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### Tinkering With Tinker: Why the Supreme Court Must Protect Student Speech Through Social Media

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# TINKERING WITH TINKER

Why the Supreme Court must Protect Student Speech  
Through Social Media

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### ***Purpose***

The goal of this paper is to address the failing of the Supreme Court in their decision of the case *Mahanoy Area School District v. B.L.*<sup>1</sup>. While the Court defended students' rights to free speech under the First Amendment in *Tinker v. Des Moines* (1969)<sup>2</sup>, they have since restricted that right through a number of cases. While the Court's decision in *Mahanoy Area School District v. B.L.* protected student speech, the Court failed to provide a standard for application in cases regarding social media in schools. This paper argues that while the Court was correct in protecting B.L.'s speech, it should have gone further to create a legal standard defending student speech through social media. Through discussing recent precedent and the history of student speech in the Supreme Court as well as examining cases about social media under the First Amendment, this paper will suggest a potential standard that could have been created for *Mahanoy Area School District v. B.L.* that would protect student speech through social media while maintaining students' rights to safety and the schools' interest in effectively educating their students.

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<sup>1</sup> *Mahanoy Area School District v. B.L.*, 2021

<sup>2</sup> *Tinker v. Des Moines*, 1969

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## ***1. Introduction***

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First Amendment speech in schools has been a long-debated topic with numerous cases heard by the United States Supreme Court. *Mahanoy Area School District v. B.L.* (further referred to as *Mahanoy*) is the most recent case on the topic that complicates the discussion of what speech can be controlled by schools<sup>3</sup>. B.L. was a disgruntled student who, after failing to make the varsity cheerleading team, posted images on her snapchat story<sup>4</sup>, one containing vulgar gestures and language, resulting in her suspension from the team. The Supreme Court ruled that B.L.'s speech was protected under the First Amendment but failed to define a standard involving the use of social media as speech<sup>5</sup>. The speech in B.L. is a common example of everyday speech occurring frequently in and out of schools. If the Court allows schools to issue punishment for speech outside of school similarly to speech in school, the court will be severely limiting student rights under the First Amendment. The question is, with the advancement of technology, how is speech defined when shared through social media? Even if it is shared outside of school, is accessibility in school a consideration? The prevalence of social media allows for out of school speech to become disruptive in school even to the point of obstructing the school's mission. The Supreme Court is the arena to answer these questions, to set a standard for schools that protects students' right to both speech and education.

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<sup>3</sup> *Mahanoy Area School District v. B.L.*, 2021

<sup>4</sup> A smartphone application allowing users to share photos with individuals or publicly to their "story" which can only be viewed by approved friends of the user for a 24-hour long period before disappearing. Stories can be saved by friends of the user through taking a screenshot to capture the image before it disappears.

<sup>5</sup> *Mahanoy Area School District v. B.L.*, 2021

## 2. Historical Review

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### a. Student Speech under the First Amendment

Student rights to freedom of speech under the First Amendment were first federally recognized through the 1969 Supreme Court case *Tinker v. Des Moines Independent Community School District* (further referred to as *Tinker*). Famously, the Supreme Court said that students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>6</sup> The standard set by the Court in *Tinker* provides that student speech must “materially and substantially interfere” with the function and operation of the school in order to be constitutionally restricted<sup>7</sup>. The application of this ruling has been used consistently for the past 53 years as strong precedent protecting students’ rights to freedom of speech and expression. As cases progressed in the Supreme Court, standards for prohibiting speech opened, while the realm of allowed student speech closed. For example, student speech under the First Amendment was restricted further in *Bethel School District v. Fraser* (further referred to as *Bethel*), defining vulgar and lewd speech as inconsistent with “fundamental values of public-school education,” and therefore allowing schools more control over their students’ voices<sup>8</sup>. In *Hazelwood School District v. Kuhlmeier* (further referred to as *Hazelwood*), this standard was once again broadened by a shift in language. Instead of proving substantial disruption of school function, schools were now able to restrict speech on the basis that their actions are: “reasonably related to legitimate pedagogical concerns”<sup>9</sup>. Together, these rulings lay the basis of the Court’s decision in *Mahanoy*,

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<sup>6</sup> *Tinker v. Des Moines*, 393 U.S. 503, 506, 1969

<sup>7</sup> *Tinker v. Des Moines*, 393 U.S. 503, 509, 1969

<sup>8</sup> *Bethel School District v. Fraser*, 478 U.S. 675, 685, 1986

<sup>9</sup> *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266, 1988

determining that B.L.'s speech must not disrupt the school's ability to undertake their fundamental purpose of education.

