *Tinker* standard and its categorical exceptions are applied to off-campus speech on an individual basis, which can appear ad hoc.[63]

A. The Reasonably Foreseeable Test

The first approach, the Reasonably Foreseeable Test, was adopted by the Second,[64] Fourth,[65] and Eighth[66] Circuits. This approach extends the scope of

60. *Id.* at 175-77.

61. *See id.* at 177-78.

62. *See id.* at 178.

63. Victoria Bonds, *Tinkering with the Schoolhouse Gate: The Future of Student Speech After Mahanoy Area School District v. B.L.*, 42 LOY. L.A. ENT. L. REV. 83, 100-02 (2022). The Courts themselves recognized that the precedent related to students' off-campus free speech rights was in disarray. The failure to articulate clear guidance on the authority of school leaders to regulate speech produced inconsistent rulings, discrimination and the suppression of free speech.

64. *See* Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 43, 48-53 (2d Cir. 2008) (applying the Reasonably Foreseeable Test to Doninger's vulgar and misleading blog post—which led to her disqualification from running for the class secretary position—and concluding that it was reasonably foreseeable that her off-campus posting would reach school property and cause a substantial disruption).

65. *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 567, 569-75 (4th Cir. 2011) (applying the Reasonably Foreseeable Test to Kowalski's use of her home computer to create a webpage largely dedicated to ridiculing a classmate—which led to a five-day school suspension and ninety-day social suspension—and concluding that it was reasonably foreseeable her actions would cause a substantial disruption); *see also infra* note 100.

66. *See* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756-57, 765-66 (8th Cir. 2011) (applying the Reasonably Foreseeable Test to D.J.M.'s instant messages talking about shooting other students at school—which led to juvenile detention and a year-long school suspension—and concluding "it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would . . . create a risk of

footnote continued on next page

Tinker's Material and Substantial Disruption Test to apply to off-campus student speech with a foreseeable risk of disrupting the school learning environment.[67] Under this approach, school administrators are given broad discretionary authority to discipline students for off-campus speech if the school determines there is a foreseeable risk that the speech may disrupt the learning environment.[68] The Reasonably Foreseeable Test emerged from a series of cases involving students disciplined for off-campus speech, particularly in the context of threats.[69] In *Wisniewski ex rel. Wisniewski v. Board of Education*, the Second Circuit applied this test to determine whether a school had violated a student's free-speech rights by suspending him for a social media icon displayed on his off-campus online messaging account.[70] In this case, a junior high school student created an icon for his AOL instant messenger account of a pistol firing a bullet at an individual's head with the caption "Kill Mr. VanderMolen," referring to his English teacher.[71] All of the AOL users with whom the student exchanged instant messages, including some of his classmates, could view the icon during the weeks it was posted to his account.[72] Eventually, one of the student's classmates shared a copy of the icon with school officials and the student was subsequently suspended for disrupting the educational environment when school officials had to replace the threatened teacher and interview students during class time to investigate the incident.[73] The student asserted that this suspension for off-campus expression violated his free-speech rights.[74]

The court could have considered this case under the "true threat" doctrine, which permits the state to restrict speech by any individual when such speech

---

substantial disruption within the school environment"). In this case, the Eighth Circuit applied both a "true threat" analysis and the Reasonably Foreseeable Test. *See id.* at 761-66 (finding that D.J.M's instant messages met both standards).

67. For example, in *Doninger*, the Second Circuit upheld a school's disciplinary action for a student who had used an off-campus social media platform to encourage others to protest the school's decision to postpone a concert. 527 F.3d at 43-46, 48-53. The court found that it was reasonably foreseeable that other classmates and school personnel would view the student's speech (i.e., the online post), thus creating a risk of a substantial disruption to the work and discipline of the school; therefore, the student's off-campus speech was not protected speech under the *Tinker* standard. *Id.* at 48-53.

68. *See* Schmidt, *supra* note 55, at 858-59.

69. *See* Klaus, *supra* note 45, at 954-56.

70. 494 F.3d 34, 35-39 (2d Cir. 2007).

71. *Id.* at 35-36.

72. *Id.*

73. *Id.* at 36-37.

74. *Id.* at 37.

constitutes a "true threat."[75] However, the court instead applied a *Tinker* analysis.[76] The Second Circuit upheld the suspension because the student's conduct created a foreseeable risk of substantially disrupting the school-learning environment, such that the court reasoned it was not protected speech.[77] Thus, the court crafted a new constitutional canon in which off-campus student speech that poses a reasonably foreseeable risk of substantial disruption to the learning environment is not protected speech and is thus subject to censorship and disciplinary action.[78]

Another Second Circuit case, *Doninger ex. rel. Doninger v. Niehoff*,[79] reified the Foreseeable Risk Test and expanded its off-campus scope beyond serious threats. In *Doninger*, a high school student council member, Doninger, decided to protest her school's decision to postpone Jamfest, an annual battle-of-the-bands concert. Doninger used the school's computer lab to access the email account of a parent to send a mass email to parents, students, and high school personnel, urging them to contact the school district superintendent about the cancellation of the event. The mass email included the phone number for the superintendent's office and recipients were encouraged to circulate the email to as many constituents as possible.[80]

Next, Doninger made a blog post disparaging the school district and administration for allegedly canceling the concert, referring to them as the "douchebags in central office," and again encouraged those reading her blog to contact the superintendent to complain about the decision to cancel the concert.[81] Eventually, the school principal discovered the blog post and reached out to Doninger to express that her behavior was unbecoming of a class officer and thus recommended she decline her nomination for senior class

75. For examples of the "true threat" analysis applied in the student-speech context, see *Doe ex rel. Doe v. Pulaski County Special School District*, 306 F.3d 616, 621-27 (8th Cir. 2002) (en banc), and *Lovell ex rel. Lovell v. Poway Unified School District*, 90 F.3d 367, 371-73 (9th Cir. 1996). Although some legal scholars assert that even a combination of the "true threat" doctrine and the *Tinker* doctrine inappropriately restricts school officials in their attempts to protect the safety of students and teachers, others posit that this constitutional two-step analysis is necessary to protect students' free-speech rights. *Compare* Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 271 (2008), *with* Fiona Ruthven, Note, *Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, 88 IOWA L. REV. 931, 935-36 (2003).

