Tales Out of School: Delineating Student Speech Protections for the Digital Age

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ABSTRACT. The way students communicate has also changed greatly over the last generation, but in the first two decades of 21st Century, the U.S. Supreme Court had yet to answer questions about the extent of power for school administrators to control off-campus speech on digital technologies. Then in the case of Mahanoy Area School District v. B.L (2021) the U.S. Supreme Court finally answered this question by holding that administrators do have the ability to control off-campus speech. The Court did give some specific scenarios in which administrators had power to regulate off-campus, but it did not give a bright-line rule. As a result, the Court may have muddied the waters even more by expanding the authority of school administrators in a cultural environment where politics and education will only continue to mix. This article provides a more precise test for student speech cases that can be applied in various contexts. First, the article reviews the decision in Mahanoy v. B.L. Next, the article outlines student speech precedent at the U.S. Supreme Court. Finally, the article forwards a new constitutional test by using the student speech precedent and drawing a parallel to the public employee speech test.

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INTRODUCTION

In February 2022, Fulton High School (NY) hosted the Syracuse Academy of Science and Technology (NY) in a basketball game. On its face, it was not an extraordinary event—but the game ended up making headlines in the local news. During the national anthem, at the start of the game, local students unfurled a “Trump 2020” banner. After the game, the coaches complained that the banners were racist and were meant to intimidate the visiting team—which consisted of all Black players. The coaches argued that such political statements had no place at a high school basketball game. Similarly, in 2014, a northern California high school basketball team was initially barred from playing in an interstate tournament because both the boys’ and girls’ teams were going to wear “I Can’t Breathe” shirts in protest of the killing of Eric Garner. The teams were reinstated when they agreed not to wear the shirts. These two stories show how political debates in our country have not only become more divisive but have also infiltrated all aspects of our lives, including high school sports.

When political issues move into the school setting, administrators have difficulty navigating the issues. But this is not a new problem. Historically, whenever political animus peaks, school administrators move to suppress any communication that could lead to discomfort and may upset the usual routine. More than fifty years ago, the U.S. Supreme Court recognized that students do not give up their First Amendment rights at “the schoolhouse gate.” Yet, the extent of students’ rights

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2 Id.
3 Id.
4 See id. The game was completed and the Syracuse Academy of Science beat Fulton High School 57-51. Id.
6 Veronica Rocher, High School Teams can wear ‘I can’t breathe’ Shirts After All, LOS ANGELES TIMES (Dec. 30, 2014, 8:43AM), https://www.latimes.com/local/lanow/la-me-ln-school-athletes-to-wear-i-cant-breathe-shirts-20141229-story.html [https://perma.cc/9NUH-4GTZ]. The teams were inspired by similar shirts worn in the NBA. Id.
has never been clear, and it is arguable that the decision in *Tinker v. Des Moines* was the height of speech rights. Since then, as the U.S. Supreme Court has moved toward conservative control, the rights of students have been slowly chipped away. Adding to that, the rise of bullying and violence in schools has led to administrators enforcing more preventative measures to stop student speech, with impunity from the courts.

The way we communicate has also changed greatly over the last generation. Today's students spend much of their time communicating in virtual forums. But the U.S. Supreme Court has been slow to catch up to these changes. Two decades into the 21st century, and there are many unanswered questions about the power of school administrators to control off-campus speech on digital technologies. In the case of *Mahanoy Area School District v. B.L.*, the U.S. Supreme Court finally answered the question, holding that administrators do have the ability to control off-campus speech. Here, the Court gave some specific scenarios in which administrators have power to regulate off-campus speech, but it did not give a bright-line rule. As a result, the Court may have muddied the waters even more by expanding the power of school administrators in an environment where politics and school will only continue to mix.

Accordingly, this paper provides a more precise test for student speech cases that can be applied in various contexts. First, the paper reviews the decision in *Mahanoy v. B.L.* Next, the paper outlines the line of school speech cases at the U.S. Supreme Court. Finally, the paper forwards an updated test by using the

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11 See infra Part III.


13 Hudson Jr., supra note 7 at 11–12.

14 Id. at 7, 10.


18 Id. at 2045.

19 Id.

20 See infra Part II.C.

21 See infra Part II.

22 See infra Part III.
student speech precedent and drawing a parallel to the public employee speech test.23

I. MAHANOY V. B.L.

Censorship of student speech has become more accepted over the last generation as the threat of cyberbullying and violence in schools has increased.24 Schools have been more forceful in their regulation of student speech, arguing that the threat to student safety has lowered the need for clear evidence that speech is disruptive.25 Moreover, since the advent of social media, speech that was once exclusive to off-campus and weekends now spills over into the regular school day.26 Though this has been an issue since the beginning of this century, the U.S. Supreme Court had not resolved the question of whether schools can regulate speech that occurs off-campus and outside of school hours. Lower courts have been split on their outcomes, but most of them apply the Tinker test to determine whether the off-campus speech materially interferes with operation of the school.27