Additional cases on student speech in schools, defined the types of speech that may be constitutionally restricted. In *Morse v. Frederick* (further referred to as *Morse*), the Court decided that student speech promoting illegal drug use was an acceptable use of school power to restrict student speech under the First Amendment<sup>10</sup>. Set in 2007, this precedent restricts student speech further by creating a topic of speech that is unacceptable for students in school. The Court determined that the free speech rights of students were not equal to those of adults<sup>11</sup>. Particularly regarding illegal drug use, *Morse* also determined that the widely protective precedent of *Tinker* would not always apply<sup>12</sup>.

An additional factor in student speech is whether the speech in question occurred in school or out of school. The Court has recognized that minors without immediate proximity to their parents makes school a unique platform for free speech. Schools often stand *in loco parentis*, or in the place of parents, as emphasized by the Court in *Bethel*<sup>13</sup>. A school's jurisdiction controlling speech is often determined by whether or not it was in school or out of school, with out of school speech falling outside of the school's jurisdiction to censor or punish<sup>14</sup>. So, when out of school speech occurs, the right to monitor that speech falls to the parent and therefore the school does not have jurisdiction to punish speech that may not comply with their usual standards.

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<sup>10</sup> *Morse v. Frederick*, 2007

<sup>11</sup> *Morse v. Frederick*, 2007

<sup>12</sup> *Morse v. Frederick*, 2007

<sup>13</sup> *Bethel School District v. Fraser*, 478 US 675, 684 (1986)

<sup>14</sup> *Mahanoy Area School District v. B.L.*, 2021

## ***b. Technology and Social Media as Speech***

Technology, and social media, is a field that has advanced incredibly rapidly in recent years. In 2021, users of social media platforms spent, on average, 147 minutes per day on social media<sup>15</sup>. While social media is a widespread venue with an incredibly number of users, it is particularly widely used by teenagers. Of teenagers ranging from ages 13-17, 90% of them have reported using social media while 75% report having at least one active account on social media platform<sup>16</sup>. While there are numerous platforms to choose from, teenagers use on social media platform more than any other with 42 million Generation Z users on the platform in 2021<sup>17</sup>. Clearly a widespread venue for speech, cases about freedom of speech through social media were soon to follow.

As a novel venue for speech, social media provides a new realm of discussion in the conversation of freedom of speech under the First Amendment. In a 1997 Supreme Court case, *Reno v. ACLU* (further referred to as *Reno*), the Supreme Court defined the internet, or “cyberspace”, to be a “unique medium... located in no particular geographical location but available to anyone, anywhere in the world, with access to the internet.”<sup>18</sup> Further, a case from 2017, *Packingham v. North Carolina*, states that social media is used to “engage in a wide array of protected First Amendment activity.”<sup>19</sup> Firmly established by the Court, the internet and social

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<sup>15</sup> “Daily Time Spent on Social Networking by Internet Users Worldwide from 2012 to 2020.” *Statista*, Jan. 2022. <https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/>.

<sup>16</sup> American Academy of Child and Adolescent Psychiatry. (2018, March). *Social Media and Teens*. AACAP. [https://www.aacap.org/AACAP/Families\\_and\\_Youth/Facts\\_for\\_Families/FFF-Guide/Social-Media-and-Teens-100.aspx](https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx).

<sup>17</sup> “Number of Generation Z Users in the United States on Selected Social Media Platforms from 2020 to 2025.” *Statista*, Mar. 2022. <https://www.statista.com/statistics/1276021/instagram-snapchat-tiktok-gen-z-users/>.

<sup>18</sup> *Reno v. American Civil Liberties Union*, 521 US 844, 851 (1997)

<sup>19</sup> *Reno v. American Civil Liberties Union*, 521 US 844, 870 (1997)



media provide important venues for speech and is therefore subject to First Amendment protections.