76. *Wisniewski*, 494 F.3d at 38.

77. *Id.* at 38-40.

78. *See id.*

79. 527 F.3d 41 (2d Cir. 2008).

80. *Id.* at 44.

81. *Id.* at 45.

secretary.[82] Doninger declined, and the principal subsequently revoked her administrative endorsement, effectively ending Doninger's candidacy as a form of discipline.[83] Doninger argued that the school administrator's disciplinary action violated her free-speech rights.[84]

If the student's blog post had been created on campus, the constitutional standard in *Fraser*—which permits public school administrators to regulate lewd or offensive speech—would be the appropriate constitutional analysis since Doninger utilized offensive language (i.e., referring to administrators as "douchebags").[85] However, since the speech in controversy occurred off campus, this was a case of first impression for the court since there was no legal precedent to govern this category of speech.[86]

The court decided the case based on a traditional *Tinker* analysis and found that the speech created a reasonably foreseeable risk of a substantial disruption to the learning environment.[87] The court utilized three factors in applying the Reasonably Foreseeable Test: (1) the language used; (2) the misleading nature of the communication; and (3) the student's role in school sponsored-activities.[88] The court found the language used by Doninger was offensive and misleading, and that her role in student government heightened the risk of disruption by frustrating efforts to settle the concert dispute and undermining the values of student government as an extracurricular activity.[89] Collectively, these factors supported the reasonableness of the school's conclusion that Doninger's actions created a reasonably foreseeable risk of substantial disruption, and therefore justified the student's subsequent ban from running for senior class secretary.[90]

The Reasonably Foreseeable Test applied in *Doninger* should not be the constitutional analysis to regulate student off-campus speech because of its expansive application of the *Tinker* standard. The *Tinker* standard has been criticized for allowing school administrators too much authority to regulate student on-campus speech, therefore the expansion of this broad authority to off-campus speech is disconcerting.[91] Expanding as opposed to constricting

82. *Id.* at 43, 46.

83. *Id.*

84. *Id.* at 46-47.

85. *See id.* at 49-50; *supra* Part I.B.

86. *See Doninger*, 527 F.3d at 49-50 (noting *Fraser*'s inapplicability and narrowly distinguishing *Wisniewski*).

87. *Id.* at 48-53.

88. *Id.* at 50-53.

89. *Id.* at 50-52.

90. *Id.* at 53.

91. *See* Nina Zollo, Comment, *Constitutional Law: School Has Broad Discretion to Prohibit Offensive Student Speech*, 39 FLA. L. REV. 193, 203-04 (1987) (criticizing *Fraser*'s application of *Tinker* by arguing that in giving schools such broad discretion, the

footnote continued on next page

school administrators' authority to regulate speech increases the likelihood of students' free-speech rights being violated because the Reasonably Foreseeable Test affords school administrators almost limitless discretionary power to censor and discipline off-campus student speech.[92]

Under *Doninger*'s Reasonably Foreseeable Test, school administrators must only rely on a mere foreseeable risk of disruption, which is a very low standard that is too subjective. Any savvy administrator can make a smokescreen argument that a particular speech poses a reasonably foreseeable risk of substantial disruption to the school learning environment. For example, a school administrator who supports the overturning of *Roe v. Wade*[93] may justify the regulation of a student's online speech advocating for abortion rights under the guise of a foreseeable risk of disruption. Under this test, students will be more susceptible to school administrators engaging in viewpoint discrimination under the pretense of a avoiding a foreseeable risk of a substantial disruption to the school learning environment. Additionally, the broad discretionary power given to school administrators under the Reasonably Foreseeable Test may increase disciplinary sanctions because it increases the likelihood that a students' speech will be classified as a foreseeable risk of disruption, and thus subject to disciplinary action.

B. The Nexus Test

The Fourth Circuit adopted a different constitutional analysis for evaluating whether students' off-campus expression is protected speech, the Nexus Test.[94] The court's inquiry focused on the "nexus" of the off-campus speech to the pedagogical activities of the school.[95] The Nexus Test is similar to the Reasonably Foreseeable Test adopted by the Second and Eighth Circuits; however, this test is broader.[96] Under this test, school administrators may not censor off-campus student expression unless they can establish the speech directly impacted the school learning environment.[97] Additionally, there must

"Court ignores its own warnings of the chilling effects inherent in prohibiting speech offensive to some members of society").

92. *Id.*

93. 410 U.S. 113 (1973).

94. *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

95. *Id.*

96. Hannah Middlebrooks, Note, *"F*ck School"? Reconceptualizing Student Speech Rights in the Digital Age*, 107 CORNELL L. REV. 1489, 1495-96 (2022).

97. *See Kowalski*, 652 F.3d at 567, 573-74 ("At bottom, we conclude that the school was authorized to discipline Kowalski because her speech interfered with the work and discipline of the school.").

be a relationship between the off-campus student expression and the disruption to the school learning environment.[98]

The Fourth Circuit developed and applied this constitutional test in *Kowalski v. Berkeley County Schools*.[99] This case represents the fluidity of interpretive approaches to off-campus speech. Although the Court in this case applies the Reasonably Foreseeable Test, the decision also includes language that has been interpreted as creating the Nexus Test.[100] The *Kowalski* Court's hybrid approach illustrates the complexities of the contextual analysis under the First Amendment and the challenges in reaching a definitive constitutional analysis. However, for the purposes of this analysis, the focus will be on the Court's application of the Nexus Test.