A. The Facts of the Case

In 2021, the Court got its chance to resolve the issue.28 The case centered on a Pennsylvania public school student (“B.L.”), who was quite displeased when she tried out for two sports teams and things did not go her way.29 First, she did not get her preferred position on the softball team.30 Then, she did not make her school’s varsity cheerleading squad—instead being relegated to another year on J.V. 31 So she did what many frustrated people do in this situation: she decided to vent.32 But

23 See infra Part IV.
25 See Jennifer Butwin, Note, Children are Crying and Dying While the Supreme Court is Hiding: Why Public Schools Should Have Broad Authority to Regulate Off-Campus Bullying "Speech", 87 FORDHAM L. REV. 671, 686–91 (2018) (outlining how lower courts have allowed for off-campus speech regulation).
26 McKenna, supra note 24.
27 Butwin, supra note 25.
29 Id. at 2043.
30 Id.
she did it the way that most teenagers do it today—through her social media.\footnote{Id.; Mahanoy, 141 S. Ct. at 2043.} She expressed her discontent on Snapchat by posting a photo of herself and a friend flashing the middle finger with a caption that read, “Fuck school fuck cheer fuck softball fuck everything.”\footnote{Mahanoy, 141 S. Ct. at 2043.} In another post, she sent the text, “Love how me and [another student] get told we need a year of J.V. before we make varsity but thaat doesn’t matter to anyone else?”—accompanied by an upside down emoji face.\footnote{Id.}

Unfortunately for B.L., she lost control of the messages when it ended up going beyond her network of friends.\footnote{Id.} Some other students who saw the Snap captured a screen grab and saved it to their phones.\footnote{Id.} As the Snap spread, one concerned student came across it and decided to show it to her mother, who was the cheerleading coach.\footnote{See id.} The coach stated that a few of the members of the cheerleading squad later came to her “visibly upset” about the posts, and that students were gossiping about it in class that week.\footnote{See id.} After consultation with the school principal, the coach decided to punish B.L. for violating the team rules about respect, and she was suspended from the J.V. team for a year.\footnote{Id.} B.L. ended up apologizing for the incident, but the sanctions were not lifted.\footnote{Id.} B.L. then pleaded with the school’s athletic director, principal, superintendent, and school board; but each of these stops yielded no change as her punishment was upheld.\footnote{Id.} So, B.L. and her parents pursued legal action against the school district for violating her First Amendment rights.\footnote{Id.}

**B. Questions at the U.S. Supreme Court**

The District Court ruled in favor of B.L., granting a temporary restraining order\footnote{See B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).} on the suspension, which was upheld by the Third Circuit.\footnote{Id.} Both courts applied the Tinker test and reasoned that the student’s off-campus speech was not a direct
threat; nor did it directly disrupt the school. The majority of the Third Circuit panel added that the Tinker test does not apply to “speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school’s imprimatur.”

The Mahanoy Area School District appealed the case to the U.S. Supreme Court and was granted certiorari. Moreover, the school district asked the Court to make a bright-line rule that Tinker applies to off-campus speech. The school argued that in the Court’s student speech cases, the Court has never specified that the speech needs to take place in school—only that the speech has to cause a substantial disruption of school operations. The school also made an argument that punishing students for off-campus speech is analogous to school employees who can be punished for off-campus actions that are detrimental to the school community. Thus, treating students differently than teachers would violate the First Amendment’s prohibition against speaker-based discrimination. Moreover, the school argued that allowing the lower court’s ruling in favor of the student undermined the efficacy of school operations because so much student interaction now happens outside of school and in virtual spaces. Though much of this speech is benign, too much of it is bullying that can interfere with the lives of students and faculty, leading to poor grades, faculty quitting their jobs, students quitting their teams, and—worst of all—suicides. The school district argued that holding that the Tinker test does not apply to off-campus speech would upend decades of school actions that regulated off-campus conduct, as well as state and federal laws that mandated safe school environments for learning.

