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TECHNOLOGY, TINKER, AND THE DIGITAL SCHOOLHOUSE

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TECHNOLOGY, *TINKER*, AND THE DIGITAL SCHOOLHOUSE

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The world, both inside and outside the schoolhouse, has changed considerably since the Supreme Court decided Tinker v. Des Moines *in 1969. Education in much of the United States is now inextricably linked with technology, and the schoolhouse is, increasingly, digital. This article critically examines the impact of the increasing use of technology on students' First Amendment rights, looking at the Supreme Court's recent decision in* Mahanoy v. B.L. *Specifically, it examines the effect of allowing schools to restrict speech on school-issued devices.*

Disciplining speech that takes place on school-issued devices will have a silencing effect on students who do not have access to personal devices. These students, who often come from low-income homes and are disproportionately likely to be students of color, use school-issued devices to engage in speech. This speech is not only more likely to be monitored by school officials, but also more likely to be restricted and silenced while their peers remain free to engage in identical speech on personal devices. Importantly, consideration of device ownership is unnecessary as it does not speak to whether a student's speech causes a "substantial disruption" or otherwise speak to the impact on the school community. Additionally, it erodes parental rights by impermissibly extending the reach of school authority into homes and other areas traditionally reserved for parental control.

Any barrier to speech that disproportionately affects a subset of already disenfranchised students and families is

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antithetical to the very ideals the Supreme Court has consistently upheld. Therefore, this article argues that this factor must be removed from the analysis.

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I. INTRODUCTION

Public schools serve as one of the cornerstones of our democracy, informing and forming young citizens. In public schools, students learn not only about the power and limitations of the American government, but also the value of the free exchange of ideas. This sentiment is reflected in the Supreme Court's decision in *Tinker v. Des Moines* over fifty years ago, where it famously held that students do not "shed their constitutional rights to freedom of speech or expression

at the schoolhouse gate . . . ."[1] This sentiment has been repeated throughout Supreme Court precedent since that time.[2]

Yet, one need only look at the language from that oft-repeated quote to understand that the Court was speaking of a different time. The "schoolhouse gate" evokes images of standalone schoolhouses, students sitting obediently at their desks with pencils in hand, and teachers writing on blackboards with chalk. But the world, both inside and outside the schoolhouse gate, has changed considerably since *Tinker*. Schools have replaced blackboards with Smart Boards and pencils with computers. Students no longer use physical encyclopedias or dictionaries but instead turn to the internet for much of their research. Homework, quizzes, and tests are often submitted online. In many schools, access to education now requires access to technology both in school and at home. Recognizing that many families lack the means to purchase devices for their children, schools have increasingly issued devices to their students for educational use, and these tablets or computers are typically taken home by students for use after-hours.[3] For better or worse, the world of education is now inextricably linked with technology, and the schoolhouse is increasingly digital.

However much the schoolhouse may have changed, the fact remains that students are guaranteed constitutional protections while in American public schools.[4] These rights are balanced against a school's need to maintain order and safety, and to ensure the educational process is not substantially disrupted. As the Court noted in *Tinker*:

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1. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

2. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007); New Jersey v. T.L.O., 469 U.S. 325 (1985); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

3. *See* Mollie Simon, *Schools Let Students Take Laptops Home In Hopes Of Curbing 'Summer Slide*,*'* NPR (June 24, 2017, 8:01 AM), https://www.npr.org/sections/alltechconsidered/2017/06/24/534151564/schools-let-students-take-laptops-home-in-hopes-of-curbing-summer-slide; Sydney Johnson & Daniel J. Willis, *A California program spent millions on devices for distance learning. Here's where it went***,** EDSOURCE (May 14, 2021), https://edsource.org/2021/a-california-program-spent-millions-on-devices-for-distance-learning-heres-where-it-went/654590.

4. *See Tinker*, 393 U.S. at 506; *New Jersey*, 469 U.S. 325.

> state-operated schools may not be enclaves of totalitarianism. School officials do not posses absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[5]

While cases since *Tinker* have further defined the parameters of students' First Amendment rights, for many years the Court did not address the pressing issues caused by this new technological world: Can schools limit speech that occurs online and, if so, in what circumstances? Just how far does the school's authority extend, and at what point do student rights become restricted? Where is the boundary of this new digital schoolhouse gate?

The Court finally addressed some of these issues in 2021 with *Mahanoy Area School District v. B.L.*[6] There, the Court considered whether a school could discipline a student for online speech that violated school rules but occurred off school grounds, outside of school hours, and on their personal device.[7] Yet rather than creating a bright-line rule, in finding for the student, the Court outlined a list of factors to consider that are meant to balance the student's right to free speech against the school's needs.[8] This encompassed factors unique to the digital schoolhouse, such as whether the student was "participat[ing] in . . . online school activities," whether they were using technology to draft a paper for school, and—important to this article—whether the student was using their own device or one issued by the school.[9]

Including device ownership as a factor in the analysis has some logic to it; after all there is a clear nexus to the school when the student is using the school's own device. However logical it may seem, the practical effects of considering this factor undermine the very ideals the Court espoused in *Tinker* and reiterated in the more than fifty years since that decision. Allowing school officials to restrict and regulate speech that takes place at a student's home, outside of school hours, and on

5. *Tinker*, 393 U.S. at 511.
6. *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038.
7. *See id.*
8. *Id.* at 2045.
9. *Id.*

websites or applications completely unrelated to the educational process extends the boundaries of the schoolhouse gate too far. The Court's inclusion of this factor effectively guarantees more robust First Amendment protection for students who have access to their own devices.

In practice, this factor silences students who do not have access to personal technological devices and must rely on devices issued by their schools. These students, who often come from low-income homes and are disproportionately likely to be students of color,[10] use school-issued devices to engage in online speech.[11] This speech is not only more likely to be monitored by school officials, but also more likely to be restricted and silenced while their peers with their own devices remain free to engage in the exact same speech.[12] These are the same students that have historically been more likely to face disciplinary consequences for engaging in the same behavior as their peers.[13]

Not only does the Court's decision limit students' rights, it also impermissibly erodes the rights of parents. The Court's inclusion of this factor extends the reach of school officials into an area of control traditionally reserved for parents. While school officials act *in loco parentis* while students are in school, exercising disciplinary authority over students in their care,[14] parents retain these rights when they are at home or otherwise not in the school's care. By allowing schools to discipline

10. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 7 (2018), https://www.gao.gov/assets/gao-18-258.pdf.

11. Elizabeth Laird et al., *Report—Hidden Harms: The Misldeading Promise of Monitoring Students Online*, CTR. FOR DEMOCRACY & TECH. 6 (Aug. 3, 2022), https://cdt.org/insights/report-hidden-harms-the-misleading-promise-of-monitoring-students-online/.

12. DeVan Hankerson Madrigal et al., *Online and Observed: Student Privacy Implications of School-Issued Devices and Student Activity Monitoring Software*, CTR. FOR DEMOCRACY & TECH. (Sept. 21, 2021), https://cdt.org/insights/report-online-and-observed-student-privacy-implications-of-school-issued-devices-and-student-activity-monitoring-software/.

13. *See id.* at 22. *See* CHRISTOBAL DE BREY ET AL., NAT'L CTR. FOR EDUC. STATS., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2018 (Feb. 2019), https://nces.ed.gov/pubs2019/2019038.pdf; *see also* Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS (Jan. 18, 2018), https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/.

14. Susan P. Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 972-73 (2010).

students for speech occurring at home and outside of school hours, the Court extends the school's authority into a zone of parental control, taking away the rights of parents along with those of their children in defiance of hundreds of years of constitutional law.[15]

In addition to these issues, including a device-ownership factor is unnecessary. As outlined in this article, other factors protect a school's need to maintain order and safety. Furthermore, device ownership does not speak to whether a student's speech causes a "substantial disruption"[16] to the learning environment, nor does it speak to the impact on the school community.[17] Rather, factors like whether the student was on a school-supported website or in an online class speak more acutely to the impact of the student's speech.

This article argues that the Court should remove device ownership from the analysis, focusing instead on those other factors that stand in line with Supreme Court precedent but do not limit students' right to free speech. In engaging in the balancing act the Court set out in *Tinker* and reiterated in subsequent cases, the balance weighs against considering the ownership of a device. The factor is unnecessary, restricts the speech of those unable to afford their own devices, and infringes on the rights of parents. Any barrier to speech that disproportionately affects a subset of already disenfranchised students is antithetical to the very ideals the Supreme Court has consistently upheld. If public schools are to remain the "nurseries of democracy,"[18] this factor must be removed from the analysis.

II. SPEECH INSIDE THE SCHOOLHOUSE GATE

It took until 1969 for the Supreme Court to affirm that students maintain their First Amendment rights in public schools.[19] In the years that followed, several decisions outlined

15. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

17. *Id.* at 509.

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

19. *See Tinker*, 393 U.S. 503.

the parameters and limitations of those rights.[20] These cases developed the standard, while adding new factors or considerations as the Court defined the reach of the school and the boundary of the schoolhouse gate.[21] However, it would not be until 2020, over fifty years after that first decision, that the Court finally considered the impact of technology on this analysis.

A. Tinker v. Des Moines Independent Community School District

In 1965, several adults and teenagers gathered in the Eckhardt family home to discuss the Vietnam War.[22] The group devised a plan to wear black armbands during the course of the holiday season, in protest of the war and in support of a truce.[23] Christopher Eckhardt, the Eckhardt family's sixteen-year-old son, was present and decided to participate by wearing an armband to school.[24] The Tinker family, who were present that night as well, agreed to follow the plan, including fifteen-year-old John Tinker and his thirteen-year-old sister Mary Beth Tinker.[25]

When the principals of their respective schools heard of the plan, they adopted a policy prohibiting wearing armbands.[26] If any student arrived at school with an armband, they would be asked to remove it.[27] Failure to remove the armband would result in suspension, and students would not be allowed to return to school until they agreed to return without wearing the armband.[28]

Despite this policy, all three students wore armbands to school and were subsequently suspended.[29] All three remained out of school for over two weeks, until after the holiday had

20. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

21. *Bethel Sch. Dist.*, 478 U.S. 675; *Hazelwood Sch. Dist.*, 484 U.S. 260; *Morse*, 551 U.S. 393.