In *Kowalski*, a high school student, Kowalski, created a Myspace page entitled "S.A.S.H." that was utilized by her classmates to ridicule another student, Shay.[101] Kowalski invited approximately 100 of her Myspace friends, many of whom attended her high school, to follow the Myspace page with the verbally abusive content.[102] Although the Myspace page was created off campus, at least one student accessed the page utilizing a school-owned computer during an after-hours class at the school.[103] Shay skipped class after finding out her classmates posted derogatory comments about her on the Myspace page.[104] Subsequently, school administrators suspended Kowalski for her creation of the Myspace page which they found to violate the school's "harassment, bullying, and intimidation" policy.[105] Kowalski filed a lawsuit alleging that the school's disciplinary actions were unconstitutional, asserting that her speech should be afforded the full protection of the First Amendment because it occurred at home (off campus) and after school, and thus was outside

98. *See id.*

99. *See id.*

100. Specifically, the Fourth Circuit stated:

> There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.

Id. at 573.

101. *Id.* at 567. There was disagreement as to what the acronym "S.A.S.H." represented. In her deposition, Kowalski testified that "S.A.S.H." meant "Students Against Sluts Herpes," while another student testified that "S.A.S.H." meant "Students Against Shay's Herpes." *Id.*

102. *Id.*

103. *Id.* at 568.

104. *Id.*

105. *Id.* at 568-69.

the disciplinary reach of school officials.[106] The Fourth Circuit ruled in favor of the school district, finding that the school had a legitimate pedagogical interest in preventing bullying and harassment because of its negative impact on the school learning environment.[107] As the court put it, the "nexus" between Kowalski's off-campus speech and the high school's pedagogical interest in promoting and maintaining a harassment-free learning environment met the constitutional threshold to justify the disciplinary action taken by school officials.[108] The court's reasoning suggests that school officials, as "trustees of the student body's well being," have a manifest pedagogical interest in protecting students from harassment to prevent anxiety, depression, and suicidal thoughts, which negatively impact students' ability to achieve their academic potential.[109]

This constitutional test thus treats speech originating off-campus and speech disseminated while on campus synonymously if such speech is directed towards an individual within the school community and the speech is received by that individual. Under the Nexus Test, there must be a connection (i.e., nexus) between the speech at controversy and the substantial disruption to the work and discipline of the school. The central premise behind the Nexus Test is that school administrators should be permitted to regulate student speech that causes a substantial disruption to the school learning environment regardless of whether the speech is communicated on or off campus.[110]

C. Case-by-Case Approach

The Fifth and Ninth Circuits reject bright-line rules (like the Nexus Test and the Reasonably Foreseeable Test) governing the regulation of off-campus student speech, instead applying *Tinker*'s Material and Substantial Disruption Test to off-campus speech cases on a case-by case basis.[111] These circuits' failure to pronounce a clear legal standard left students and school officials with more

106. *Id.* at 567, 573.

107. *Id.* at 572 ("Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment." (citations omitted)).

108. *Id.* at 573.

109. *See id.* at 572-73.

110. *See* Joe Towslee, *The "Nexus" Test vs. the "Reasonably Foreseeable" Test: How Off-Campus Student Speech Can Cause On-Campus Consequences*, 13 IDAHO CRITICAL LEGAL STUD. J., 2020, at 18-20, https://perma.cc/4YXN-5M2K.

111. Bonds, *supra* note 63, at 100-01.

questions than answers.[112] For example, in *Bell v. Itawamba County School Board*, the Fifth Circuit used the *Tinker* analysis to evaluate whether a student's suspension for disseminating a rap song while off-campus, which contained threats and harassing language directed at two teachers, violated the student's First Amendment rights.[113] The Fifth Circuit declined announcing a universal legal standard for off-campus speech and decided *Bell* based upon its unique facts.[114] The circuit split regarding the regulation of off-campus student speech has created confusion and discord regarding the regulation of off-campus student speech. Although the various federal circuit courts adopted myriad tests in an attempt to balance the special interests of schools with students' free-speech rights, the tests all fail to provide the necessary constitutional safeguards to protect student free-speech rights off-campus.[115] The Supreme Court had the opportunity to establish precedent in this unsettled area of free-speech jurisprudence in *Mahanoy Area School District v. B.L. ex rel. Levy*;[116] however, the Court left circuit courts with an overly broad constitutional analysis which failed to identify what special circumstances permit school leaders to regulate off-campus speech.[117] An analysis of the *Mahanoy* decision reveals its doctrinal and conceptual limitations and its failure to protect students' First Amendment rights.[118]

III. *Mahanoy*'s Inadequate Response

After years of inconsistencies among lower courts regarding the appropriate application of *Tinker* to off-campus speech, the Supreme Court granted certiorari to hear *Mahanoy*.[119] This was the first time the Supreme Court has heard a First Amendment student-speech case since *Morse* in 2007.[120]

112. *See id.* at 100; *see also* Longoria *ex rel.* M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267-68 (5th Cir. 2019); Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1069 (2013).

113. 799 F.3d 379, 383, 394 (5th Cir. 2015) (en banc).

114. *See id.* at 394-96 ("Further, in 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.").

115. W. Christopher Schwartz, Note, Mahanoy v. B.L. *ex rel.* Levy *and the Virtual School Environment: A Framework for Regulating Online, Off-Campus Student Speech*, J.L. & EDUC., Fall 2022, at 262, 289.