### ***c. Student Speech Through Social Media***

As students inevitably took to social media, cases involving student speech through social media made their way into the courts. One of the first cases with connected student speech to social media, *Beussink v. Woodland R-IV School District* (further referred to as *Beussink*), was heard in the United States District Court in 1998. Beussink was suspended from the school for 10 days following the discovery of a website, maintained by Beussink, that was critical of the school. The website also contained vulgar language in connection with its criticisms of the school. The website was made at home with no use of school materials or resources and was accessible to anyone via the internet. Despite the gray area created by the use of the internet as a venue for speech, the District Court decided to return long past precedents. The District Court used the standard set in *Tinker* to determine that the website had not created a substantial disruption and was therefore protected speech<sup>20</sup>. *Beussink*, however similar to *Mahanoy*, occurred 23 years earlier. The advancement of technology has not had paralleled development in this area by the courts.

Technology, and social media in particular, has rapidly advanced in recent years with new platforms and applications being created every day<sup>21</sup>. The law and courts have not been able to, nor attempted to, successfully keep up with this technological boom. Reluctance, particularly in the Supreme Court, to address such a prevalent issue is concerning, but not entirely shocking.

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<sup>20</sup> *Beussink v. Woodland R-IV School District*, 30 F. Supp. 2d 1175 (1998)

<sup>21</sup> Platforms and applications are venues for online interaction, coded sites, or programs designed to meet a wide array of specific purposes.

The youngest Justice currently on the Supreme Court was born 11 years before the invention of the internet and 39 years before the creation of the Snapchat application. The creation of such new technologies complicates legal matters like the freedom of speech, and the current Court is hesitant to hear cases about social media. However, this hesitance is a disservice to the both the public and authorities who need clear standards that protect both party's rights. There were many instances of much more abrasive or disruptive speech by students through social media that were refused by the Supreme Court<sup>22</sup>. While not discussed in the Supreme Court, there are many lower court decisions about student speech through social media.

The lower courts have taken varying approaches in handling cases of student speech either off-campus or through social media, an issue that in and of itself highlights the necessity of a Supreme Court decision. The first approach taken by lower courts considers the application of *Tinker* through determining whether it was “reasonably foreseeable that a student’s off-campus speech would reach the school environment”<sup>23</sup>. Cases heard by the Second and Eighth Circuits applied this standard particularly in cases of violence. In *Wisniewski ex rel. Wisniewski v. Board of Education*, a student’s suspension was upheld by the Second Circuit following his creation of an instant messaging icon showing a man being shot in the head with the words “Kill Mr. VanderMolen”<sup>24</sup>. In applying *Tinker*, the court determined that it was reasonable to expect that the student’s speech would reach the school environment in a disruptive manner<sup>25</sup>. On the Eighth Circuit, the court applied a similar standard in an instance of a threat of violence determining that students would be unable to flourish in a school environment that

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<sup>22</sup> McCarthy, M. (2021). Social Media, Students, and the Law. *Laws*, 10: 81.  
[file:///C:/Users/19784/Downloads/laws-10-00081-v2%20\(2\).pdf](file:///C:/Users/19784/Downloads/laws-10-00081-v2%20(2).pdf).

<sup>23</sup> *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_, 141 S. Ct. 2038, 2040 (2021)

<sup>24</sup> *Wisniewski ex rel. Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007)

<sup>25</sup> *Wisniewski ex rel. Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007)

accommodated violence<sup>26</sup>. Though the “reasonably foreseeability” standard was often applied by lower court in cases of violence, it was also applied to cases involving sexual or racial harassment<sup>27</sup>. The Eighth Circuit has suggested that the standard should apply to all cases involving off-campus student speech regardless of the involvement of threats or violence<sup>28</sup>. A similar approach taken by the court is to apply *Tinker* through cases where the speech has enough of a connection to impact the pedagogical interest of the school. The Fourth Circuit determined that harassment of other students was sufficient disruption to the school environment to merit the application of *Tinker* in *Kowalski v. Berkeley City Schools*<sup>29</sup>.