22. *Tinker*, 393 U.S. at 504.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Tinker*, 393 U.S. at 504.

29. *Id.*

passed, marking the end of the time period in which the group agreed to wear the armbands.[30]

The fathers of Mary Beth, Christopher, and John filed a complaint in the United States District Court for the Southern District of Iowa seeking nominal damages in addition to an injunction preventing the school from disciplining the students.[31] The District Court dismissed the complaint, finding that the discipline "was reasonable in order to prevent disturbance of school discipline."[32] The plaintiffs appealed to the Court of Appeals for the Eighth Circuit.[33] Considering the case en banc, the Court of Appeals decision was equally divided, thus keeping in place the lower court's decision.[34] The plaintiffs appealed again to the Supreme Court, and the Court granted certiorari.[35]

The Court began by considering the constitutional rights of students.[36] In a now oft-repeated line, the Court noted that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[37] Citing to *Meyer v. Nebraska* and *Bartels v. Iowa*, where the Court held that states may not prohibit the teaching of a foreign language to students in public schools, the Court noted that a prohibition against wearing armbands would violate the Due Process Clause of the Fourteenth Amendment by "unconstitutionally interfere[ing] with the liberty of teacher, student, and parent."[38] Children retained some constitutional rights in public schools.

Returning to the case at hand, the Court went on to consider the wearing of armbands, which it found was "closely akin to 'pure speech' which . . . is entitled to comprehensive

30. *Id.*
31. *Id.*
32. *Id.* at 504-05.
33. *Tinker*, 393 U.S. at 505.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 506.
38. *Tinker*, 393 U.S. at 506 (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923)). The Court also noted similar cases recognizing the rights of parents and students, including Pierce v. Society of Sisters, 268 U.S. 510 (1925) and West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

protection under the First Amendment."[39] However, the Court cited a long line of precedent recognizing the authority of schools "to prescribe and control conduct in the schools."[40] However, this must be weighed against a student's right to free speech. "Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[41]

The Court first looked to the effect of the students' actions on the school community, noting that the wearing of armbands did not disrupt the school's work or impact the rights of other students.[42] Only five of the over eighteen thousand students in the school district engaged in the demonstration.[43]

The Court remarked that the school did not prohibit other expressions of political viewpoints.[44] Indeed, students in these schools were known to don buttons supporting certain political campaigns or, even more incendiary, buttons depicting a traditional Nazi symbol.[45] Yet school officials prohibited only the armbands, despite the possibility that these other symbols would generate unrest and disruption within the school community.[46] The Court recognized the need for schools to maintain safety and order within their walls.[47] Balancing this against the First Amendment rights of students and the need to protect against unnecessary restriction of student speech, the Court articulated the standard still used today.[48] Unless the speech or expression would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[49]

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39. *Tinker*, 393 U.S. at 505-06. Pure speech is "the communication of ideas through spoken or written words or through conduct limited in form to that necessary to convey the idea." *Pure speech*, MERRIAM-WEBSTER LEGAL DICTIONARY https://www.merriam-webster.com/legal/pure%20speech (last visited Feb. 24, 2023).

40. *Tinker*, 393 U.S. at 506.

41. *Id.* at 507.

42. *Id.* at 507-08.

43. *Id.* at 508.

44. *Id.* at 510.

45. *Tinker*, 393 U.S. at 510.

46. *Id.*

47. *Id.* at 512 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

48. *Id.* 510-11.

49. *Id.* at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Aside from "hostile remarks" from some students, there were no threats of violence or actual violence because of the armbands.[50] Turning to the District Court's decision, the Supreme Court noted that there was no evidence of any actual disruption, rather school officials expressed a fear of substantial disruption that ultimately was unfounded.[51] This alone, the Court held, was not sufficient.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[52]

Schools may not prohibit expression or speech merely because they wish to avoid "the discomfort and unpleasantness that always accompany an unpopular viewpoint."[53] Mirroring a sentiment often repeated in cases involving the rights of students and the nature of public education, the Court noted that American public schools are the "marketplace of ideas," and that the creation of an informed democracy depends on children's exposure to differing opinions and ideas.[54] This exchange of ideas and "personal intercommunication" is vital to American public education.[55]

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not posses absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must

50. *Id.* at 508.
51. *Tinker*, 393 U.S. at 509.
52. *Id.* at 508-09.
53. *Id.* at 509.
54. *Id.* at 512.
55. *Id.*

> respect, just as they themselves must respect their obligations to the State.[56]

Tinker recognized that robust debate and civic engagement are cornerstones of American democracy. As one author put it, "*Tinker* insisted [that] students must be permitted to exchange independent ideas with one another—on an extensive array of topics—because those exchanges constitute an essential part of the educational process itself."[57]

While *Tinker* appeared to offer relatively broad protection for student speech, subsequent Supreme Court decisions began to limit students' rights by providing more authority to schools to regulate that speech.

B. Bethel School Dist. No. 403 v. Fraser

Almost twenty years after *Tinker*, the Supreme Court once again considered the balance between students' rights and school needs, this time creating a limitation on those rights.[58] Matthew Fraser, a public high school student, delivered a speech to approximately six hundred students nominating another student for a student governance role.[59] That speech described the candidate in "an elaborate, graphic, and explicit sexual metaphor."[60] Many students jeered and gesticulated in response to the speech, while other students appeared uncomfortable or confused.[61] After the speech, Fraser was suspended for three days and prohibited from speaking at his graduation.[62]

The Supreme Court this time ruled in favor of the school, carving out an exception for speech that "would undermine the school's basic educational mission."[63] Turning once again to the nature of public education, the Court found that the role of public education in creating an informed democracy weighed in favor of restricting student speech:

> [T]he "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of

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56. *Id.* at 511.
57. JUSTIN DRIVER, THE SCHOOLHOUSE GATE 73 (2018).
58. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
59. *Id.* at 677-78.
60. *Id.* at 678.
61. *Id.*
62. *Id.*
63. *Id.* at 685.

> debate highly offensive or highly threatening to others." Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools…." The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.[64]

Differentiating the speech from *Tinker*, the Court noted that Fraser's speech was not political and, most importantly, the speech in *Tinker* did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."[65] The Court found that Fraser's speech greatly disturbed many students and confused some of the younger ones.[66]

Fraser continues to give schools more authority to restrict student speech, and as the Court took up more cases, they began to add more restrictions to student speech and more authority to school officials.

C. Hazelwood School Dist. v. Kuhlmeier

Just two years after *Fraser*, the Court took up a case involving the censorship of a school newspaper.[67] The newspaper, *Spectrum*, was written by high school students in a journalism class, published every three weeks, and circulated to students, school staff, and the larger community including families.[68] The budget came from the local Board of Education.[69] The journalism teacher oversaw the newspaper's production, exercising "a great deal of control over *Spectrum*," and the "the final authority with respect to almost every aspect

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64. *Bethel Sch. Dist.*, 478 U.S. at 683 (citing Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 508 (1969)).

65. *Id.* at 680 (citing *Tinker*, 393 U.S. at 508).

66. *Id.* at 678. As Chief Justice John Roberts once noted "[t]he mode of analysis in *Fraser* is not entirely clear." Morse v. Frederick, 551 U.S. 393, 404 (2007). Although there has been some disagreement as to whether *Fraser* builds upon or alters *Tinker*, at its basis the Court gave schools the authority to restrict speech when the speech is sexual in nature or would otherwise "undermine the schools basic educational mission." *See* DRIVER, *supra* note 57.

67. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

68. *Id.* at 262.

69. *Id.*

of the production and publication of Spectrum, including its content."[70] The newspaper had to be approved by both the teacher and the school principal prior to any publication.[71]

At issue were two articles written by students.[72] The first concerned student pregnancy, and although the article omitted the names of the girls, the journalism teacher believed that they could still be identified.[73] Additionally, the teacher was concerned that the content of the article that dealt with sexual activity might be inappropriate for younger students or family members.[74] The second article at issue concerned divorce and included quotes from a student who was critical of his father's conduct and mentioned details of his parent's divorce.[75] The teacher felt the parents referenced in the article should be allowed to either agree to the publication of the article or should be allowed to respond to the article's content.[76] Believing that there was insufficient time to alter the articles, the teacher pulled them from the paper before publication.[77]

The students filed suit alleging the removal of the articles violated their First Amendment rights and requesting an injunction.[78] The District Court found in favor of the school and denied the injunction.[79] On appeal, the Court of Appeals for the Eighth Circuit reversed, and the school district appealed.[80]

The Supreme Court found in favor of the school district.[81] The Court again differentiated the speech from the speech in

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70. *Id.* at 268 (internal citations omitted).
71. *Id.* at 268-69.
72. *Hazelwood Sch. Dist.*, 484 U.S. at 262.
73. *Id.* at 263.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 263-64.
78. *Hazelwood Sch. Dist.*, 484 U.S. at 264.
79. *Id.*
80. *Id.* at 267.
81. The Supreme Court also considered, but ultimately rejected, the argument that the newspaper was a "public forum":

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the

Tinker: "[t]he 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."[82] The Court noted that the public could reasonably believe that views expressed in a school newspaper, much like the content of a school-sponsored play, were being promoted by the school.[83]

Just as with *Fraser*, the Court placed parameters on the type of speech being regulated. "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order' . . . ."[84] Unlike *Fraser*, however, the Court tied the opinion to the school-sponsored nature of the publication.[85] This consideration of school sponsorship would arise again almost twenty years later in *Morse v. Frederick*.

D. Morse v. Frederick

The next case to take up the issue of student speech considered activity outside of school grounds, occurring at a school-sponsored event held during school hours.[86] In 2002, the Olympic Torch Relay was scheduled to pass by a local high school in Juneau, Alaska.[87] School officials decided to allow students to leave school during the day to observe the

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general public," or by some segment of the public, such as student organizations.

Id. at 267 (internal citations omitted). The Court determined that

> [s]chool officials did not evince either "by policy or by practice," any intent to open the pages of Spectrum to "indiscriminate use," by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner.

Id. at 270 (internal citations omitted).

82. *Id.* at 270-71.