116. 141 S. Ct. 2038 (2021).

117. *See id.* at 288.

118. *See generally* 141 S. Ct. at 2045-46 (declining to articulate a clear standard).

119. *Id.* at 2044.

120. Morse v. Frederick, 551 U.S. 393 (2007).

Mahanoy provided the Court with an opportunity to update *Tinker*'s outdated framework and provide a blueprint for free-speech jurisprudence in today's digital age. However, the Court retreated from protecting students' First Amendment rights in relation to off-campus speech and instead expanded school officials' discretionary authority to determine the circumstances in which censorship comports with the Constitution.[121] The Court's failure to articulate a clear constitutional standard exacerbated the sea of ambiguity surrounding the appropriate constitutional analysis for assessing whether public school students' off-campus speech is beyond *Tinker's* disciplinary reach. It is important to understand the underpinnings of this landmark decision to fully comprehend the dire implications for students' free-speech rights.

A. Relevant Factual Background

Mahanoy involved a high school student, B.L., who challenged a disciplinary action by school officials for online speech she communicated off campus.[122] B.L. became upset after learning that she had failed to make the school's varsity cheerleading squad and had not received her preferred position on the school's softball team.[123] While visiting a store during the weekend, she posted two images on Snapchat, a popular social media platform, expressing her frustration.[124] Her Snapchat "friends" (i.e., users who were able to view the posts) included some Mahanoy Area high school students, some of whom were members of the school's cheerleading squad.[125] Although one of the posts included vulgar language, the posts did not refer to Mahanoy Area High School by name nor any school personnel.[126] At least one student used a separate cellphone to take pictures of B.L.'s posts and shared the posts with her mother, a cheerleading squad coach.[127] The images began to spread and several cheerleaders and other students were "visibly upset" as they communicated with the cheerleading coaches their concerns about the posts.[128] There was also an

121. *Mahanoy*, 141 S. Ct. at 2045-2046.

122. *Id.* at 2042-43.

123. *Id.* at 2043.

124. *Id.* The images were posted to B.L.'s Snapchat "story," a feature of the application that allows "friends" of the user to view the images for twenty-four hours. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* The student presumably used a separate cellphone to capture the images rather than taking a "screenshot" on her own phone because a user who posts a story on Snapchat is able to identify anyone who takes a screenshot of the post. Elsa, *How to See Who Screenshotted or Viewed Your Snapchat Story*, AIRDROID, https://perma.cc/SDE2-59ZJ (last updated Apr. 28, 2023).

128. *Mahanoy*, 141 S. Ct. at 2043.

interruption in a math class taught by one of the coaches as students posed questions regarding the posts.[129] After consulting with the school principal, the coaches informed B.L. that she would be suspended from the junior varsity cheerleading squad for the upcoming year.[130] B.L. and her parents filed suit in district court arguing the school's disciplinary action violated B.L.'s First Amendment rights.[131] The district court, relying on *Tinker*, ruled in favor of B.L., finding that the school's disciplinary actions violated her First Amendment rights because the Snapchat posts did not cause a substantial disruption to the school learning environment and were therefore protected speech.[132] The Third Circuit affirmed the lower court's ruling, limiting *Tinker*'s reach with a bright-line rule that *Tinker* does not apply to off-campus speech and therefore B.L.'s speech should be afforded the full protection of the First Amendment.[133] This ruling set the stage for the Supreme Court to resolve the doctrinal conflict regarding whether off-campus student speech is protected speech and thus outside the disciplinary reach of school administrators.

B. Tinkering with *Tinker*: The *Mahanoy* Majority Opinion

The Supreme Court decision in *Mahanoy* left circuit courts with more questions than answers. What was the Court's response to whether *Tinker*'s test applies to off-campus student speech? It depends. The Court declined to adopt the bright-line rule proposed in the Third Circuit decision or any of the other constitutional tests adopted by the other circuits.[134] The Supreme Court upheld the Third Circuit ruling that the school violated B.L.'s First Amendment rights but disagreed with the circuit court's rationale.[135] The Court asserted that the *Tinker* test may apply to off-campus speech because, unlike the Third Circuit, the Court did not believe that "the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus."[136] But the Court failed to clarify to what extent, if any, a school's special interests in regulating student speech apply when the expression is off

129. *Id.*

130. *See id.* at 2043-44.

131. *Id.*

132. *Id.*

133. *Id.* at 2044.

134. Caudle, *supra* note 37, at 176-78, 184-86 (describing the Nexus Test and Reasonably Foreseeable Test adopted by some circuits but noting the Court's decision in *Mahanoy* to adopt neither test); *see Mahanoy*, 141 S. Ct. at 2045-46, 2048.

135. *Mahanoy*, 141 S. Ct. at 2048.

136. *Id.* at 2045.

campus.[137] Although the Court referenced certain types of behavior that may call for school regulation of off-campus speech listed in the parties' briefs and those of amici (i.e. threatening other students or teachers, bullying, harassing, breaching school security devices, and participating in online school activities), the Court declined to adopt any such list.[138] The Court reasoned that a list of "appropriate exceptions or carveouts" would undermine the applicability of *Tinker*'s proclamation about the importance of a school's special interest in determining the appropriateness of speech depending on factors such as the student's age and maturity.[139]

The Court sidestepped the primary constitutional inquiry in this case, which is what type of off-campus speech, if any, may be regulated by school officials. Furthermore, the *Mahanoy* Court declined to set forth a singular bright-line rule to determine what constitutes off-campus speech and instead identified three features of off-campus speech that often diminish a school's special interests in restricting students' First Amendment rights.[140]

First, the Court asserted that schools will rarely stand in loco parentis in the context of off-campus speech.[141] The doctrine of in loco parentis grants legal responsibility to school administrators, allowing them to stand in the place of parents when they perform the responsibilities of a parent under circumstances where the student's parents cannot.[142] Traditionally, school officials stand in loco parentis while students are in their care during normal school hours.[143] To this end, the Court asserted off-campus speech normally falls within the periphery of parental responsibility, and therefore school officials are relieved of acting in loco parentis, or in the legal place of a parent.[144] Generally, parents have full legal authority over their child when they are off campus and thus such speech is implicitly outside the disciplinary reach of school officials.[145] Although the Court asserted that the in loco parentis doctrine diminishes the strength of the special circumstances upon

137. *Id.* at 2045-46.