Finally, although the reasoning was rejected by the Supreme Court, some circuit courts have applied *Tinker* to off-campus speech without deciding on a standard. In *Bell v. Itawamba City School Board*, the Fifth Circuit applied *Tinker* when a student posted a video of themselves perform a rap online which included “threats to, and harassment and intimidation of” two teachers at their school<sup>30</sup>. The Fifth Circuit determined that the application of *Tinker* was justified in that the threats were school related and therefore subject to constitutional censorship on the behalf of the school<sup>31</sup>. In another case, *Wynar v. Douglas City School District*, the Ninth Circuit declined to articulate a standard for student speech through social media while applying *Tinker* to the case at hand in which a student sent numerous instant messages from home threatening a school shooting and naming specific students<sup>32</sup>. Both the district and circuit court

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<sup>26</sup> *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757–59, 765–67 (8th Cir. 2011)

<sup>27</sup> *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_, 1415 S. Ct. 2038, 2040 (2021)

<sup>28</sup> *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_, 1415 S. Ct. 2038, 2040 (2021)

<sup>29</sup> *Kowalski v. Berkeley City Schools*, 652 F.3d 565, 573 (4th Cir. 2011)

<sup>30</sup> *Bell v. Itawamba City School Board*, 799 F.3d 379, 394 (5th Cir. 2015)

<sup>31</sup> *Bell v. Itawamba City School Board*, 799 F.3d 379 (5th Cir. 2015)

<sup>32</sup> *Wynar v. Douglas City School District*, 728 F. 3d 1062, 1069 (9<sup>th</sup> Cir. 2013)

in this case upheld the school's decision to expel the student citing other student's rights to safety and a school's responsibility to provide a safe school environment<sup>33</sup>.

While none of the above discussed cases made it to the Supreme Court, the variation in application of *Tinker* in the decisions clarify the need for a standard to be set by the Supreme Court. The most recent case on the issue, *Mahanoy*, was an opportunity for the Court to make this move. Yet, maintaining their indecision on the topic, the Court instead fell back on past precedent pushing the issue of student speech and social media to the future.

### ***3. Overview of the Case***

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*Mahanoy Area School District v. B.L.* is a case about student rights to free speech under the First Amendment. Addressing an issue over the speech of a student expressed through social media, the case made its way from the District Court all the way to the Supreme Court of the United States. Central to this case is the question of whether or not student speech, through social media, can be constitutionally censored by schools.

#### ***a. Facts of the Case***

B.L. is a high school student who wished to join the varsity cheerleading squad. Unfortunately, at tryouts, she did not make the team and was told she would have to stay on the junior varsity team for another year. Displeased with the decision of the coaches, and with the other students who had made varsity, B.L. decided to take to social media to express her feelings. B.L. posted two images on her snapchat story about the result of tryouts while at a local

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<sup>33</sup> *Wynar v. Douglas City School District*, 728 F 3d 1062 (9<sup>th</sup> Cir. 2013)

convenience store. The first image was of B.L. and a friend, both with their middle fingers raised, with the caption: “Fuck school fuck softball fuck cheer fuck everything.” The second image only contained a caption which read: “Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn’t matter to anyone else” along with an upside-down smiley face emoji. While snapchat stories can only be viewed by approved friends, screenshots were taken, and the images spread to other students and the cheerleading coaches at the school.

Having spread, the posts caused discussion at school among other students as well as the coaches. As one of the coaches was also an algebra teacher, the issue was brought into the classroom causing a minor disruption (discussion lasting about 5-10 minutes during class time). Additionally, at the time of the discussion, some students on the team had appeared visibly upset by the content and message of the posts. The coaches determined that the images violated the rules of the team and the school, which had previously been presented to and acknowledged by B.L. Additionally, the inclusion of profanity directed at school extracurriculars (both cheerleading and softball) was seen as an additional factor allowing the school to issue punishment. As a result, the coaches saw fit to suspend B.L. from the junior varsity team for the year. Following this decision, B.L. attempted to overturn the decision by issuing additional apologies. However, these actions did not change the coach and school’s decision to suspend B.L.. Subsequently, B.L.’s parents brought the case to court, concerned that the school had violated their daughter’s right to freedom of speech by punishing her for her posts. B.L. sued the school following her suspension claiming that it violated her First Amendment right to free

speech, the team and school rules were overbroad and viewpoint discriminatory, and the rules were unconstitutionally vague<sup>34</sup>.