83. *Id.*

84. *Hazelwood Sch. Dist.*, 484 U.S. at 271 (citing Behel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1988)).

85. *Id.* at 271.

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

87. *Id.* at 397.

procession, treating it as a sort of class trip with school staff monitoring students while the procession went by.[88] A senior at that high school, Joseph Frederick, arrived late and stood opposite the school.[89] He and his friends then unfurled a banner that read "BONG HiTS 4 JESUS."[90] This banner was visible to the school staff, students, and camera crews passed by the banner as they filmed the event.[91]

Frederick refused the principal's requests to remove the banner.[92] The principal believed the banner encouraged illegal drug use in violation of the school discipline code, which also specified that students would be subject to the same disciplinary standards while on school trips or during sponsored activities, and suspended Frederick for ten days.[93]

Frederick brought suit against the principal and school board, arguing that this disciplinary action violated his First Amendment rights.[94] While the District Court found in favor of the school, the Ninth Circuit Court of Appeals reversed, turning to the test outlined in *Tinker* and finding no "risk of substantial disruption."[95] The Supreme Court granted certiorari and reversed.[96]

Important to this article, although this case involved conduct outside of the physical school campus, the Court found significant that school staff had sanctioned the activity and supervised the event, that it occurred during the school day, and that the school disciplinary code clearly subjected student conduct on class trips and school-sponsored activities to staff oversight.[97]

Turning to *Fraser*, the Court noted that the decision clearly held that

> the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. Had Fraser delivered the same speech in a public forum outside the school context, it would have been

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Morse*, 551 U.S. 393 at 398.
93. *Id.*
94. *Id.* at 399.
95. *Id.* at 399-400.
96. *Id.* at 400.
97. *Id.* at 400-01.

> protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment."[98]

While there was some disagreement among the Justices as to whether the banner advocated drug use, the majority found that several readings of the banner could be interpreted that way.[99] Importantly, the Court found that the principal reasonably believed that it did.[100] This gave school officials the authority to restrict the speech, as "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people."[101] Like *Fraser*, a content-based restriction for pro-drug speech was appropriate.[102]

Frederick made clear that the "schoolhouse gate," the barrier delineating school authority to regulate some speech, was not limited to the physical boundaries of the schoolhouse.[103] Instead, as with *Kuhlmeier*, one key factor was the extent of school control over the activity.[104] Thus, so long as the speech took place during a time when school officials continued to exercise control over students and that event had a nexus to the school itself, the limitations of the schoolhouse on student speech remained intact.[105]

E. Mahanoy Area School District v. B.L.

The Supreme Court declined to hear any student speech cases for several years following the *Morse* decision.[106] During those years, the use of technology changed rapidly and drastically, and lower courts attempted to adjust the reasoning in prior cases to this new technological world.[107] However, it became clear that new guidance was needed as the world of education moved online, the boundaries of the schoolhouse gate needed to be redefined. Finally, in 2021, the Court

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98. *Morse*, 551 U.S. at 404-05. The Supreme Court also noted that *Fraser* failed to utilize the "substantial disruption" test employed in *Tinker*. *Id*. at 405.

99. *Id.* at 402.

100. *Id.* at 404-05.

101. *Id.* at 407.

102. *Id.*

103. *Id.* at 406-10.

104. *Morse*, 551 U.S. at 405-06.

105. *Id.*

106. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011) (cert denied); Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (cert denied).

107. *See Doninger*, 642 F.3d 334; *see also Bell*, 799 F.3d. 379.

weighed in once more on the topic of student speech when it heard *Mahanoy Area School District v. B.L.*.[108]

B.L. was a high school student at a local public school who had previously tried out for the cheerleading and softball teams.[109] When B.L. learned that she did not make the varsity cheerleading team or obtain the position she wanted on the softball team, B.L. did what many teenagers do today—she took to social media.[110]

The weekend after learning of the news, B.L. went to a convenience store and used the social media application Snapchat.[111] She posted a short video that was only visible to her "friend" group of about 250 people.[112] Per the Snapchat application parameters, the post disappeared after twenty-four hours.[113] The video contained two images:

> The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything …." The second image was blank but for 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?" The caption also contained an upside-down smiley-face emoji.[114]

One Snapchat "friend," who was also on the cheerleading team, took a screenshot of the posts and shared them with other cheerleaders.[115] Another member of the cheerleading team shared the images with her mother, who was a coach on the cheerleading team.[116] The images began to make their way through the school.[117] "That week, several cheerleaders and other students approached the cheerleading coaches 'visibly upset' about B.L.'s posts."[118] During one particular math class

108. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021).
109. *Id.* at 2043.
110. *Id.*; *see Connection, Creativity and Drama: Teen Life on Social Media in 2022*, PEW RSCH. CTR. (Nov. 16, 2022).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2043.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

taught by one of the cheerleading coaches, students interrupted class to ask questions about the posts.[119]

> After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team.[120]

In response, B.L. filed a lawsuit challenging the disciplinary action.[121]

The decisions in the lower courts[122] exemplify the uncertainty around this area of law as applied to technology. The District Court granted a temporary restraining order and preliminary injunction, and eventually granted B.L.'s motion for summary judgment.[123] The District Court found that there had been no "substantial disruption" at the school due to the posts.[124] On appeal, the Third Circuit affirmed on slightly different grounds.[125] The Third Circuit differentiated between speech on campus during school hours and off-campus speech.[126] The latter, they held, could not be regulated by the school without running afoul of the student's First Amendment rights.[127] In short, the boundary of the schoolhouse gate could not extend off campus, outside of school hours.

However, the Supreme Court declined to follow the Third Circuit's approach on appeal.[128] In finding for B.L., the Court noted that "[u]nlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school

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119. *Id.*
120. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2043.
121. *Id.*
122. *Id.* at 2043-44.
123. *Id.*
124. *Id.* at 2044.
125. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2044.
126. *Id.*
127. *Id.* One member of the Third Circuit panel concurred, but found in favor of B.L. solely on the grounds that the speech did not cause a "substantial disruption." *Id.*
128. *Id.* at 2045, 2048.

regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances."[129] In rejecting a bright-line rule, the Court outlined several categories of off-campus speech that schools could regulate, including:

> serious or 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.[130]

However, the Court steadfastly refused to articulate

> 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.[131]

In lieu of a bright line rule, the Court outlined three features unique to off-campus speech that "often, even if not always" will alter the First Amendment analysis.[132] "Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."[133]

The first of these features was geographical in nature—when students engage in speech off campus, school staff rarely stand *in loco parentis*.[134] "The doctrine of *in loco parentis* treats school administrators as standing in place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them."[135] Important to this article, the Court noted that "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[136]

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129. *Id.* at 2045.
130. *Id.*
131. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045.
132. *Id.*
133. *Id.* at 2046.
134. *Id.*
135. *Id.*
136. *Id.*

The second feature considered the breadth of control a school would maintain over student speech were they able to regulate all off-campus speech.[137] This would, in essence, "include all the speech a student utters during the full 24-hour day."[138] The Court cautioned that "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."[139] Singling out religious and political speech, the Court noted that schools "will have a heavy burden to justify intervention" if that speech occurs outside of school.[140]

Finally, the Court once again turned to the role of the public schoolhouse in American democracy:

> 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.[141]

The Court observed that unpopular ideas and expressions are particularly in need of protection.[142] Thus, it is important for students to learn that the First Amendment protects these as well.

> 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 case to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.[143]

Turning to the facts of the case, the Court first considered the "where, when, and how" of B.L.'s speech.[144] The Snapchat posts occurred on the weekend and were posted from a location not on school grounds.[145] B.L. did not:

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137. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.
143. *Id.*
144. *Id.* at 2046-47.
145. *Id.* at 2043, 2047.

> target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless . . . diminish the school's interest in punishing B.L.'s utterance.[146]

The Court then turned to the school's interest, which it identified as "primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches . . . ."[147] The Court stated that while the school has an interest in "teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community," the fact that the speech occurred outside of school hours and not on school property diminished this interest.[148] In short, this factor came down to whether the school was acting *in loco parentis*.[149] B.L.'s parents could not be reasonably understood as delegating their authority to the school during weekend hours while in a convenience store.[150]

While the school argued that B.L.'s conduct caused a substantial disruption, the Court found no such disruption in the record.[151] Students discussed the Snapchats for no more than five or ten minutes, for only a few days, and some students reported being "upset" by the posts.[152] However, even one of the coaches conceded that this was not a substantial disruption.[153]

The school also asserted that they were concerned about team morale.[154] The Court again found no record that the posts "create[d] a substantial interference in, or disruption of, the school's efforts to maintain team cohesion."[155] Returning to *Tinker*, the Court noted that "simple 'undifferentiated fear or

146. *Id.* at 2047.
147. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2047.
148. *Id.*
149. *Id.* at 2047.
150. *Id.*
151. *Id.*
152. *Id.* at 2047-48.
153. *Mahoney Area Sch. Dist.*, 141 S. Ct. at 2048.
154. *Id.*
155. *Id.* at 2048.

apprehension . . . is not enough to overcome the right of freedom of expression.'"[156]

The majority ended its decision acknowledging that

> [i]t might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. . . . "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." [157]

Just as with other Supreme Court cases, the Court once again affirmed the importance of the right to free speech for students, connecting this right to the fundamental values implicated by free speech.

Although the opinion left many advocates frustrated with its lack of a bright-line rule and multitude of factors to consider,[158] the case nonetheless stands out as the first time the Court has recognized the changing nature of the schoolhouse by acknowledging the interplay between the digital and physical schoolhouse. As explored further in this article, one factor laid out by the Court fails to take into account the nature of this new technological world and the inequitable implications of its inclusion in the analysis—device ownership. Given the now inextricable connection between education and technology, this factor will significantly impact the rights of students and parents.

III. THE DIGITAL SCHOOLHOUSE AND THE DIGITAL DIVIDE

Since the Court decided *Tinker*, the schoolhouse has evolved. While classes are still largely taught by a teacher, children still sit at desks, tests and quizzes are given

156. *Id.* (citing Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 508 (1969)).

157. *Id.* at 2048 (citing Cohen v. California, 403 U.S. 15, 25 (1971)).