138. *Id.* at 2045.

139. *Id.*

140. *Id.*

141. *Id.* at 2046.

142. *Id.* at 2046.

143. *See id.* at 2046; *see generally id.* at 2059-63 (Thomas, J., dissenting) (discussing among other things the history of in loco parentis doctrine at the time of the Fourteenth Amendment's ratification).

144. *Mahanoy*, 141 S. Ct. 2044-46; *accord* Kutchinski *ex rel.* H.K. v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 357 (6th Cir. 2023) ("[F]or off-campus speech, the school rarely stands *in loco parentis*." (citing *Mahanoy*, 141 S. Ct. at 2046)).

145. *See Mahanoy*, 141 S. Ct. at 2046.

which school officials may regulate student speech,[146] it did not provide a bench mark or constitutional standard to delineate the threshold which triggers the full protections of the First Amendment.[147] Thus, it left school officials and lower courts with no clear constitutional guidance regarding the legal parameters surrounding in loco parentis and First Amendment protections for off-campus speech.[148]

Second, the Court expressed a general skepticism about the regulation of off-campus speech, emphasizing the importance of ensuring that students are not subjected to unbridled restriction of their speech.[149] The Court reasoned that if on- and off-campus speech were treated equivalently, school officials would have the unmitigated right to regulate student speech twenty-four hours a day, which is contrary to the spirit and purpose of the First Amendment.[150] Thus, the Court acknowledged that school officials do not have unlimited authority to restrict student speech yet failed to delineate the constitutional boundaries to protect such speech.[151]

Third, the Court highlighted that America's public schools, as "nurseries of democracy," have a vested interest in safeguarding unpopular speech, including speech that occurs off campus.[152] Thus, schools have a responsibility to demonstrate democratic values to prepare students to be civically engaged adults.[153] The "marketplace of ideas" must be protected to promote and maintain a representative democracy.[154] By failing to offer a test, or at least a substantive evaluative standard, the Court undermines First Amendment analysis because there is no contextual framework for evaluating off-campus speech. Indeed, the Court's default position simply reconstitutes *Tinker* with no consideration of where, when, and how expression circulates off-campus when it impacts the learning environment on campus.

The Court's opinion in *Mahanoy* is analytically sparse and conceptually limited due to its blind indifference to students' free-speech rights in its refusal to provide more definitive constitutional boundaries to restricting off-campus speech. In this opinion, the Court counterintuitively acknowledged that off-campus features diminish the special characteristics in a schooling context that afford school administrators the constitutional authority to regulate student

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.*

151. *Id.*

152. *Id.*

153. *See* Noah C. Chauvin, *Replacing* Tinker, 56 U. RICH. L. REV. 1135, 1137 (2022).

154. *See Mahanoy*, 141 S. Ct. at 2046.

speech, yet it failed to delineate the threshold when such speech becomes unprotected.[155] Why acknowledge the doctrinal divide at the heart of the case and then show deliberate indifference to resolving the constitutional question? The Court acknowledges this shortcoming, stating, "We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."[156] The *Mahanoy* Court unequivocally failed the millions of students attending public schools by not adopting a clear constitutional test to protect their First Amendment rights off campus. Ideally, schools should prepare students to be civically engaged adults. This notion is evinced in Justice Breyer's majority opinion, in which he stated, "America's public schools are the nurseries of democracy."[157] Disciplining students for off-campus speech that is controversial or unpopular sends a substantive message diminishing the importance of protecting all speech to the greatest extent possible. It also chills the vitality of speech so that the marketplace of ideas shrinks in light of the possibility of ideological censorship.

IV. A New Gold Standard for Free Speech in K-12 Schools: The Integrated Contextual Disruption Test

In the aftermath of *Mahanoy*, circuit courts and school leaders remain in a state of flux as they attempt to navigate the uncertain terrain of free speech jurisprudence in the context of off-campus speech. Unfortunately, the various constitutional tests adopted by the circuit courts prior to *Mahanoy* are inadequate and thus offer little guidance on how to safeguard First Amendment rights in the context of off-campus speech.[158] Under the three analytical approaches adopted by the circuits, the regulation of the content of off-campus speech is balanced between free expression and the administrative and curricular authority of school officials to maintain an environment conducive to learning. Under *Tinker*, that mission cannot be disrupted, nor can the free-speech rights of students undermine the learning environment.[159] Thus, each circuit test tries to accommodate the competing values of free expression and maintaining a school learning environment free from disruptions. But this analysis is complicated when free expression moves off campus, but could still

155. *Id.*

156. *Id.*

157. *Id.*

158. *See supra* Part II.

159. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (noting that "conduct by the student, in class or out of it, which for 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.").

impact the learning environment on campus. How far is the reach of school regulatory policy impacting the content of speech off-campus? The Reasonably Foreseeable, Nexus, and Case-by-Case Tests try to address this issue with varying degrees of success due to their analytical limitations.[160]

For instance, under the Reasonably Foreseeable Test, adopted by a plurality of the circuits, *Tinker*'s Material and Substantial Disruption Test is expanded to reach *all* forms of off-campus expression.[161] This exceedingly broad test expands state power to suppress speech after an assessment of foreseeable risk, which could be inherently subjective—broad discretionary power could be exercised so that the foreseeability of risk could turn on the content of speech (and the identity of the speaker) with only cursory analysis of the impact on the learning environment.[162] The Reasonably Foreseeable Test is a constitutionally ineffective analysis for regulating off-campus speech because its expansive application of the *Tinker* standard is too broad.[163] It affords school administrators almost limitless discretionary power to censor and discipline off-campus student speech, without the necessary constitutional safeguards to protect students' free-speech rights.[164] Under this test, school administrators must only identify a mere foreseeable risk of disruption, which is a very low standard that is too subjective.[165] Affording school administrators too much discretionary authority to regulate off-campus online student speech places students at greater risk of viewpoint discrimination.[166] Protecting students' off-campus speech from regulation because a school official disagrees with the message is of the upmost importance due to the significant role student advocacy plays in shaping public discourse on matters that directly impact their school and community.[167] Therefore, the Reasonably Foreseeable

160. *See supra* Part II.

161. *See supra* Part II.A; *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring) ("I agree that school authority may be exercised for off-campus student activity, consistently with the First Amendment, whenever publication or other speech-related activity satisfies the *Tinker* test of creating a reasonable basis for forecasting interference or disruption of school activities."); Towslee, *supra* note 110, at 13 (discussing Judge Newman's dissent in *Thomas*).

162. *See supra* Part II.A.

163. *See* Meghan K. Lawrence, Tinker *Stays Home: Student Freedom of Expression in Virtual Learning Platforms*, 101 B.U. L. REV. 2249, 2276 (2021).

164. *Id.* at 2276-77.

165. *Id.*

166. Maggie Geren, Comment, *Foreseeably Uncertain: The (In)ability of School Officials to Reasonably Foresee Substantial Disruption to the School Environment*, 73 ARK. L. REV. 155, 175-77 (2020)).

167. *See* Lawrence, *supra* note 163, at 2265 ("[T]he school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." (quoting Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021))).

Test is inadequate because students are more susceptible to viewpoint discrimination by school officials under the guise of avoiding a foreseeable risk of a substantial disruption of the school learning environment. Additionally, the broad discretionary power given to school administrators under the Reasonably Foreseeable Test may increase disciplinary sanctions because it heightens the likelihood that under laissez-faire guidelines, a student's off-campus speech will be classified as posing a foreseeable risk of disruption and thus subject to disciplinary action. The harmful effects of schools with high levels of disciplinary sanctions are well established in education research, especially in relation to students of color and those with disabilities.[168] Once a school administrator oversteps their boundaries and either wrongfully or overly punishes a student, how do we undo the psychological and often irreparable harm to the student? *Mahanoy* provides a prime example of an overzealous school administrator hastily issuing a disciplinary sanction that was then memorialized in B.L.'s school record, and thus could have long-term implications.[169]

The Nexus Test offers a tighter analytical framework than the Reasonably Foreseeable Test as it connects the regulation of the content of speech with a direct impact on the learning environment; however, it is still a constitutionally inadequate analysis for regulating off-campus speech.[170] Under the Nexus Test, discretionary power is cabined somewhat because there must be a direct relationship between the off-campus speech and the

168. For example, a report from the Learning Policy Institute concluded that "exclusionary punishments have deleterious consequences and disproportionately impact students of color and students with disabilities." MELANIE LEUNG-GAGNÉ, JENNIFER MCCOMBS, CAITLIN SCOTT & DANIEL J. LOSEN, LEARNING POL'Y INST., PUSHED OUT: TRENDS AND DISPARITIES IN OUT-OF-SCHOOL SUSPENSION v-vi (2022), https://perma.cc/GU67-TAY5 (finding that "[e]ducators consistently exclude Black students from school at the highest rate, with more than 1 in 8 Black students (12%) receiving one or more out-of-school suspensions in 2017-18," and that "[i]n 2017-18, almost 1 out of 11 students with disabilities (9%) were suspended, compared to 4% for students without disabilities."). The American Psychological Association has found such disparate treatment to have lasting negative effects on students. Press Release, Am. Psych. Assoc., For Black Students, Unfairly Harsh Discipline Can Lead to Lower Grades (Oct. 7, 2021) https://perma.cc/LE3D-8MDX ("Black students are often subject to harsher discipline at school than white students, and those punishments can damage students' perceptions of their school and negatively impact their academic success years later . . . .").

169. *See Mahanoy*, 141 S. Ct. at 2043-44. The vague constitutional guidelines for determining students' off-campus free speech rights may exacerbate the overly punitive response to student disciplinary issues, especially among students of color. *See* Lawrence, *supra* note 163, at 2265 ("While *Mahanoy* gave an important and much-awaited answer to the off-campus speech question—that schools may have authority over students' off campus speech in select situations—the case is, at best, a vague guidepost for courts to follow and will undoubtedly cause many inconsistencies and debates in the lower courts.").

170. *See supra* Part II.B.

substantial disruption to the school learning environment. While this test does not have the limitations inherent in predicting the foreseeability of risk,[171] it nevertheless focuses on a connection between the content of the off-campus and the learning environment on campus that is defined without analytical precision. For example, how "direct" must the relationship be? What is the criteria for determining whether the disruption is significant enough to qualify as "substantial"? A similar doctrinal quandary existed within *Tinker*'s Material and Substantial Disruption Test due to the highly subjective framework governing the test.