In response, B.L. argued that the Court should not extend a school’s ability to regulate speech to off-campus speech, as such a concept has no grounding in Tinker v. Des Moines. Young people have full free speech protections outside of school, and the Tinker test is a narrow exception to that right. Finally, B.L. argued that opening students up to arbitrary and subjective censorship outside of school would cause a chilling effect on speech, as administrators could always imagine a

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46 Id. at 194.
47 Id. at 189.
48 See Mahanoy, 141 S. Ct. at 2042–43.
49 Brief for Petitioner at 2, Mahanoy, 141 S. Ct. 2038 (No 20-255).
50 Id. at 9–10.
51 Id. at 23–24.
52 Id. at 4.
54 See Brief for Petitioner at 36–37, 43, Mahanoy, 141 S. Ct. 2038 (No 20-255).
55 Id. at 31.
56 Brief for Respondents at 13, Mahanoy, 141 S. Ct. 2038 (No. 20-255).
57 Id. at 14.
disruption coming from the speech they do not like.58

In the alternative, B.L. asked that if the Court did choose to extend the *Tinker* test to off-campus speech, it do so only in the context of intentional threats or other speech that directly interferes with school operations.59 Furthermore, the student argued that the Third Circuit correctly analyzed the facts in this case, as the school administration did not present any evidence that the off-campus speech was disruptive to school operations.60 The student’s speech, though profane in nature, was neither directed at the school nor threatening.61 She also posted the message during the weekend on her personal network on a social media platform designed to not permanently record the message.62

**C. U.S. Supreme Court Decision**

In June of 2021, the U.S. Supreme Court ruled in favor of B.L.63 The Court held that in this instance, the school could not punish the student’s speech.64 Yet, the Court explained that public school administrations can punish student speech that occurs off-campus, albeit in very limited circumstances.65 The opinion gave possible examples such as: “severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.”66 Nevertheless, the Court refused to make a clear-line rule or an exhaustive list.67 Instead, it noted that when it comes to off-campus speech, “the leeway the First Amendment grants to schools . . . is diminished.”68 The reasoning was that allowing schools broad authority to regulate off-campus speech would expose most student speech to overregulation, including

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58 Id. at 24.
59 Id. at 42.
60 Id. at 44–45.
61 See id. at 45.
62 Id. at 4.
63 *Mahanoy*, 141 S. Ct. at 2048.
64 Id.
65 Id. at 2045.
66 Id. The Court also added:

all times when the school is responsible for the student; the school’s immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school’s website; speech taking place during remote learning; activities taken for school credit; . . . communications to school e-mail accounts or phones . . . [and] extracurricular activities, such as team sports.[]

Id.
67 Id. ("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.").
68 Id. at 2046.
the censoring of unpopular opinions. The Court stated that regulation of student speech outside of school should mostly remain in the domain of parents.

The Court then turned to the facts of the case. First, it concluded that B.L.’s speech was the type of speech that would be protected if an adult said it. Next, since the speech was posted outside of school grounds and hours, the school had limited jurisdiction to regulate it. Moreover, the Court did not find any significant evidence that the speech caused a disruption to the school’s operations. According to the Court, even speech on arguably trivial matters deserves full First Amendment protection.

II. FIRST AMENDMENT PROTECTIONS FOR PUBLIC STUDENTS & PUBLIC EMPLOYEES

The First Amendment promotes the free exchange of ideas. Moreover, it is an explicit protection of dissidents from being silenced by the majority. This protection now extends to speech that is vulgar, offensive, and noxious. Ultimately, when speech occurs in a public forum, the government cannot regulate it based on the message, viewpoint, or speaker. However, the government can regulate speech when it has dominion over the speaker. Two examples are public school students and public employees.

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69 Id.
70 Id.
71 Id. at 2046–48.
72 Id. at 2046–47.
73 Id. at 2047.
74 Id. at 2047–48.
75 Id. at 2048. In dissent, Justice Thomas made an originalist argument that First Amendment protections did not extend to children at the adoption of the Fourteenth Amendment. Id. at 2059–61 (Thomas, J., dissenting). Justice Thomas observed, “Because speech travels, schools sometimes may be able to treat speech as on campus even though it originates off campus.” Id. at 2063.
76 See Patterson v. Colorado, 205 U.S. 454, 462 (1907).
77 “[T]he freedom of Speech may be taken away—and, dumb & silent we may be led, like sheep, to the Slaughter.” From George Washington to Officers of the Army, 15 March 1783 (Mar. 15, 1783) (transcript available at Founders Online, National Archives, https://founders.archives.gov/documents/Washington/99-01-02-10840 [https://perma.cc/T538-YFRX]).
79 Id. at 458, 461. The government can regulate the time, place, and manner of speech. Id. at 456.
80 There are a few other contexts in which the government has the expanded ability to regulate speech, including the military, prisons, and compelled government speech. See, e.g., Parker v. Levy, 417 U.S. 733 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550 (2005). These contexts will not be covered in this article.
A. Student Speech

One exception to the rule against treating speakers differently is in the context of student speech.81 For most of American history, students had no rights in schools.82 But fifty years ago, in the case of Tinker v. Des Moines Independent Community School District,83 the U.S. Supreme Court held that students do not lose their “constitutional rights to freedom of speech or expression at the schoolhouse gate.”84 According to the Court, administrators could only restrict or punish students’ speech if there was articulated evidence that the speech “collid[ed] with the rights of others” and “materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.”85 The Tinker rule was a balancing test between the constitutional rights of the students and the government’s need to create an effective learning environment.86