### ***b. The Lower Courts***

The case was heard in the federal District Court who they found in B.L.'s favor. The Court granted an injunction ordering the school to remove B.L.'s suspension from the team. The decision relied on *Tinker* and found that the school's actions violated B.L.'s right to freedom of speech under the First Amendment and that B.L.'s actions had not instigated significant disruption in school. On appeal, the case was heard by the United States Court of Appeals for the Third Circuit who affirmed the decision. However, the Third Circuit differed in claiming that *Tinker* did not apply because the speech occurred off campus and the school has no interest in monitoring off-campus student speech<sup>35</sup>. Following the decision in the Third Circuit, Mahanoy Area School District further appealed to the Supreme Court.

### ***c. The Supreme Court***

The Supreme Court granted a Writ of Certiorari to hear the case on January 7, 2021. Argued on April 27 and decided June 22, the Court affirmed the decision of the Third Circuit but disagreed with its reasoning<sup>36</sup>. The question asked of the Supreme Court, by the Mahanoy Area School District, was whether or not the First Amendment prohibited school officials from regulating off campus speech<sup>37</sup>. The decision issued by the Supreme Court protected B.L.'s speech on the grounds that it was issued off-campus and was not considered to be a substantial disruption to the school. Specifically, the Court determined that the short discussion during

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<sup>34</sup> *Mahanoy Area School District v. B.L.*, 2021

<sup>35</sup> *Mahanoy Area School District v. B.L.*, 2021

<sup>36</sup> *Mahanoy Area School District v. B.L.*, 2021

<sup>37</sup> *Mahanoy Area School District v. B.L.*, 2021

algebra and the upset of some students was not sufficient to be considered disruptive. However, the Court was unwilling to speak on the issue of social media under the First Amendment, instead applying the standard of off-campus speech.

#### ***4. Analysis***

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The Court was incorrect in simply falling back on the precedent of a case decided in 1969, 42 years before the creation of Snapchat. The explosion of technology and social media desperately calls for the Court to set a reasonable standard regarding speech issued through all forms of electronic social media. Particularly in regard to schools, where students, while still under the protection of the First Amendment, have the most restrictive constitutional right to speech. Current case law primarily focuses on whether or not student speech is conducted in or out of school and whether said speech disrupts the school's directive as an institution of public education. Social media provides a venue for speech that undermines both of those criteria. Whether or not it originated in or out of school, speech through social media can still be accessed, or heard, while in school hours, days, and weeks later. Additionally, social media has the unique ability to spread instantaneously, thus increasing the likelihood of disruption exponentially. The additional complications to these criteria that are induced by the existence of social media, means there is a need for a federal legal standard to protect student speech under their constitutional right as written in the First Amendment.

*Mahanoy* exemplifies the Court desperately clinging to the distinction between on-campus and off-campus speech without consideration for the fact that social media transcends these categories. A sign made at home then brought to campus would be considered on-campus; a

social media post is no different. In *Mahanoy*, the Court claims that B.L.’s posts “appeared” both outside schools hours and from an off campus location<sup>38</sup>. Distinct from other types of speech, electronic posts through social media can appear anytime and anywhere. While the posts were sent outside of school hours and off campus, yet the posts also appeared on campus and during school hours. How can one apply a standard of on or off campus speech, as defined in *Tinker*, to circumstances involving speech through social media such as that from B.L.’s or any future student? The full extent of the precedent set forth in *Tinker* is no longer sufficient to cover all speech forums available to students today. It is time for the Court to consider the implications of the advancement of technology. In what ways does social media change the categories we are used to? The Court avoids the topic of social media and technology, but it is unable to ignore the prevalence of social media. A legal standard should have been created by the Court to address the advancement of technology in the realm of student speech. An update to the over fifty-year-old precedent set in *Tinker* is due to protect students’ freedom of speech. While the origins and ideas in *Tinker* must be considered, a change to respond to current conditions is necessary. This legal standard should have addressed acceptable speech through social media along with what is considered disruptive in an age where words can spread to thousands in a nanosecond.