The circuit test likely to leave students most vulnerable to violations of their free-speech rights is the case-by-case approach. The previous tests at least contemplated some limits to the scope of administrative discretion in regulating off-campus expression.[172] The case-by-case approach is nearly boundless in its reach and power. Here, discretionary power is virtually unlimited, which will result in censorship of unpopular off-campus speech that may have no direct connection to the learning environment. Under this test, students are denied any First Amendment protections, as school administrators are authorized to regulate student speech twenty-four hours a day, regardless of whether the speech occurs within the confines of their private homes, devoid of any direct connection to the school learning environment. Moreover, standardless review leads to ad hoc determinations which offer little consistency or guidance.

In light of the gross inadequacies of the circuit tests and *Mahanoy* decision, it is imperative that a clear constitutional standard is adopted that protects students' off-campus speech communicated online. The *Tinker* Material and Substantial Disruption Test, which regulates student speech based on content and location (where the speech was disseminated or received), is an insufficient constitutional analysis for evaluating off-campus online speech because it is too subjective and affords school administrators too much discretionary authority. The Integrated Contextual Disruption Test strikes the necessary balance between the state's need to maintain an environment conducive to learning and the competing value of students' free-speech rights.

171. In the context of online speech where tablets, cell phones and other technology communication devices are ubiquitous, virtually any form of online communication may "foreseeably—if not inevitably—make its way to school premises." *See* Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3430-31 (2014). The Reasonably Foreseeable Test fails to impose a reasonable limit on the quantity and quality of online speech in which the school may regulate. This overbroad approach makes it difficult to predict foreseeability because of the lack of constitutional guidance and restraints.

172. *See supra* Part II.

A. The Integrated Contextual Disruption Test

The proposed Integrated Contextual Disruption (ICD) Test makes an important contribution to free-speech jurisprudence by providing a clear constitutional analysis for regulating off-campus online student speech. None of the tests endorsed by the circuit courts appropriately balance off-campus freedom of expression and the *Tinker* mandate to preserve the learning environment through the Material and Substantial Disruption Test.[173] Furthermore, the other doctrinal approaches to evaluating the constitutionality of regulating student speech are either overly broad, too narrowly construed, or limited conceptually and doctrinally.[174] The ICD Test fills the theoretical gaps present in the other approaches to regulating off-campus speech. Moreover, the ICD Test strikes this difficult doctrinal balance between students' First Amendment rights while offering school administrators enough authority to maintain an environment conducive to learning. Under the proposed ICD Test, students' off-campus online speech is not protected if:

(1) The speech occurs off campus and through an online platform;

(2) The actor/speaker intends to convey a message that targets a member of the school community in a negative manner;

(3) The message is disseminated in an open accessible online or other medium; *and*

(4) There is a strong basis in evidence, supported by the factual record, that such a message has caused, or is reasonably foreseeable to cause, a substantial or material disruption.

Collectively, the components of this test provide the necessary constitutional guidance to resolve the current ambiguity surrounding the regulation of off-campus online student speech. First, the ICD Test establishes a framework to identify whether the communication qualifies as off-campus online speech. Under this test, expression is deemed off-campus online speech if the expression does not occur on school property and occurs through an online platform. Identifying the correct category of speech is an essential part of the constitutional analysis for students' First Amendment rights because if the category of online speech occurs on campus, then *Tinker*'s Material and Substantial Disruption Test applies.[175] However, if the speech occurs off campus and through an online platform, the ICD Test applies.

---

173. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-14 (1969).

174. *See supra* Part II.

175. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021) ("Finally, in *Tinker*, we said schools have a special interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'

footnote continued on next page

The second component of the ICD Test identifies the special circumstances in which the school's regulatory interests remain significant and thus warrant broader discretionary authority due to the potential harm to a member of the school community. These circumstances include serious or severe bullying or harassment targeting particular individuals, threats aimed at school personnel or students, writing of papers, use of school computers, and breaches of school security devices (including but not limited to material maintained on school technological devices).[176] If any of these methods are utilized to target a member of the school community, such speech is unprotected under the proposed ICD Test.

The third component of the ICD Test focuses on preserving students' privacy rights. It is reasonable for students to have an expectation of privacy for expression occurring in an off-campus setting through an online platform among their friends and families, as long as the expression is not communicated to a broader audience. To this end, the ICD Test requires that off-campus expression be disseminated in an open, accessible online medium. This component of the test provides the necessary constitutional safeguards to ensure that school officials do not have boundless authority to regulate all forms of off-campus online expression, especially expression made with an expectation of privacy. As Justice Breyer emphasized in *Mahanoy*, there must be a distinction between on-campus and off-campus expression to avoid overly broad regulation by the state in which "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day."[177]

The final component of this test requires a strong basis in evidence,[178] supported by the factual record, that such a message has caused, or is reasonably foreseeable to cause, a substantial disruption to the school learning environment. "Strong basis in evidence" refers to a factual record offering proof that it is probable a substantial disruption has or will occur. Probability may be proven by various means such as pattern and practice evidence, prior misconduct, student handbook violations, or various other contextual factors.

These special characteristics call for special leeway when schools regulate speech that occurs under its supervision." (citation omitted) (quoting *Tinker*, 393 U.S. at 513)).

176. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1269 (7th ed. 2023).

177. *Mahanoy*, 141 S. Ct. at 2046.

178. The Court in *Ricci v. DeStefano* extended the Equal Protection Clause's "strong basis in evidence" standard to a Title VII case, reasoning that there must be "[e]videntiary support for the conclusion that remedial action is warranted." 557 U.S. 557, 582-83 (2009) (quoting Wygnat v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)). Under the ICD Test, the evidentiary burden would be on school administrators to demonstrate that disciplinary action was necessary in the context of the specific case in issue.