But Tinker was the apex of student speech protection.87 Over the next forty years, the U.S. Supreme Court added several exceptions to this right. First, in Bethel School District No. 403 v. Fraser,88 the Court held that public schools could regulate lewd and indecent speech on campus.89 The Court argued that schools need the ability to regulate “habits and manners of civility” by “inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”90

Two years later, in Hazelwood School District v. Kuhlmeier,91 a principal censored a student newspaper that wanted to run articles on teenage pregnancy and how divorce affected students in the school.92 The U.S. Supreme Court held that public schools could regulate student media if the censorship related to pedagogical purposes of teaching students how to be professional journalists and

82 See Mahanoy, 141 S. Ct. at 2059–60 (Thomas, J., dissenting).
84 Id. at 506.
85 Id. at 513.
86 See id. at 512–13.
89 Id. at 683.
90 Id. at 681 (quoting Charles A. Beard & Mary R. Beard, New Basic History of the United States 228 (1968)).
92 Id. at 263. The sources for the story had been kept confidential. Id.
protecting the privacy rights of the sources.\textsuperscript{93} Finally, in \textit{Morse v. Frederick},\textsuperscript{94} a student was suspended when he refused to take down a banner that read, “BONG HiTS 4 JESUS,” during a school assembly just outside the school.\textsuperscript{95} The Court held that schools could censor speech that promoted the use of drugs.\textsuperscript{96} Today, the \textit{Tinker} test is most likely to protect student speech if it is political in nature,\textsuperscript{97} but with other types of speech, it is \textit{much} easier for administrators to find a way to show it is disruptive.

\textbf{B. Public Employee Speech}

Traditionally, public employees did not have free speech protections on the job.\textsuperscript{98} But, just over fifty years ago, the U.S. Supreme Court recognized a free speech protection for public employees.\textsuperscript{99} In \textit{Pickering v. Board of Education},\textsuperscript{100} a school district fired a teacher who had written a letter criticizing the school board.\textsuperscript{101} The Court held that the teacher could not be fired for making statements that were a matter of public concern without showing that they were false.\textsuperscript{102} In doing so, the Court created a new test that balanced the employee’s free speech interests with the employer’s interests in efficient government administration.\textsuperscript{103} Over the next decade, the Court continued to uphold the free speech rights of public employees who spoke on a matter of public concern, even when it criticized the employer, was in private communications, or was offensive.\textsuperscript{104}

\begin{footnotesize}
\textsuperscript{93} Id. at 272–73. This included advocating ideas that go against “the shared values of a civilized social order” such as alcohol and drug use and irresponsible sexual activity. \textit{Id}. at 272.
\textsuperscript{94} 551 U.S. 393 (2007).
\textsuperscript{95} Id. at 397–98. The rally was held for the school to watch the Olympic Torch pass by the school in Juneau, Alaska. \textit{Id}. at 397. Local media was there and captured pictures of the event including the banner. \textit{Id}. at 398–99.
\textsuperscript{96} \textit{Id}. at 403.
\textsuperscript{98} \textit{Id}. at 564.
\textsuperscript{99} \textit{Id}. at 574.
\textsuperscript{100} 391 U.S. 563 (1968).
\textsuperscript{101} \textit{Id}. at 564.
\textsuperscript{102} \textit{Id}. at 574.
\textsuperscript{103} \textit{See id}. at 568.
\end{footnotesize}
But, in *Connick v. Myers*, the Court ruled against a government employee. In doing so, the Court gave deference to the government in concluding that the speech was not a matter of public concern. If the employee succeeded in doing so, then the government employer would have to establish that the speech was disruptive to the operation.

The U.S. Supreme Court further expanded the government’s control over employee speech in *Garcetti v. Ceballos*. Ceballos was a supervising district attorney whose duties required him to review prosecutions pursued by his office. When he reviewed a search conducted by the county sheriff, Ceballos found flaws in the process, so he reported his findings to his superior, the District Attorney. But the District Attorney ignored Ceballos’s report and pursued the prosecution. Ceballos was later transferred out of the office. He sued the office claiming he had been retaliated against for pointing out the flaws in the case.

The U.S. Supreme Court held in favor of the government, holding that the employee’s free speech rights were not protected, because he was acting within the scope of his official job duties. The Court reasoned that when a paid employee speaks within their official capacity, they represent the government and do not have individual free speech rights, though they do maintain full speech rights outside of the scope of their employment.