In order to protect student rights to free speech, a standard using the precedents set in past cases as well as recognizing technological advancement and addressing social media as a forum for speech should be set by the Court. Such a standard could look like the following:

*No speech through social media shall be restricted,*

1. *due to subjection to the **distinction** between on or off campus speech due to the **ambiguous physical location** implicit to social media.*

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<sup>38</sup> *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_, 1415 S. Ct. 2038, 2040 (2021)



*No student speech shall be restricted through social media except; that which,*

1. *threatens or harms another student or teacher*<sup>39</sup>,
2. *substantially disrupts a school's ability to function*<sup>40</sup>,
3. *promotes the use of illegal substances*<sup>41</sup>,
4. *is sponsored by a school such as on a social media account owned by and representing the school*<sup>42</sup>.

The suggested standard acknowledges past precedents set by the Court while expanding to acknowledge social media. The first qualification is the most important in the suggested standard because it is where this standard differs, and why it is necessary. While most of the standard considers past rules and standards set by the Court, the initial qualification in this standard directly protects student speech in the realm of the internet. While there have been past cases related to this issue, the Court has never created a standard that protects students' rights to speech in cyberspace. Past cases have all connected speech through social media and technology to the physical location of origin or viewing which simply is not an effective or plausible categorization for social media as it is always accessible at any time in any location. This standard acknowledges this new forum for speech as something that is different and still worthy of constitutional protection. In considering speech through social media, physical location should play no role. Due to the unique and inherent nature of social media, speech cannot be connected to a location. Therefore, this consideration should be removed entirely from the discussion of student speech through social media.

The suggested standard above protects student rights to speech as has been confirmed by the Court in *Tinker* while simultaneously acknowledging the important distinctions between a

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<sup>39</sup> *Elonis v. United States*, 2015

<sup>40</sup> *Tinker v. Des Moines*, 1969

<sup>41</sup> *Morse v. Frederick*, 2007

<sup>42</sup> *Hazelwood v. Kuhlmeier*, 1988

student and an adult as described in *Bethel*, *Hazelwood*, and *Morse*. As emphasized as important in *Tinker*, this standard respects a student's right to free speech and acknowledges that simply being in school does not negate their rights<sup>43</sup>. To acknowledge and apply past case precedent that protects schools' rights, the standard does not too broadly allow for all student speech. While social media may provide a new forum for student speech, it does not constitute entirely different rules for content of speech. As such, any language that directly and immediately harms or threatens others should be subject to constitutional censorship<sup>44</sup>. It acknowledges the importance of a school's purpose and allows for constitutional censorship of student speech to achieve this purpose. The intention of the standard is not to overturn *Tinker*, but instead to expand on it to reach a new forum for student speech. As such, the standard addresses a school's right to constitutionally censor speech that materially or substantially interferes with the school's pedagogical mission<sup>45</sup>. Further it includes the standard set in *Morse* that allows for constitutional censorship of speech promoting use of illegal substances<sup>46</sup>. Finally this standard acknowledges the school's right to constitutionally censor language that is directly connected to the name of the school or is school sponsored<sup>47</sup>. Therefore, student speech on social media may be constitutionally censored if sponsored by the school or delivered through a school connected or owned account.

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<sup>43</sup> *Tinker v. Des Moines*, 1969

<sup>44</sup> *Elonis v. United States*, 2015

<sup>45</sup> *Tinker v. Des Moines*, 1969

<sup>46</sup> *Morse v. Frederick*, 2007

<sup>47</sup> *Hazelwood v. Kuhlmeier*, 1988

## 5. Results

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The result of the application of such a standard is imperative to why it is needed. *Mahanoy Area School District v. B.L.* provides a highly likely scenario that is seen frequently in schools. Although these other scenarios likely will not end up in front of the Supreme Court, they are occurring daily across the country. The institution of a legal standard to evaluate constitutionality of censoring student speech through social media will greatly increase the freedom of speech and ideas present on public school campuses. As was noted by Justice Holmes in 1927, “We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.” Holmes’ statement is central to *Mahanoy* and its importance. While the idea that a simple snapchat post and a Junior Varsity cheerleading position ending up in front of the Supreme Court may seem frivolous or ridiculous to some, this case, at its heart, is central to the sharing of important ideas and information through the public forum which is social media. Picture instead a student sharing an image about proper CPR technique to their 400+ followers. While one of the followers could have used CPR to keep someone alive until the EMT’s arrive the next day, the teacher suspended the student because social media was not welcome during their class break. Many would find this use of speech as much more amenable to protection than a student’s expression of displeasure over the outcome of cheerleading tryouts, however, the protection of one cannot rightly come without the protection of the other.