This evidentiary standard ensures that the mere fear of a potential disruption from off-campus online student speech will not trigger a school administrator's authority to regulate off-campus online student speech. Therefore, to meet this standard, the claim that either a disruption has occurred or that one is likely to occur must be based upon probability as opposed to possibility; otherwise, the off-campus online speech is protected. This distinction is important to help prevent the regulation of students' off-campus online speech based upon speculation or because the speech is unpopular or controversial. Furthermore, this heightened standard helps protect students' online off-campus free-speech rights from viewpoint discrimination by school administrators.

In summary, the proposed ICD Test maintains the core tenets of *Tinker*'s Material and Substantial Disruption Test, providing school leaders with the necessary authority to maintain the appropriate discipline and operation of the school, while still preserving students' constitutional rights to the greatest extent possible. This is possible because the balancing test is anchored by a strong-basis-in-evidence test that cabins the discretionary authority of school officials.[179] Furthermore, *Mahanoy* marks the new frontier of the Court's First Amendment jurisprudence—it is the first decision since *Tinker* to affirm the free-expression rights of students, but in a dramatically different context (off campus and online).[180] It is ironic that the Court affirms the free-speech rights of students while giving school administrators more power to regulate that speech.[181] This counterintuitive balance must be rejected. Indeed, the paucity

179. *See generally* Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 181, 189 (2011) ("The post-*Tinker* Supreme Court decisions have also conferred broad discretion on public school authorities to determine when student speech threatens or creates the requisite disruption or rights collision. To fulfill their 'basic educational mission,' school authorities may exercise this discretion to discipline student speech that compromises efforts to teach 'the boundaries of socially appropriate behavior," 'habits and manners of civility,' and respect for 'the sensibilities of fellow students.'" (footnotes omitted) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681-85 (1986))).

180. *See supra* text accompanying note 25; *supra* Part III.

181. The Court acknowledged the importance of protecting free speech yet failed to articulate a clear constitutional standard for regulating off-campus online speech. *Compare Mahanoy*, 141 S. Ct. at 2046 ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection."), *with id.* ("We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."). The lack of a clear constitutional standard allows school administrators to utilize their discretion to determine whether or not off-campus online speech is protected speech. *See supra* Part III.

of the analytical framework espoused in *Mahanoy* means that the circuits will labor in doctrinal disarray for years to come.

Thus, the ICD Test offers a nuanced approach to the regulation of off-campus online content that is constitutionally permissible. This test offers a critical distinction between off-campus online speech with no (or severely limited) impact and off-campus online speech that invades the school environment, substantially disrupting it and undermining the educational mission of the school. This test makes a distinction between off-campus online speech with no reach and off-campus online speech that impacts the school environment and substantially disrupts it. Furthermore, under this test an evaluation of the category of online speech will help determine how much protection it should be afforded given the guiding principle of freedom of expression.

B. Limitations

It is important to acknowledge the potential limitations and negative outcomes that may result from the adoption of the ICD Test. First, the proposed test is not completely free from subjectivity. For instance, what is considered a strong basis in evidence may vary based on differing perspectives. Any constitutional analysis with a subjective component increases the risk of unconstitutional infringement of an individual's rights. Moreover, while it is beyond the scope of this Essay to fully develop the strong-basis-in-evidence standard, it at least requires evidence that there has been or will be a disruption of the on-campus school environment from speech occurring off campus and online. Lastly, another limitation of this test is its narrow scope. It only provides guidance for regulating online off-campus student speech and does not provide a constitutional analysis for the regulation of off-campus speech not communicated online. School administrators are left with the difficult task of determining the scope of their authority to regulate off-campus student speech not communicated online with no guiding legal precedent. Despite these limitations, the ICD Test provides the best path forward for safeguarding First Amendment protections for students' off-campus online speech because it strikes the necessary balance in affording school administrators enough regulatory authority to maintain an environment conducive to learning while preserving students' off-campus online free speech to the greatest extent possible.

Conclusion

America's public schools are the nurseries of democracy. To this end, the Supreme Court has recognized the vital role schools play in preserving democracy, stating, "The vigilant protection of constitutional freedoms is

nowhere more vital than in the community of American schools."[182] In the words of Justice Breyer, "Our representative democracy only works if we protect the 'marketplace of ideas.'"[183] The digital age has rapidly expanded the platforms and audiences for the marketplace of ideas through various social media outlets such as X, Snapchat, and Instagram. This broader digital audience has created formidable challenges for school administrators as student speech occurring off campus, in some instances, reaches the on-campus environment. The *Mahanoy* Court's failure to provide a clear constitutional test to govern the regulation of off-campus speech leaves a doctrinal void that must be filled. The proposed ICD Test provides the constitutional guidance to ensure that students' off-campus online speech is protected to the greatest extent possible while still providing school administrators with the necessary authority to maintain an environment conducive to learning. No balancing framework is perfect under the First Amendment. The ICD Test, however, best safeguards the learning environment by allocating discretionary authority, while still fostering the values of free speech.

Integrating the marketplace of ideas preserves the constitutional imperative of free expression, critically assesses context as a determinant of the scope of administrative discretion to censor student speech, and acknowledges that student rights are limited in the schoolhouse and online when the message "targets a member of the school community in a negative manner." The complexity of the virtual marketplace of ideas means that First Amendment jurisprudential tests must evolve and adapt to varying contexts. The ICD Test begins this important work.

182. Shelton v. Tucker, 364 U.S. 479, 487 (1960); *accord* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

183. *Mahanoy*, 141 S. Ct. at 2046.