The Court then added another prong to the public employee speech test: courts must first examine whether the speaker was acting within his or her official duties. If an employee was speaking in his or her official capacity, then there is no First Amendment protection. If the employee was not speaking pursuant to his or her job duties, then courts are to apply the *Pickering/Connick* test. Thus,

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106 See id. at 142.
107 Id. at 151–52.
108 See id. at 158.
110 Id. at 413.
111 Id. at 414.
112 See id. at 414. The evidence collected by the sheriff was admitted to the trial. Id. at 414–15.
113 Id. at 415.
114 Id.
115 Id. at 421. (holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).
116 Id. at 418–19. “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” Id. at 418 (citing Waters v. Churchill, 511 U. S. 661, 671 (1994)).
117 See id. at 421.
118 Id.
119 See id. at 418, 424.
courts must examine if the employee’s speech was a matter of public concern. If it was not, then there is no First Amendment protection.\textsuperscript{120} Public concern is usually determined on a case-by-case basis, but courts commonly protect speech about problematic issues in an agency, such as discrimination or corruption.\textsuperscript{121}

If the speech is found to be of public concern, then courts move on to the third prong: whether the speech was disruptive to the agency.\textsuperscript{122} With this prong, courts evaluate the time, place, and manner of the speech.\textsuperscript{123} Some examples of disruptive employee speech include impairing the harmony among co-workers, impairing efficiency, and interfering with operations.\textsuperscript{124} Additionally, employee speech can be of public concern, but if there is other speech or action that also led to the punishment, then there is no First Amendment protection if the government can show that the employee would have been fired absent the speech.\textsuperscript{125} As a result of \textit{Garcetti}, there is no longer a pure balancing test, because if a person speaks as an employee at all, there is no protection.\textsuperscript{126}

One of the difficulties in the \textit{Garcetti} prong has been defining job duties in the digital age when technology allows people to work any time from any place.\textsuperscript{127} Another issue has occurred when employees report government maleficence through internal channels.\textsuperscript{128} Generally, if an employee’s job duties require him or her to report wrongdoings to officials, courts do not protect the speech, even if it serves the public interest.\textsuperscript{129} But, in \textit{Lane v. Franks},\textsuperscript{130} the U.S. Supreme Court faced an issue involving a public employee who felt he had been fired for answering a subpoena and testifying against his government employer.\textsuperscript{131} The Court ruled in favor of the employee, holding that a public employee may not be punished for “[t]ruthful testimony under oath . . . outside the scope of his ordinary job duties . . . .”\textsuperscript{132}

\begin{thebibliography}{99}
\item \textsuperscript{120} \textit{Id.} at 418.
\item \textsuperscript{122} \textit{See} Connick v. Myers, 461 U.S. 138, 153 (1983).
\item \textsuperscript{123} \textit{Id.} at 152.
\item \textsuperscript{124} \textit{See} Arnett v. Kennedy, 416 U.S. 134, 168 (1974).
\item \textsuperscript{126} \textit{See} Garcetti v. Ceballos, 547 U.S. 410, 427–428 (Souter, J., dissenting).
\item \textsuperscript{128} \textit{See} e.g. \textit{Lane v. Franks}, 573 U.S. 228, 231 (2014).
\item \textsuperscript{129} \textit{See} e.g. \textit{Foley v. Town of Randolph}, 598 F.3d 1, 6 (1st Cir. 2010).
\item \textsuperscript{130} 572 U.S. 228 (2014).
\item \textsuperscript{131} \textit{Id.} at 234–235.
\item \textsuperscript{132} \textit{Id.} at 238.
\end{thebibliography}
However, the decision in *Lane* did not nullify the *Garcetti* prong, as speech that is pursuant to one’s job duties is still not necessarily protected, even if it is truthful testimony.133

III. DELINEATING THE STUDENT SPEECH TEST

In *Mahanoy*,134 the U.S. Supreme Court finally declared that public schools are allowed to regulate off-campus speech.135 However, in doing so, it refused to create a bright-line rule, an exhaustive list of exceptions, or a clear legal test as to when schools can do so.136 In declaring that the schools can punish off-campus speech, the Court only further muddied the waters as to when this great power can be wielded.137 Not having a clear test will only open the door to more litigation and confusion in the lower courts, while also guaranteeing a future student speech case at the U.S. Supreme Court.138 Instead, the Court should have taken the opportunity to create a more precise legal test in the area of student speech.

A. The Parallel Between Public Students and Public Employees

In search of a new legal test for student speech, the Court should have drawn a parallel to another context where speakers are in the dominion of the government—public employment.139 Public employees are in the employ of the government, but do not lose all of their First Amendment rights.140 Similarly, students submit to the controls of the school administration, but do not lose all of their First Amendment rights.141 Employees submit to government control in exchange for pay and benefits, while students submit to government control in exchange for education.142

133 See id. at n.5.
135 Id. at 2045.
136 Id. (listing some possible situations where school administrators could punish off-campus speech).
139 See supra Part III.B.
142 See generally Mary Grace Henley, *Professionally Confusing: Tackling First Amendment Claims by Students in Professional Programs*, 50 Stetson L. Rev. 417, 421 (2021) (outlining how courts have applied both doctrines in cases of college students in professional programs). The parallel ends when it comes to agency. Employees choose to work for the government while students are compelled to attend school by the state (and their parents). However, parents can choose to send their children to private or parochial schools. A hybrid of the issue is college-students who often walk the line between student citizens and employees in training. See id.
Thus, it makes sense that the legal tests should be similar. In fact, there are already many parallels between the two. First, both tests examine whether the speech was a matter of public concern, with such speech receiving the most protection. Second, both tests examine the disruption caused by the speech, allowing the government or school to punish speech when it is disruptive to the operation of the government or school.