158. *See* Joshua Dunn, *Supreme Court Ruling in Cheerleader Case Stops Short of Clear Rule on Off-Campus Speech, But Sends Strong Signal*, EDUC. NEXT, Vol. 22, No. 1 (Winter 2022) (noting: "Today the Supreme Court decided its much anticipated student speech case, Mahanoy v. B.L. Those looking for the court to announce a bright line rule on whether schools can punish students' off-campus and online speech will be disappointed. In an 8-1 opinion written by Justice Breyer, the court explicitly refused to do so. Instead, it offered a set of guideposts. Thus, there is still some uncertainty about what speech is protected.").

throughout the year, and children do homework after school; today, these activities frequently involve technology. [159] Teachers now use Smart Boards, children take quizzes on electronic tablets, and homework is often completed and submitted entirely online. [160] These changes have been in effect for some time, and recent events have only magnified technology's impact on education.

The Supreme Court's decision in *Mahanoy* came after perhaps one of the most unusual and challenging years in the history of education in the United States. Across the country, and indeed the globe, schools struggled with how to safely educate children in the midst of a global pandemic.[161] In the 2019-2020 school year, schools in all fifty states closed their doors to keep students and staff safe.[162] The majority of these schools shifted to some version of remote learning, where instruction and learning took place online.[163]

The next school year saw similar closures at different times throughout the academic year, with many schools shifting to either fully remote learning or hybrid learning.[164]

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159. *See id.*

160. *See Students' Internet Access Before and During the Coronavirus Pandemic by Household Socioeconomic Status*, NAT'L CTR. FOR EDUC. STATS. (Sept. 20, 2021), https://nces.ed.gov/blogs/nces/post/students-internet-access-before-and-during-the-coronavirus-pandemic-by-household-socioeconomic-status#:~:text=While%20access%20to%20computers%20and,the%202020%E2%80%9321%20academic%20year. Janelle Cox, *Technology in the Classroom: the Benefits of Smart Boards*, TEACHHUB, (Oct. 6, 2019) (last visited Apr. 4, 2023), https://www.teachhub.com/technology-in-the-classroom/2019/10/technology-in-the-classroom-the-benefits-of-smart-boards/.

161. The COVID-19 pandemic, referred hereinafter as "the pandemic." Alyson Klein, *During COVID-19, Schools Have Made a Mad Dash to 1-to-1 Computing. What Happens Next?*, EDUC. WEEK (Apr. 20, 2021), https://www.edweek.org/technology/during-covid-19-schools-have-made-a-mad-dash-to-1-to-1-computing-what-happens-next/2021/04.

162. *School Responses in New York to the Coronavirus (COVID-19) Pandemic*, BALLOTOPEDIA, https://ballotpedia.org/School_responses_in_New_York_to_the_coronavirus_(COVID-19)_pandemic (last visited Aug. 18, 2022).

163. *Id.*

164. *More than 98 Percent of Public Schools Made Concerted Efforts to Promote Pandemic-Related Learning Recovery During the 2021-22 School Year*, NAT'L CTR. FOR EDUC. STATS. (Aug. 4, 2022), https://nces.ed.gov/whatsnew/press_releases/08_04_2022.asp#:~:text=More%20than%2098%20percent%20of%20public%20schools%20employed%20strategies%20to,dosage%20tutoring%20(56%20percent). ("Comparing learning mode offerings at the end of the 2020-21 school year and the end of the 2021-22 school year[,] … [r]emote learning offerings were less prevalent (40 percent at the end of 2020-21 versus 33 percent at the end of 2021-22)" and "[h]ybrid learning offerings were less prevalent (44

These circumstances forced schools to utilize creative solutions to ensure educational access, which meant access to technology for the vast majority of classrooms.[165] For the first time in American history, the majority of American elementary and secondary students needed both devices and the internet to attend schools.[166]

However, even before the pandemic, many schools had already begun issuing devices to students to use either during the school day or at home to complete schoolwork.[167] For many years now, educators have been incorporating some aspects of technology into classrooms with things as simple as typing classes to more advanced things like coding classes and Smart Boards.[168] As technology has improved and the world of technology has expanded, schools have gradually embraced the way technology can improve education.

The pandemic then propelled these changes forward, as remote learning necessarily required both the internet and access to a device.[169] Consequently, schools which had otherwise resisted this shift to technology in the classroom had to adjust their approach.[170] These changes that began before the pandemic have continued in the years since, with most classrooms utilizing some form of technology throughout the day and after school.[171]

It is perhaps an understatement to say that technology has changed the educational landscape. Not only has technology enabled educational access for populations unable to be physically present in the schoolhouse, an issue that came

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percent at the end of 2020-21 versus 10 percent at the end of 2021-22)"); *see also* SRINITHYA RANGANATHAN ET AL., HYBRID LEARNING: BALANCING FACE-TO-FACE AND ONLINE CLASS SESSIONS 179 (2007); BALLOTPEDIA, *supra* note 162.

165. *See* Kevin McElrath, *Nearly 93% of Households With School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU (Aug. 26, 2020), https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html.

166. *See id.*

167. *See id.*; Klein, *supra* note 161.

168. *See Teaching Keyboarding: More Than Just Typing*, EDUC. WORLD, https://www.educationworld.com/a_tech/tech/tech072.shtml (last visited Mar. 8, 2023); Jacqui Murray, *Common Core Breathes Life Into Keyboarding*, ASK A TEACHER, https://askatechteacher.com/common-core-breathes-life-into-keyboarding/ (last visited Mar. 8, 2023); Cox, *supra* note 160.

169. *See* BALLOTPEDIA, *supra* 162.

170. *Id.*

171. *See id.*

to the forefront during the COVID-19 pandemic,[172] but technology has also changed the classroom experience. From using electronic whiteboards in classrooms, to video conferencing with teachers after hours, to online homework assignments, schools are utilizing technology to expand educational offerings and engage students in new ways.[173] Yet, as schools embark on this new era of education, some students are being left behind.[174]

As schools increasingly rely on technology in elementary and secondary education, those students without consistent and reliable access to technology face challenges in accessing that education.[175] This division between students with access to technological devices and internet in their homes versus those without access is often referred to as the "digital divide."[176] While this divide has existed for as long as technology has been present in education,[177] the pandemic furthered this divide as students suddenly become entirely dependent on at-home devices:

> Children without computers or high-speed internet at home were already at an educational disadvantage before the coronavirus pandemic due to the growing need for students to access resources and submit assignments online. Many relied on computers and internet access at school or a local

172. *See* McElrath, *supra* note 165.

173. VICTORIA RIDEOUT & VIKKI S. KATZ, *OPPORTUNITY FOR ALL? TECHNOLOGY AND LEARNING IN LOWER-INCOME FAMILIES* 5 (2016), https://www.joanganzcooneycenter.org/wp-content/uploads/2016/01/jgcc_opportunityforall.pdf; *Use of Educational Technology for Instruction in Public Schools: 2019-20 1-4*, U.S. DEP'T EDUC. (Nov. 2021), https://nces.ed.gov/pubs2021/2021017Summary.pdf; Cox, *supra* note 160; *see also* Harriet Taylor, *Google's Chromebooks make up Half of U.S. Devices Sold*, CNBC, (Dec. 9, 2015), https://www.cnbc.com/2015/12/03/googles-chromebooks-make-up-half-of-us-classroom-devices.html.

174. RIDEOUT & KATZ, *supra* note 173.

175. RIDEOUT & KATZ, *supra* note 173; U.S. DEP'T EDUC., *supra* note 173; Cox, *supra* note 160; Taylor, *supra* note 173.

176. Lisa A. Jacobsen, *Digital and Economic Divides Put U.S. Children at Greater Educational Risk During the COVID-19 Pandemic*, POPULATION REFERENCE BUREAU (Aug. 18, 2020), https://www.prb.org/resources/economic-and-digital-divide/.

177. *See Understanding the Digital Divide in Education*, AM. UNIV. SCH. EDUC., (Dec. 15, 2020), https://soeonline.american.edu/blog/digital-divide-in-education/; *Narrowing the Digital Divide: Our Future Depends On It*, NEWARK TR. EDUC. (Nov. 28, 2022), https://www.newarktrust.org/narrowing_the_digital_divide#:~:text=While%20the%20digital%20divide%20has,educators%2C%20caregivers%2C%20and%20policymakers.

> library to complete their work. As the pandemic prompted libraries to close and schools across the country shut down and moved to online instruction, this digital divide [became] even more critical.[178]

One study of low-income families found that the primary reason families did not have a home computer was the expense, as opposed to a lack of need.[179] "About four-in-ten adults with lower incomes do not have . . . a desktop or laptop computer (41%). And a majority of Americans with lower incomes are not tablet owners. By comparison, these technologies are nearly ubiquitous among adults in households earning $100,000 or more a year."[180] In fact, 63% of American households earning $100,000 a year or more report having more than one device, whereas 23% of lower-income households do not have access to any technological devices or internet at home.[181] Another study found that "[i]n 2018, roughly 10% of U.S. children ages 5 to 17 did not have a computer—desktop, laptop, or tablet—at home, and 23% did not have home access to paid high-speed internet. Fully one-fourth of all school-age children were lacking either a computer or high-speed internet."[182]

These discrepancies disproportionately impact children of color. As one author observed, what is painfully clear is that a disproportionate share of those who lack access to a reliable internet connection and devices are Black, Hispanic, live in rural areas, or come from low-income households."[183] Another study found that while 5.4% of white students lack a computer at home, that percentage jumps to 24.9% for American Indian and Alaskan Native children, 17.5% for Black children, and 15.5% for Hispanic or Latino children.[184]

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178. Jacobsen, *supra* note 176.

179. *Id.*

180. *Id.*; Emily A. Vogels, *Digital divide persists even as Americans with lower incomes make gains in tech adoptions*, PEW RSCH. CTR. (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/; Robin Lake & Alvin Makori, *The Digital Divide Among Students During COVID-19: Who Has Access? Who Doesn't?*, CTR. ON REINVESTING PUB. EDUC. (June 2020), https://www.crpe.org/thelens/digital-divide-among-students-during-covid-19-who-has-access-who-doesnt.