The issue of student speech through social media goes further than a simple case about a student’s status on the cheerleading team. In declining to create a standard, the Court left both students and schools in a gray area. For both students and schools, the absence of a rule makes it

unclear what speech is allowed and what can be censored. Furthermore, the absence of a rule means that student speech, that is exactly the same, in message and venue, could be censored differently depending on where they live. The adoption of the suggested rule would give clarity, and consistency, to schools and students while protecting both of their rights. While the need for clarity is widely accepted, the avenue through which it can be achieved differs. Victoria Bonds argues that a test should be accepted by the lower courts that is focused on the location where the student speech occurred<sup>48</sup>. The continued emphasis on location of speech, while important to most venues, cannot be applied to social media. Due to its inherent nature, social media does not have a physical location. It can be viewed from anywhere at any time. Students can manipulate the seeming location of origin to change the location linked to the creation of the post. The test proposed by Bonds ignores these facts about social media and is ineffective due to the emphasis on physical location<sup>49</sup>. In creating a test or standard to apply to social media, the Court must not consider location as central to social media as a venue for speech. The proposed standard acknowledges the unique characteristics of social media and creates a standard that rejects the idea that speech through social media can be accurately connected to a certain location.

While the First Amendment does not protect all speech, the proposed standard acknowledges reasonable restrictions on student speech, but allows students to freely use social media as an important venue for speech. The right to free speech has been officially extended to students by the Supreme Court since 1969 when they determined that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”<sup>50</sup>. This right to

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<sup>48</sup> Bonds, V.R., *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 (2022).

<sup>49</sup> Bonds, V.R., *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 (2022).

<sup>50</sup> *Tinker v. Des Moines*, 393 U.S. 503, 506, 1969

freedom of speech cannot be changed by the expanded use of social media. Students have a right to speech and expression through social media and it is time for the Court to acknowledge this right. The decision in *Mahanoy* was an opportunity to confirm this right, but instead, the Court continued to fall back on the precedent set in *Tinker* 53 years ago. The proposed standard would have a great impact of students and schools by providing them with a standard that creates clear guidelines for what speech can be constitutionally censored by schools. Both students and schools would benefit from this standard and it is time for the Court to seriously consider student speech through social media.

## ***6. Conclusion***

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The Court's decision in *Mahanoy Area School District v. B.L.* was incorrect in simply falling back on past precedent when the situation of the case clearly merited significant updating to past rules. In spite of the already established principle that social media is an important venue for speech, the rule has not been applied to students. Instead, distinguishing between on campus and off campus speech is applied to a technology that does not fit into either category. In spite of numerous cases on student speech, the consideration of student speech through social media was absent from where it should have been in the decision. By not creating a new standard, the Court has left students and schools with unclear standards and opportunity for the violation of student's rights to freedom of speech. The lack of a standard allows for different reasoning to be applied by different courts on situations that may be similar. Lower court rulings would have continuity with the creation of a standard that would avoid the application of less favorable standards. The Court criticized numerous standards applied by the lower courts to cases involving student

speech through social media, but when given the opportunity, refused to create a standard that could apply<sup>51</sup>. The creation of such a standard is necessary for students, schools, and the lower courts.

The application of a standard, such as that proposed in the analysis, provides protection for both students right to freedom of speech and schools purpose as an educational center and the “nurseries of democracy”<sup>52</sup>. It emphasizes the importance of protecting trivial speech for the benefit of productive speech, while also acknowledging the importance of student voice. The proposed standard builds on the idea that students still have a right to freedom of speech in schools. Giving access to a widespread and popular venue allows students to make an impact and use their voice. As the next generation of our nation, the students of today should be given the right to access such an important venue for speech. It is time for the Supreme Court to break its silence on the issue and bring student speech into the 21<sup>st</sup> century.

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<sup>51</sup> *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_, 141 S. Ct. 2038, 2040 (2021)

<sup>52</sup> *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_, 141 S. Ct. 2038, 2040 (2021)