Similarly, in the last generation, both realms have dealt with the issue of digital technology and how it has blurred the line where government dominion begins and ends. In the context of public employee speech, the Court addressed this issue in Garcetti by creating a “job-duty” prong of the test, which includes an analysis for when a citizen is and is not an employee. This prong has given some clarity as to when an employee’s speech outside of the office can be regulated. So it seems like a parallel prong should be applied in the student speech context. Such a prong would focus less on the place of the speech and focus more on the status of the speaker at the time of the speech. Consequently, the new student speech test should ask:

1. Was the citizen acting within the scope of student duties?
2. Was there articulable evidence that the speech was disruptive to the operation of the school?
3. Was the speech about a matter of public concern?

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143 In Tinker, one year after the decision in Pickering, the U.S. Supreme Court mentioned both students and public employees—teachers: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker, 393 U.S. at 506 (1969).
144 See Bice, supra note 121; Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2055 (2021).
145 See supra Part III.B.
147 See, e.g., Lane v. Franks, 573 U.S. 228, 238 n.4 (2014) (suggesting that an analysis under the Garcetti prong can be bypassed where the speech at issue is indisputably not within the scope of the employee’s job duties).
148 See supra Part III.B.
B. A More Precise Legal Test In Student Speech Cases

1. (Professional) Duties?

In the public employee speech test, the first prong is whether the employee was acting within the scope of the employee’s job duties. In this context, if the employee was acting within the scope of the employee’s job duties, then there is no speech protection. The reasoning is that the employee is speaking on behalf of the government, and the government should have greater discretion to control such speech.

Thus, when it comes to student speech, a similar prong should be created: Was the citizen acting within the scope of student duties? This would certainly include in-class activities and school-sponsored events, both inside and outside of the school (e.g., field trips, clubs, sports, etc.). Admittedly, this becomes more difficult when a student is outside of school, because unlike employees, students usually do not represent their schools when outside a school-sanctioned event. Thus, when a student is home at night or on the weekends, they are generally not representing their school. However, there are situations when they may be at home and within their “student duties”; for example, during online learning.

This analysis is also difficult in the context of school-sponsored events. In these cases, the school would have to show that they retained dominion over the students. This is easier in the case of school-sponsored events during the school day, field trips, and overnight trips for sports teams, after which students return to school. However, in situations like sporting events where students are in the crowd, it would be difficult for a school to show dominion over students, because they have

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151 See Garcetti, 547 U.S. at 418.
152 Id.
154 Some public-school students are over the age of 18 and otherwise have the full rights of citizens, such as the right to vote. Yet they can still be punished in school under the Tinker rule. See Morse v. Frederick, 551 U.S. 393 (2007).
155 See, e.g., Morse, 551 U.S. at 403 (holding that student could be punished for pro-drug message during rally outside of school building).
likely gone home and come back, and may leave whenever they please. In that case, they are the same as any other adult citizen in the crowd. But the students could still be punished if the school could show their speech was disruptive and the students could not show it was protected political speech.

Unlike the public employee speech test, when it comes to student speech, the burden of proof should be on the school to show that the student was acting within the scope of student duties. This could be proven through the mandated legal duties, as well as duties that are written into student handbooks.

2. Disruptive to the Administration of the School?

In the third prong of the employee speech test, the government must show that the employee’s speech, which was a matter of public concern, was disruptive to the administration of the government. If the government can prove this, then the employee's speech can be punished. In meeting this burden of proof, the government must justify “treating the employee differently from any other member of the general public.” Yet in practice, employee speech cases rarely get this far, because they are either won by the government under the scope-of-job-duties prong or by the employee for speaking on a matter of public concern.

Similarly, in the new student speech test, the next prong should be a burden on the government to show that the speech was disruptive to the operation of the school. This is derived from the Tinker test, which still is good law—though many exceptions have been added. Over the years, courts have eroded the

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160 As the Third Circuit argued in B.L. v. Mahanoy Area School District, administrators should not be able to regulate “speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school’s imprimatur.” 964 F.3d 170, 189 (3d Cir. 2020).

161 See Mahanoy, 141 S. Ct. at 2045 (listing categories of unprotected off-campus speech that school administrators may regulate). This would include statements on matters of public concern that are threats, incitement, or intended to intimidate.