181. *Id.*

182. Jacobsen, *supra* note 176.

183. Lake & Makori, *supra* note 180.

184. *Digital Divide Dashboard: U.S. School-Age Children at Educational Risk Due to COVID-19 Pandemic*, POPULATION REFERENCE BUREAU,

Aware of the reliance on technology for educational access and this digital divide, many educators responded by giving students free devices to use during their time as students.[185] These devices continue to be owned by the school but are taken home by students to complete homework, research, group projects, and even occasionally for classes themselves.[186] One survey found that even before the COVID-19 pandemic, roughly 66% of middle and high school students had school-issued devices.[187] During the 2020-2021 school year, that percentage jumped to 90%.[188]

Although device ownership and access discrepancies exist, providing students with school-issued devices has helped address this digital divide.[189] This is especially important in addressing educational access, as the use of technological devices can have a profound, and typically positive, effect on student's school engagement and academic success.[190] Simply put, without access to the necessary technology students cannot access their education. Of course, parents can always reject school-issued devices and offer their own personal

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https://assets.prb.org/maps/digital-divide-071720.html (last visited Sept. 26, 2022).

185. *See* NAT'L CTR. FOR EDUC. STATS., *supra* note 160; Klein, *supra* note 161; McElrath, *supra* note 165.

186. David Nagel, *One-Third of U.S. Students Use School-Issued Devices*, JOURNAL (Apr. 8, 2014), https://thejournal.com/articles/2014/04/08/a-third-of-secondary-students-use-school-issued-mobile-devices.aspx; *see also* Taylor, *supra* note 173; Rebecca Torchia, *What to Know About Student Privacy on School-Issued Devices*, ED TECH (Aug. 24, 2021), https://edtechmagazine.com/k12/article/2021/08/what-know-about-student-privacy-school-issued-devices.

187. Klein, *supra* note 161 ("A survey last month of educators by the EdWeek Research Center found that about two-thirds recalled there was one school-issued device for every middle and high school student before the pandemic. Another 42 percent said the same about elementary school kids. . . . 90 percent of educators said there was at least one device for every middle and high schooler by March of 2021. An additional 84 percent said the same about elementary school students.").

188. *Id.*

189. RIDEOUT & KATZ, *supra* note 173. School-issed devices provide the digital access that these students would otherwise lack.

190. *See* Tara García Mathewson, *The learning Experience is Different in Schools thatAssign Laptops, a Survey finds*, HECHINGER REP. (Sept. 20, 2018), https://hechingerreport.org/the-learning-experience-is-different-in-schools-that-assign-laptops-a-survey-finds/; Slyamoy Ghory & Hamayoon Ghafory, *The Impact of Modern Technology in the Teaching and Learning Process*, 4 INT'L J. INNOVATIVE RSCH. & SCI. STUD. 3, 168-73 (2021).

devices to their children.[191] Practically, however, this choice is unavailable to parents who cannot afford to provide devices to their children, which often cost in the hundreds of dollars.[192]

As explored in the following sections, students increasingly use school-issued devices for non-educational or quasi-educational uses. This is especially true for those students without access to their own devices at home.[193] As technology has become ubiquitous both inside and outside the classroom, student speech has increasingly taken place online. This is especially true for young adults, many of whom have access to this online world only through these school-issued devices.

A. School Surveillance and Discipline

While schools may have initially envisioned students using school-issued technology solely to further their education, the reality is often quite different.[194] Nearly all American children use devices throughout the day to access social media, websites, games, and, important to this article, to engage in speech unrelated or only peripherally related to their academic studies.[195] Research consistently demonstrates

191. Gennie Gebhart, *Spying on Students: School-Issued Devices and Student Privacy*, ELEC. FRONTIER FOUND. (Apr. 13, 2017), https://www.eff.org/wp/school-issued-devices-and-student-privacy.

192. Vogels, *supra* note 180; Lake & Makori, *supra* note 180; *How Much Does a Laptop Computer Cost?*, COSTHELPER ELECS. (last visited Apr. 11, 2023), https://electronics.costhelper.com/computers-notebook.html#:~:text=Expect%20to%20pay%20%24700%20to,but%20only%20average%20battery%20life; Average price of consumer tablets in the United States from 2013 to 2027, STATISTICA (last visited Apr. 11, 2023), https://www.statista.com/statistics/619505/tablets-average-price-in-the-us/.

193. *See Digital Divide Dashboard*, *supra* note 184; *see also Student Activity Monitoring Software: Research Insights and Recommendations*, CTR. FOR DEMOCRACY & TECH. 2, (2021), https://cdt.org/wp-content/uploads/2021/09/Student-Activity-Monitoring-Software-Research-Insights-and-Recommendations.pdf.

194. For instance, one study looking at the addition of iPads to classrooms found that "83% of all teacher respondents agreeing that 'Students are more likely to be offtask when we are using iPads than when we are not.'" AMY F. JOHNSON & CAROLINE A. PINKHAM, CTR. FOR EDUC. POL'Y, APPLIED RSCH. & EVALUATION, MINI-BRIEF: LESSONS LEARNED AT SELECTED 1:1 IPAD HIGH SCHOOLS, SCHOOL YEAR 2012-2013 (2013).

195. *See Children's engagement with digital devices, screen time*, PEW RSCH. CTR. (July 28, 2020), https://www.pewresearch.org/internet/2020/07/28/childrens-engagement-with-digital-devices-screen-time// ("Among the 36% of parents of a child under the age of 12 who say their child ever uses or interacts with a voice-

that students will use devices while in class for non-educational activities.[196] This online activity only increased during the pandemic.[197]

Aware of this non-sanctioned use of their technology, schools typically include monitoring software on any school-issued devices.[198] Indeed, federal and many state laws require schools to monitor student internet use as a safety measure.[199] However, this monitoring often goes far beyond what is legally required.[200]

Monitoring technology enables schools to not only block certain websites or track browsing history, but student's social media pages, personal email accounts, and messages can all be viewed by any administrator with access.[201] One article noted

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activated assistant, majorities say their child uses this device to play music (82%) or get information (66%). Smaller shares of these parents say their child uses a voice-activated assistant to hear jokes (47%) or play games (30%).").

196.

> Previous research has shown that at some point during class time, a majority of students use technology to engage in activities that are not class-related (Currie, 2015; Jackson, 2013; Judd & Kennedy, 2011; Kraushaar & Novak, 2010; Portanova, 2014; Ragan et al., 2014). Students have in their hands an abundance of possible distractions (Harper & Milman, 2016; Preston et al., 2015), due to both their personal and school-issued devices, which often leads to cyberslacking behaviors.

Kristy Self Rykard, DIGITAL DISTRACTIONS: USING ACTION RESEARCH TO EXPLORE STUDENTS' BEHAVIORS, MOTIVATIONS, AND PERCEPTIONS OF CYBERSLACKING IN A SUBURBAN HIGH SCHOOL 96 (2020), https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=6698&context=etd. One study looking at the addition of iPads to classrooms found that "83% of all teacher respondents agreeing that '[s]tudents are more likely to be offtask when we are using iPads than when we are not.'" JOHNSON & PINKHAM, *supra* note 194.

197. Melinda Wenner Moyer, *Kids as Young as 8 Are Using Social Media More Than Ever, Study Finds*, N.Y. TIMES (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html.

198. Bridget McCrea, *Are Schools Disproportionately Surveilling Students Who Rely on School-Owned Devices?*, EDSURGE (June 15, 2022), https://www.edsurge.com/news/2022-06-15-are-schools-disproportionately-surveilling-students-who-rely-on-school-owned-devices; *see also* CTR. FOR DEMOCRACY & TECH., *supra* note 193, at 2.

199. For instance, the Federal Children's Internet Protection Act (CIPA) requires certain schools and libraries to monitor and block certain websites containing anything harmful or obscene. *20 U.S.C.* § 9134; 47 U.S.C. § 254.

200. *See* McCrea, *supra* note 198; CTR. FOR DEMOCRACY & TECH., SUSTAINED SURVEILLANCE: UNINTENDED CONSEQUENCES OF SCHOOL-ISSUED DEVICES 2 (2021), https://cdt.org/wp-content/uploads/2021/09/Sustained-Surveillance-One-Pager-Unintended-Consequences-of-School-Issued-Devices.pdf.

201. McCrea, *supra* note 198.

that the software on school-issued devices "can allow teachers to view and control students' screens, [and] use AI to scan text from student emails and cloud-based documents . . . ."[202] This can mean real-time observation of a student's screen at any point during the day.[203] For instance, one survey found that only 25% of schools reported that their surveillance of school-issued devices is limited to school hours while almost 30% said that they monitor student activity twenty-four hours a day.[204] That same survey showed that "81% of teachers report that their school uses some form of monitoring software," with 71% reporting its use on school-issued devices, but only 16% reporting its use on personal devices (i.e. devices owned by students or their families).[205]

This increased monitoring does not affect all children equally, as school officials are substantially more likely to monitor school-issued devices. Students with access to personal devices can use their own devices while engaging in online speech, but students lacking these personal devices must rely upon the school-issued device to access this same content. [206] "Because students who are reliant on school-issued devices may be subject to more pervasive monitoring, this suggests that students in higher-poverty districts are subjected to a higher degree of monitoring than students in wealthier districts, who are more likely to have access to personal devices."[207] And with this increased monitoring of student online activity comes increased disciplinary consequences as school officials gain more oversight into online activity.[208]

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202. *Kids Are Back in Classrooms and Laptops Are Still Spying on Them*, WIRED (Aug. 3, 2022, 12:01 AM), https://www.wired.com/story/student-monitoring-software-privacy-in-schools/.

203. McCrea, *supra* note 198.

204. CTR. FOR DEMOCRACY & TECH., *supra* note 193, at 2.

205. *Id.*

206. *See Digital Divide Dashboard*, *supra* note 184. Schools are increasingly incorporate digital learning into their programming, and students without access to devices at home are forced to use school-issued devices to access that programming.

207. CTR. FOR DEMOCRACY & TECH., *supra* note 200.

208. McCrea, *supra* note 198. *See* DeVan Hankerson Madrigal et al., *Report-Online and Observed: Student Privacy Implicaions of School-Issued Devices and Student Activiy Monitoring Sofware*, CTR. FOR DEMOCRACY & TECH. (Sept. 21, 2021), https://cdt.org/insights/report-online-and-observed-student-privacy-implications-of-school-issued-devices-and-student-activity-monitoring-software/.

Compounding the fact that students of color are more likely to need school-issued devices is the fact that they are also more likely to face disciplinary consequences from school officials.[209] In fact, students of color are overrepresented across nearly every discipline metric, with Black students the most likely to face school discipline despite evidence that they are not more likely to engage in conduct that would subject them to disciplinary consequences.[210] Further, students who use school-issued devices are more likely to be subject to school discipline based on their internet activity, as that activity is often monitored by school officials.[211] Accordingly, it is more likely that low-income students will face discipline for the same speech their peers are engaging in, due to this increased monitoring.

These factors contribute to a scenario in which children of color are statistically more likely to face disciplinary consequences from school officials for speech.[212] While this author is unaware of any study examining this issue specifically, each of these factors would contribute to this phenomenon.[213] This disproportionality is important to bear in mind when considering the Supreme Court's reliance on device ownership.

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209. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, *supra* note 10, at 12-13 ("Black students were particularly overrepresented among students who were suspended from school, received corporal punishment, or had a school related arrest. For example, Black students represented 15.5 percent of all public school students and accounted for 39 percent of students suspended from school, an overrepresentation of about 23 percentage points. Differences in discipline were particularly large between Black and White students. Although there were approximately 17.4 million more White students than Black students attending K-12 public schools in 2013-14, nearly 176,000 more Black students than White students were suspended from school that school year.") (citation omitted).

210.

> A higher percentage of Black students (13.7 percent) than of students from any other racial/ethnic group received an out-of-school suspension, followed by 6.7 percent of American Indian/Alaska Native students, 5.3 percent of students of Two or more races, 4.5 percent each of Hispanic and Pacific Islander students, 3.4 percent of White students, and 1.1 percent of Asian students.

BREY ET AL., *supra* note 13; *see also* Gordon, *supra* note 13.

211. *See* DeVan Hankerson Madrigal et al., *supra* note 208; McCrea, *supra* note 198.

212. Laird et al., *supra* note 11, at 23-24.

213. *Id.*

Consider B.L.'s conduct. The Court's inclusion of the device ownership factor throughout the opinion implies that the case could have come out differently were B.L. using a school-issued device. Based on the Court's analysis, were another student at the school to engage in identical behavior but use a school-issued tablet or computer, that student's conduct would be subject to school oversight and discipline. The difference between these two hypothetical students is, more likely than not, an issue of finances.

IV. DEVICE OWNERSHIP AND THE RESTRICTION OF FREE SPEECH

It is often easy to dismiss much of teenagers' online speech as vulgar, ridiculous, or otherwise not worthy of constitutional protection. Yet, as the Court warned in *Mahanoy*, "[i]t is necessary to protect the superfluous in order to preserve the necessary . . . '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.'"[214] Public schools are the "nurseries of democracy,"[215] and as the Court often notes they are the American citizenry's first exposure to the power and limitations of government.[216] This is why, despite recognizing the need for order and safety within schools, the Court did not grant complete authority over student speech.[217] Instead, the Court established a balancing test, with the importance of free speech on one side and the school's needs on the other.

Although American youth have traditionally engaged in political speech long before they reach voting age, the internet has allowed them to access more information and post their opinions more broadly.[218] Of course, political speech is not new to the youth population, a point made clear by the facts of *Tinker* and borne out in many political movements across the

214. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2047 (2021) (citing Cohen v. California, 403 U.S. 15, 25 (1971)).

215. *Id.* at 2043.

216. *Id.* at 2046.

217. *See id.*

218. *See* Madeline McGee, Abby Kiesa, & Sara Suzuki, *Media-Making about Social and Political Issues Builds Confidence in Teens*, CTR. FOR INFO. & RSCH. ON CIVIC LEARNING AND ENGAGEMENT (Oct. 28, 2021).

United States.[219] In fact, much of student speech that was originally dismissed in this way has later been revealed to be the beginning of major political change. As one author stated,

> [w]hen schools have sought to prevent students from wearing black armbands to protest the Vietnam War or freedom buttons to support the quest for equal voting rights—when educators have tried to stop students from revealing their sexual orientation through their prom dates or their gender identity through their clothing choices—it seems clear that majoritarian sentiment within those communities would have supported the schools. While many observers now view those student messages as presenting valued input to our schools and our polity, they were not always so considered at the outset.[220]

The internet has only increased the visibility of this youth engagement.

> Young people are turning to social media to both consume and produce political content more than ever: 70% of young people had gotten information about the 2020 election on social media and 36% reported posting political content in the week prior. . . . Over 60% of youth said that creating social media content helped them feel more informed, represented, and heard . . . .[221]

The youth's use of social media has become, in many ways, their civic engagement.[222]

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219. DRIVER, *supra* note 57, at 139-40.

220. *Id.*

221. *Young People Turn to Online Political Engagement During COVID-19*, CTR. FOR INFO. & RSCH. ON CIVIC LEARNING & ENGAGEMENT (Oct. 20, 2020), https://circle.tufts.edu/latest-research/young-people-turn-online-political-engagement-during-covid-19.

222. Studies demonstrate that not only are youth engaging in more online political speech, but also that the use of social media as a means of expressing political thoughts, opinions, or sharing information differs across some racial and ethnic lines:

> Black users stand out: 48% of Black social media users say they have posted a picture on social media to show their support for a cause in the past month, compared with 37% of Hispanic users and 33% of white users. . . . Black users are also more than twice as likely as white users to say they have used a hashtag related to a political or social issue on these platforms in the past month (33% vs. 15%), while Hispanic users fall in between these two groups (22%).

Brooke Auxier, *Activism in the Social Media Age*, PEW RSCH. CTR. (July 13, 2018), https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/.

How schools have embraced remote education, and in which children have begun engaging in that remote world, impact the analysis of student speech and complicate the Court's balancing test. Considering the way America's youth engages in speech and the reality facing many students who lack the means to access the remote world through their own devices, the Court has tipped the scales decidedly in the direction of the school.

The following sections consider the negative impact of the Supreme Court's decision in *Mahanoy* on the rights of students and the reasons why device ownership should not be considered in the balancing test. First, device ownership does not speak to the level of disruption the speech will cause. The application or website used, rather than the device, is a more logical extension of the classroom and thus more in line with the school's regulatory authority. Further, schools have sufficient other controls pursuant to existing caselaw to ensure safety and order are maintained. Additionally, the extension of the school's authority impermissibly undermines parental authority. The decision in *Mahanoy* stretches school authority too far into the private homes of students. Finally, while many schools may attempt to implement "user agreements" that restrict students' use of their devices, these agreements often impermissibly restrict students' constitutional rights. Even were user agreements permissible, schools should seriously consider whether the deprivation of rights and the lesson taught to students is worth the extension of the school's authority.

A. School Authority—Maintaining Order and Safety

One consideration that appears in nearly all student speech cases, from *Tinker* to *Mahanoy*, is the "comprehensive

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> Racial differences are also present *within* younger groups, with younger Black social media users being particularly likely to post hashtags or encourage others to be politically engaged. For example, 55% of Black social media users ages 18 to 49 say they posted a picture to show support for a cause in the past month, compared with fewer than four-in-ten Hispanic (37%) or white users (36%) in the same age range. Among adults under the age of 50, Black users (44%) are about twice as likely as their white (22%) or Hispanic (23%) counterparts to say they have used a hashtag in the past month related to a political or social issue.

Id.

authority of the States and of school officials . . . to prescribe and control conduct in the schools."[223] In short, schools must be able to discipline their students to maintain order, and doing so is necessary to ensure students can learn, the very purpose of a school in the first place.[224] Moreover, the Court has consistently recognized the "special characteristics of the school environment" alter the free speech analysis.[225] Thus, "conduct by [a] 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 . . . not immunized by the constitutional guarantee of freedom of speech."[226]

Considering the ownership of the device used in the context of this "substantial disruption" test and existing caselaw demonstrates why it is unnecessary. The disruption to a school community is simply not affected by what device is used to engage in the speech, and schools are given sufficient power to limit speech through prior cases.[227]

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223. Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 507 (1969).

224. *Id.* Educators need the ability to discipline students for genuine disruptions to the learning process or violations of policies that enable other students to feel safe and welcome in the school environment. As one author noted,

> [t]raditionally, with respect to school discipline, American educators have had two distinct aims: (a) to help create and maintain a safe, orderly, and positive learning environment, which often requires the use of discipline to correct misbehavior; and (b) to teach or develop self-discipline. Both aims are equally important and should always be included in the development and evaluation of school discipline practices. Whereas the first is generally viewed as an immediate aim (to stop misbehavior and bring about compliance), the second is viewed as long term (to develop autonomy and responsible citizenship). Both aims are reciprocally related in that each promotes the other. Both also serve a preventive function. That is, by correcting misbehavior and developing self-discipline, schools help prevent the future occurrence of behavior problems.

George Bear, *Discipline: Effective School Practices*, NAT'L ASS'N SCH. PYSCHS. (last visited Apr. 12, 2023), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://apps.nasponline.org/resources-and-publications/books-and-products/samples/HCHS3_Samples/S4H18_Discipline.pdf.

225. Morse v. Frederick, 551 U.S. 393, 397 (2007).

226. *Tinker*, 393 U.S. at 513.

227. *See e.g.*, *Tinker*, 393 U.S. at 507; Bethel School District v. Fraser, 478 U.S. 675 (1986); Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988); *Morse*, 551 U.S. 393.

1. The Level of Disruption

Whether someone used their own computer or a school computer, the level of disruption to the school community is likely to remain the same. Disruption more often comes from things like the number of students or staff who witnessed the speech, their response to the speech, and the uproar caused by the speech. None of these things are impacted by the device's owner, but rather the reach of the speech.

An example helps illustrate this point. Consider a middle school student who uses Twitter to criticize the school guidance counselor in a way that many view as racially charged. The tweet is posted at night on a weekend. The school community is divided, and heated disagreements break out in classes throughout the week. Some students create t-shirts in support of the guidance counselor, and others respond by printing the tweet onto shirts and wearing those to school. Classes are constantly interrupted by student outbursts on both sides, and teachers are unable to complete lessons for several weeks. Students plan a walkout to protest the student's tweet and demanding immediate school action on issues of racism more generally.