162 See generally Thomas E. Hudson, Comment, Talking Drugs: The Burdens of Proof in Post-Garretti Speech Retaliation Claims, 87 Wash. L. Rev. 777, 795–98 (2012) (arguing that lower courts have been inconsistent in applying the burden of proof).


164 See id. at 150–52.

165 Garcetti v. Ceballos, 574 U.S. 410, 418 (2006); see Rankin v. McPherson, 483 U.S. 378, 384 (1987) (“Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”).


168 Id.; see also Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021) (listing categories of student speech that schools may regulate).
requirement for articulated evidence of disruptions. The new test should require articulate evidence once again.

Examples of disruption would include speech involving a true threat, incitement, intent to intimidate, or obscenity. In most cases, political speech should not be deemed disruptive unless it crosses into one of the enumerated categories of unprotected speech. After all, a school is meant to be a place to learn and discuss new ideas, which includes debating about politics. There may be classes more suited for this, such as civics, but even in science classes debates about sexuality and evolution necessarily invoke politics. When these topics are germane to the class, it should be the duty of the teachers and administration to moderate such difficult subjects and not rush to shut down debate.

If a school can show that students were acting within the “scope of student duties” and that their speech was disruptive, then the school should win the case. An example of this would be political speech in a class that is not germane to the topic, such as an arbitrary chanting of “Let’s Go Brandon” in art class or a BLM slogan during math class, whether face-to-face or online. If a similar disruptive speech occurred, but the student was not within the “scope of student duties,” then the courts should move to the third prong.

If the school cannot show that the speech was disruptive, and it failed to show that the students were acting within the “scope of student duties,” then the students would win. An example of this would be the situation in Mahanoy, involving a student who sent a vulgar Snap during the weekend. However, if the student was within the “scope of student duties,” the court should move on to the third prong, even if the speech was not shown to be disruptive.

3. A Matter of Public Concern

In the second prong of the public employee speech test, the courts examine whether the speaker was speaking on a matter of public concern. If the speaker

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170 Cf. Mahanoy, 141 S. Ct. at 2045 (listing “types of off-campus behavior that may call for school regulation”).
171 See id. (listing categories of student speech that schools may regulate).
175 Mahanoy, 141 S. Ct. at 2043.
can demonstrate this, then the speech is generally protected, unless it is disruptive to the agency.\footnote{See Connick v. Myers, 461 U.S. 138, 154 (1983). But the analysis must make it past the “scope of job duties” prong. See Garcetti v. Ceballos, 547 U.S. 410, 415 (2006).}

This parallels how student speech jurisprudence has evolved in the last fifty years. Initially, the \textit{Tinker} rule made no such distinction, though the speech in that case was clearly political.\footnote{See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); see also Lindsay Foley, Note, \textit{Tinkering with Student Speech: Balancing the Protection of Students’ First Amendment Rights with a School’s Duty to Protect}, 52 SUFFOLK U. L. REV. 459, 464–66, 468–69 (2019) (discussing how the U.S. Supreme Court distinguished post-\textit{Tinker} cases based on the substance of the speech).} Since that time, the U.S. Supreme Court has added several exceptions, including obscenity,\footnote{See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (holding that student indecent speech during assembly was not protected); Foley, supra note 178, at 464–65.} promotion of drug use,\footnote{Morse v. Frederick, 551 U.S. 393, 397 (2007) (holding that student could be punished for pro-drug message).} and privacy.\footnote{See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (concluding that student newspaper story about teen pregnancy was not protected).} Today, essentially the only speech that is protected in school is pure political speech.\footnote{See Tinker, 393 U.S. at 509. But even political speech has received less protection with each case subsequent to \textit{Tinker}. See Alexander Tsesis, \textit{Categorizing Student Speech}, 102 MINN. L. REV. 1147, 1169 (2018) (arguing that \textit{Tinker} meant to protect core political speech but courts have not lived up to this promise).}

Today, essentially the only speech that is protected in school is pure political speech.\footnote{See Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); see also Tsesis, supra note 182, at 1186.}

Similarly, in the new test, the third prong will require the student to show that they were speaking on a matter of public concern.\footnote{If the student was within the scope of student duties and the speech is found to be disruptive, then the test does not move to the third prong. See supra Part IV.C.2.} If they were, then the speech will be protected. Ultimately, there are two ways for the student to be protected when speaking on matters of public concern. First, the speech will be protected if the student was acting within the “scope of student duties,” so long as the speech is not shown to be disruptive.\footnote{\textit{Tinker}, 393 U.S. at 514.} This was the case in \textit{Tinker}, where the students’ speech took the form of a symbolic black armband in protest of the Vietnam War.\footnote{\textit{Id.} at 508. “[U]ndifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression.” \textit{Id.}} Even though the students wore them during the school day, the school district had no evidence that the armbands were disruptive to the school’s operations.\footnote{Id. at 508.} Students will also win on this prong if they can show that the speech was a matter of public concern, even if the speech was disruptive, so long as they were outside of the “scope of student duties.” This would include political speech on social media that may infiltrate the school day. It is reasonable to believe that a student who is politically active on social media could cause a disruption when other