Almost certainly, a substantial disruption has occurred. Yet whether the student used their own or a school device does not change the level of disruption. This factor simply has no bearing.

Mahanoy itself illustrates this. Although the Court observed that B.L.'s device was her own,[228] there would have been no discernible difference in the practical effect of her speech based on the device's provenance. Ownership could have had no effect on school disruption. Furthermore, that case presented facts that avoided any need to resolve disputes about who owned the relevant device.[229] Using bad facts to make bad law, the Court gave emphasis to device ownership as a factor in deciding a case in which ownership was not in

228. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).

229. *Id.* The Court found that her conduct did not rise to the level required by *Tinker* and that "there [was] little to suggest a substantial interference in, or disruption of, the school's efforts to maintain cohesion on the school cheerleading squad." *Id.* at 2040. Thus, regardless of the device she used, the school would have lacked the authority to regulate the speech.

dispute.[230] Having decided that ownership matters, the Court has invited disputes about who owned the relevant device, disputes that may often be difficult to resolve.

Furthermore, as a practical matter, in the majority of cases it is likely that the school staff and students will not know what device was used to engage in the speech.[231] One can access Facebook or Twitter from any online device. While some schools now have the ability to track students' internet activity, it seems unlikely that any school staff has access—more likely, the principal or other top school administrators control that access. Additionally, this presumes that students do not undertake measures to hide their internet activity, something many savvy children are more than capable of doing.

The actual device used to engage in the speech does not change the level of disruption to the school community. In fact, as explored more fully in the next section, in the context of online speech, it is more likely that the website or application used to post the speech is what will affect the disruption to the school community, as this will determine how many people see it which, in turn, is more likely to determine the scope of the response.

2. Setting the Boundaries of the Schoolhouse Gate

The Court has long acknowledged the boundaries of the schoolhouse are not brick-and-mortar. For instance, the Court in *Frederick* allowed school officials to exercise authority outside the schoolhouse to a school-sponsored event during school hours, similar to a field trip.[232] In *Mahanoy*, the Court further defined the limits of school authority by applying them to online activity including "speech that takes place during or as part of what amounts to a temporal or spatial extension of the regular school program, *e.g.* online instruction at home, assigned essays or other homework, and transportation to and

230. *Id.* at 2047.

231. While some schools have tracking mechanisms on their devices to monitor internet activity, it is unlikely that students or school staff would immediately have access to the informed contained in that tracking application. Additionally, students may find a way to sidestep the tracking applications by shielding their internet activity.l,

232. *Morse*, 551 U.S. 393.

from school."[233] Were a student to use inappropriate language or post an inappropriate picture, the cases make clear that the school would likely have the authority to discipline the student.[234] Just as in *Frederick*, such activity extends the school day. A field trip, much like an online class, is undoubtedly within the school's disciplinary authority under the Court's rulings, as these are simply different locations for the "classroom." The nexus to the school is clear.

Applying the reasoning in *Frederick* and *Mahanoy* to the new remote world of education, a more appropriate area of restriction would be to look at the application used rather than the device itself. For example, if a student were to write the same words that B.L. posted on Snapchat, but this time while at home in an online "chat room" run by the school and visible to all students in the class, the resulting disruption could be more substantial than if the student had posted on a privately owned application not affiliated with the school, visible only to "friends" rather than the entirety of the class. In this case, the *application* itself would be monitored and controlled by the school. This surely would explain the extension of the school's reach, regardless of what device was used when the student accessed the application. While it may make sense to allow schools more authority to discipline students for speech in these school-run applications, the actual device used has no effect.

These applications are more analogous to the classroom, an extension of the physical classroom to the online world. Much like the school-sponsored event in *Fraser*,[235] the school's authority reasonably extends to this online version of the classroom. These are places where the school requires students to "attend" or sign on, to do work with other students.[236] The applications themselves would be limited to the student body and school staff. As with *Frederick*, the school could be seen as condoning or supporting the student's words[237] as the school maintains control over the application. It cannot

233. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2054.
234. *See id.*; *Morse*, 551 U.S. 393.
235. *See generally* Behel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1988).
236. *Id.* at 677-79.
237. *Morse*, 551 U.S. at 400-02.

be argued that the school maintains control over Twitter the same way.

A website owned, operated, and controlled by third parties separate from the school, for instance a social media website, is a different matter. These are not owned or operated by the school, the school is not condoning or even encouraging students to use them, and their use is not restricted to students and school staff.

Allowing schools to maintain control over their own websites or applications gives schools the authority they need without imposing undue restrictions on the rights of students. Otherwise, the school has the very control the Supreme Court rejected in *Mahanoy*—that is, control over a student's speech twenty-four hours a day, seven days a week.[238]

3. The School's Authority

Consideration of device ownership is unnecessary because the school is given sufficient other control over speech that would disrupt the school community or threaten its safety. As delineated in prior caselaw, plenty of other factors outlined by the Court are better indicators of whether school control is necessary and appropriate.

For example, in *Mahanoy*, the Court specifically singled out "serious or severe bullying or harassment targeting specific individuals," and "threats aimed at teachers or other students."[239] Were a student to use *any* device to commit these acts, the school would have ample authority to restrict that speech.[240] Considering the impact this could have on the school community, this makes sense and correctly balances the school's need for order and safety with the student's right to free speech.

Other caselaw provides similar support to schools, for instance speech condoning drug use in *Frederick* [241] or sexually explicit speech in *Fraser*.[242] Schools may limit speech which is an "invasion of the rights of others."[243] These factors, along with the myriad factors outlined in *Mahanoy*, provide

238. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2047.
239. *Id.* at 2045.
240. *Id.*
241. Behel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1988).
242. *Morse*, 551 U.S. 393.
243. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045.

sufficient guardrails for schools to restrict speech and discipline students.[244]

Device ownership need not be considered when one takes into account the already robust authority schools have to discipline speech and the disproportionate impact that device ownership could have on the restriction of student speech.

B. The Right to Discipline

Not only are students' rights affected by the Court's decision, parental rights are also implicated.[245] By giving schools the authority to discipline students for activity that takes place in the home, during times when parents are traditionally in charge of the care and discipline of their children, the Court impermissibly erodes the rights of parents.

Schools act *in loco parentis* while students are in their care.[246] This long-standing doctrine appears in caselaw dating back to 1837 and in Blackstone's Commentaries, where the delegation of authority is expressly related to discipline:

> [The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[247]

This doctrine remains largely intact, and is frequently cited in First Amendment cases where public schools attempt to discipline students for speech.[248]

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244. *Id.*; *id.* at 2040 ("Circumstances that may implicate a school's regulatory interests include serious or 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.").

245. This author uses the term "parent" to denote any adult figure with children in their care who would otherwise have the legal authority to discipline.

246. "The origins of the in loco parentis doctrine are murky. It may go back as far as the Code of Hammurabi through ancient Roman times . . . . The Latinism, in loco parentis, translates as 'in the place of a parent.'" Stuart, *supra* note 14, at 972-73.

247. WILLIAM BLACKSTONE, *The Rights of Persons*, *in* COMMENTARIES OF THE LAWS OF ENGLAND 441(Oxford, Clarendon Press 1765-69).

248. *See* Behel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1988).

While this basic tenant of education law in the United States allows schools to enforce order and maintain control within their buildings, it results in a limited incursion into some parental rights. Parents implicitly cede disciplinary authority to the school temporarily. A school may discipline a student for conduct that the parents would otherwise condone, but traditionally only while under the school's care.[249]

In *Mahanoy*, the Court stated that "the doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances *where the children's actual parents cannot protect, guide, and discipline them*."[250] In fact, the Court noted that the school's interests were diminished because the speech took place outside of the school property and hours.[251] Ultimately, the Court held that B.L.'s parents could not be reasonably understood as delegating their authority to the school in these circumstances.[252]

This distinction is important when considering the practical implications of allowing schools to discipline students for all speech ocurring on school-owned devices. By including device ownership, the Court extends school authority into students' homes, areas that ought to be within the exclusive purview of parental authority. This allows schools to discipline a student when they are off of school property, in their family home, after hours, and on private websites.

This becomes even more impactful if these parents cannot afford their own devices for their children. These parents are denied the parental authority they would otherwise have over their children's conduct in the home merely because their children do not have access to other devices. Importantly, the Court in *Mahanoy* stated that "Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[253] This concession

249. Stuart, *supra* note 14. In fact, B.L.'s own parents did not agree with the school's disciplinary decision. They felt that any disciplinary consequences should have been left to the parents. One can imagine similar feelings from parents when students are engaging in out of school speech that the parents agree with, even were this speech to be unsavory to some.

250. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) (emphasis added).

251. *Id.* at 2042.

252. *Id.* at 2047.

253. *Id.* at 2046.

is undermined by any consideration of device ownership, especially when that child has no other access to devices. In fact, it could be argued that when schools allow, or sometimes require, students to bring home these devices, they are ceding their disciplinary authority back to parents.

Again, examples are illustrative. Consider a student who writes a short story that includes sexual, specifically homosexual, themes. The student intends to keep the story private, and the student only writes after school hours are over and in their own home. Parents feel the writing helps allow the student to work through feelings about the student's own sexuality and actively encourage their child to continue writing. However, another student discovers the short story and informs a teacher.

In this particular school district, the student would receive disciplinary consequences for submitting the work to a teacher. Does the fact that the student wrote it on a personal computer mean that the school cannot discipline the student? Asked differently, if the student was using a school-issued device, does that change the analysis? If the answer to the second question is yes, how far does this authority extend? Consider the student who writes the story in a personal email. Does opening the email on their school-issued device alter the school's authority to discipline the student? Most importantly, does the school's belief that the content is inappropriate override the parents' belief that it is beneficial to their child? If the school has any role here, it ought not be defined by who owns the device but rather whether the student is under the school's disciplinary control or the parent's.