\\[\footnotemark{179}\] See \texttt{Bethel Sch. Dist. No. 403 v. Fraser}, 478 U.S. 675, 685–86 (1986) (holding that student indecent speech during assembly was not protected); Foley, supra note 178, at 464–65.
\\[\footnotemark{180}\] Morse v. Frederick, 551 U.S. 393, 397 (2007) (holding that student could be punished for pro-drug message).
\\[\footnotemark{182}\] See \texttt{Tinker}, 393 U.S. at 509. But even political speech has received less protection with each case subsequent to \textit{Tinker}. See Alexander Tsesis, \textit{Categorizing Student Speech}, 102 MINN. L. REV. 1147, 1169 (2018) (arguing that \textit{Tinker} meant to protect core political speech but courts have not lived up to this promise).
\\[\footnotemark{183}\] See \texttt{Pickering v. Bd. of Educ.}, 391 U.S. 563, 574 (1968); see also Tsesis, supra note 182, at 1186.
\\[\footnotemark{184}\] If the student was within the scope of student duties and the speech is found to be disruptive, then the test does not move to the third prong. See supra Part IV.C.2.
\\[\footnotemark{185}\] \texttt{Tinker}, 393 U.S. at 514.
\\[\footnotemark{186}\] \textit{Id.} at 508. “[U]ndifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression.” \textit{Id.}
students learn of it.¹⁸⁷ Yet since such a student is outside of the school’s dominion, the government should not have the expanded authority to censor what might be an unpopular opinion.¹⁸⁸

However, a student will lose on this prong if they cannot show that the speech was a matter of public concern. First, if the speech was exercised within their “scope of student duties,” the speech will be punished even if it is not proven to be disruptive. This is demonstrated in the line of post-*Tinker* cases, where the U.S. Supreme Court ruled against student speech in unprotected categories such as obscenity, privacy infringement, and promotion of drugs.¹⁸⁹ Similarly, if the speech was not a matter of public concern and not within the “scope of student duties”—that is, outside of school and off-hours—it will not be protected, so long as it was shown to be disruptive to the operation of the school. This would include online bullying that occurs on social media and creates a hostile environment in the school.¹⁹⁰ In this situation, the school has a right to punish students to ensure the safety of others. However, students generally should be able to make public commentary about the school operations and school administration, as such issues are often a matter of public concern.¹⁹¹

**CONCLUSION**

Over fifty years ago, the U.S. Supreme Court first recognized protections for student speech. But *Tinker* was the zenith and since then the Court has chipped away at the rights of students. The post-*Tinker* evolution of student speech jurisprudence has demonstrated that only non-disruptive political speech is protected. Yet the Court has never explicitly recognized this as the legal test.


¹⁸⁹ In oral argument, Justice Souter hypothesized that a student holding a sign advocating for changes in the marijuana laws would be a matter of public concern. Transcript of Oral Argument at 6–7, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278).

¹⁹⁰ *See, e.g.*, Karly Zande, Article, When the School Bully Attacks in the Living Room: Using *Tinker* to Regulate Off-Campus Student Cyberbullying, 13 BARRY L. REV. 103, 134 (2009) (arguing that cyberbullying is a true threat not protected under the *Tinker* framework).

¹⁹¹ “*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment.” Lane v. Franks, 573 U.S. 228, 239 (2014).
Additionally, over the last generation, digital technology has blurred the line as to when students stop being students and when their speech is no longer within the jurisdiction of the school. In *Mahanoy*, the Court did take a step in the direction of clarity by declaring that schools can regulate off-campus speech. Nonetheless, it did not create a bright-line rule to help lower courts decide when it is acceptable.

In response, this paper forwards a new test recognizing these two shortcomings by finding the parallel between being a public-school student and a public employee. By creating a parallel legal test, student speech will be regulated by similar “scope of duties” and “matter of public concern” prongs. School administration will maintain the ability on campus to punish unprotected speech, such as obscenity and incitement, as well as speech that is disruptive to in-class learning, such as political chants in a classroom. Additionally, the administration will also have the limited ability to punish disruptive off-campus speech that is not political in nature, such as cyberbullying. But the test also protects the students’ First Amendment rights by making sure that political speech both on and off campus is protected, so long as it is not disruptive to in-class learning. This bright-light rule recognizes how the student speech test has changed since *Tinker*, and answers the questions left by the Court in its most recent decisions.