It must be conceded that there is unavoidably some overlap between a school's authority and the parents' authority in the home, such as using a school-sponsored app that is provided exclusively for school activity. However, as mentioned previously in this article, one can draw a line between using a school-issued device on a school-based application or program versus other, personal applications such as on public websites. The school-sponsored websites or even online classes are distinct from other activity, where traditionally the parents would have the authority to make disciplinary determinations for their children. These school-based applications are more akin to extensions of the

schoolhouse, areas where schools would largely retain their disciplinary authority. The risk of substantial disruption to the school community is higher, as all students are likely required to go on these applications or websites.

The Court has sought to strike a balance between the responsibility of schools with the rights of students and parents in the context of free speech.[254] By including device ownership in this balancing of responsibilties and rights, the Court impermissibly extends the authority of schools into domains that are traditionally within a parents' sphere of control. In accepting these devices, many parents are unaware of the authority they are handing over to school officials.[255] As explored in the next section, parents and students' agreements are often uninformed and, given what is at stake, entirely too broad.

C. User Agreements and Codes of Conduct

The majority of schools do not simply hand over devices to their students, but rather require students and parents to sign "user agreements."[256] These user agreements outline the appropriate use of the technology.[257] They frequently require students to consent to school oversight of the use of the device, which can include monitoring search history, online chats, emails, and real-time observation of a student's online activity.[258] User agreements will typically reference a code of conduct either generally or one specific to the use of

254. *See* Tinker, *supra* note 1.

255. Laird et al., *supra* note 11, at 17.

256. *See, e.g.*, *Appendix A: Sample Acceptable Use Agreements and Policies, Sample Acceptable Use Agreement for Internet and Other Electronic Resources*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/pubs2005/tech_suite/app_a.asp (last visited Mar. 2, 2023); *Device User Agreement*, *Atlanta Public Schools Department of Information Technology Parent-Student Contract for the T-Mobile Digital Bridge Initiative*, ATLANTA PUB. SCHS., https://www.atlantapublicschools.us/cms/lib/GA01000924/Centricity/Domain/10185/Digital%20Bridge%20DEVICE%20USER%20AGREEMENT%20Final.pdf (last visited Mar. 2, 2023); *Student Device Loan Agreement School Year 2022-23*, HOUSTON PUB. SCH. DIST., https://www.houstonisd.org/cms/lib2/TX01001591/Centricity/Domain/31640/Student%20Device%20Loan%20Agreement%20SY%202022%202023.pdf (last visited Mar. 2, 2023).

257. *See, e.g.*, NAT'L CTR. FOR EDUC. STAT., *supra* note 256.

258. *See id.*

technology.[259] These user agreements differ across schools and school districts, with some requiring students and parents consent to more robust oversight and others merely concentrating on "digital citizenship" and the treatment of others online.[260]

A savvy school district could attempt to restrict students' right to free speech by including limiting language in their user agreements. For example, schools could require that students consent to the school's ability to discipline them for any behavior that involves the use of the device, without reference to any other factors such as location, day of the week, or time of the day. And in fact, one could argue that these user agreements are a waiver of the student's right to use the device for personal means and, therefore, give the school the authority to regulate speech the student would otherwise be permitted to post online. However, while it must be conceded that the Supreme Court has always given schools a certain allowance to maintain control over the school environment, the use of user agreements to limit a student's constitutional rights goes too far.[261]

In the United States, all children are legally required to attend school.[262] In fact, in many states these mandatory education laws impose criminal sanctions on parents who fail to bring their children to school.[263] Considering that many

259. *See id.* For the sake of brevity, this article refers generally to "user agreements" and incorporates in that term the codes of conduct referenced within them.

260. *See Digital Citizenship Agreement*, BELMONT INTERMEDIATE SCH., https://assets.website-files.com/5e37cc707c077b62c1f034d9/61032564fbc1675f2f9e1370_2021_%202022%20Digital%20Citizenship%20Agreement%20(1).pdf; *Digital Citizenship Use Agreement For Students*, RAINY RIVER DISTRICT SCHOOL BOARD, https://cdnsm5ss14.sharpschool.com/UserFiles/Servers/Server_73762/File/Digital%20Citizenship%20Use%20Agreement%20for%20Students%20(PDF).pdf.

261. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Morse v. Frederick, 551 U.S. 393 (2007).

262. *Compulsory Education Laws: Background*, FINDLAW, https://www.findlaw.com/education/education-options/compulsory-education-laws-background.html (last reviewed June 20, 2016). In fact, it seems likely that many school districts are enforcing these user agreements already without considering the constitutional implications.

263. *See* NAT'L CTR. FOR SCH. ENGAGEMENT, PIECES OF THE TRUANCY JIGSAW: A LITERATURE REVIEW 14 (2007), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/truancy_toolkt_2.pdf.

schools now require students to use school-issued devices,[264] a user agreement requiring this type of school control of speech expands the school's disciplinary authority past any reasonable point. If courts accepted that schools could have students sign away their constitutional rights when engaging in public education, the deprivation of student liberty, privacy, and the right to free speech would be nearly completely undermined for the many students with no other access to the online world.

Families unable to afford technological devices are not at liberty to refuse the user agreement offered by the school. Recognizing that nearly every school across the United States requires students to have some access to technology to complete their schoolwork,[265] the implication is that those students and parents unwilling to sign the user agreement are left without access to the education to which they are legally entitled and, importantly, which they are legally required to attend. Parents and students without the means to purchase their own devices would be prevented from engaging in the same speech their peers can engage in on different devices.

While a student may voluntarily waive their constitutional rights in appropriate circumstances, it is quite another matter for schools to impose otherwise unconstitutional restraints on free speech merely by issuing devices to students.[266] To be voluntary, the waiver must be in circumstances where the student has a choice. Any contrary doctrine is particularly pernicious in light of the "digital divide" which essentially compels low-income students to waive important rights by agreeing to accept school devices

264. *See generally*, RIDEOUT & KATZ, *supra* note 173.

265. Brook Auxier & Monica Anderson, *As schools close up due to coronavirus, some U.S. students face a digital "homework gap*," PEW RESEARCH CENTER (Mar. 16, 2020), https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/.

266. Additionally, many students may not intend to use the device for personal uses but may nonetheless expose their speech to school oversight. For instance, there have been circumstances where students plug their phones into the school-issued computer to charge. This "pairs" the phone with the computer, allowing the computer to download the photos, messages, or other personal affects from the personal phone. In these cases, the school could attempt to discipline the student based on the terms of the user agreement.

under restrictions that do not apply to wealthier students with access to personal devices.[267]

While not a perfect analogy, considering other constitutional rights within this framework is helpful. Public schools could not, for instance, require students to consent to unreasonable searches without any legal justification.[268] Any such waiver would be considered a clear violation of their Fourth Amendment right.[269] A school may not require students to waive their constitutional rights to access the education to which they are both legally entitled and required to engage in.

Consider a scenario in which a student wears a school uniform off campus but adds a pin to their sweater advocating a certain political position. No reasonable court would agree that that student waives their right to engage in this speech merely because they continue to wear the uniform.[270] Similarly, when students are required to use school-issued devices, whether because the school requires it or because they have no other option, they are placed in the same position as these hypothetical students.

Finally, schools should think critically about what lesson the enforcement of these types of user agreements teaches their students. The Supreme Court has consistently recognized the role of public schools in introducing students to the power and limitations of the government.[271] As government actors, each time a school imposes on a constitutional right they are teaching students about the nature of these rights. What lesson, then, are students learning when their peers are guaranteed more robust constitutional rights when engaging in similar speech, merely because they can access their own devices?

When the Court attempts to balance the rights of students against the school's needs, the balance weighs in favor of protecting students' rights. Courts should not only reject user agreements that extend the scope of school authority to out of school speech, but schools should reject them as well. Courts, and indeed schools, must consider the lessons these user

267. Jacobsen, *supra* note 176; Lake & Makori, *supra* note 180.
268. New Jersey v. T. L. O., 469 U.S. 325.
269. *See* U.S. CONST. amend IV.
270. *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021).
271. *Id.* at 2043 (citing Cohen v. California, 403 U.S. 15, 25 (1971)).

agreements teach students about the reach of government and their rights.

If the Court's decision stands in its entirety, then two students engaging in exactly the same speech after school hours, off-campus, indeed possibly in their own homes, will be treated differently merely because one of them does not have their own personal device. B.L. may have escaped discipline,[272] but a similarly situated student unfortunate enough to use the school's assigned tablet would face disciplinary action and the restriction of their speech. If this is the case, what lesson are public schools teaching students about freedom of speech? In balancing the rights of students against the school's need for control,[273] the balance weighs in favor of removing device ownership as a factor in the analysis of whether schools can discipline students.

The Supreme Court has consistently recognized the role of public education in creating citizens and an informed democracy.[274] What lessons, then, do young citizens learn of democracy when their right to free speech is limited by their finances?

V. CONCLUSION

As the world becomes increasingly more technologically advanced, those advances have moved into the schoolhouse. The pace and breadth of these technological changes in education is monumental, and its impact on educators, students, and parents continues to be significant.[275] But as fast as education has changed, the law has been slow to respond.

As schools continue to incorporate technology into education, moving the schoolhouse online, the barriers of the schoolhouse gate must be redefined. The Court attempted to do this in *Mahanoy Area School District v. B.L.*, and many student rights advocates hailed it as a victory.[276] Yet hidden

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272. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2048.

273. *Id.* at 2047-48.

274. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982); Abington School District v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Ambach v. Norwick, 411 U.S. 68, 77 (1971).

275. *See generally* McElrath, *supra* note 165; Klein, *supra* note 161; U.S. DEP'T OF EDUC., *supra* note 173 at 1-4.

276. *See* Adam Steinbaugh, *VICTORY: Supreme Court sides with high school cheerleader, rules school's punishment for Snapchat posts violated First*

within that victory is an impermissible extension of the school's authority into private stores, public libraries, even homes. And with this extension, a deprivation of many students' right to free speech.

Young Americans are finding new ways to engage with the world around them. With the proliferation of technology, young adults have unprecedented access to information and new ways to express themselves. This access makes the lessons they learn about freedom of speech even more crucial.

The public schoolhouse is responsible for more than teaching math, science, and reading—it is also responsible for creating an informed citizenry. If public schools are to remain the "nurseries of democracy,"[277] the Court must remove device ownership from the analysis. While technology has changed the educational landscape, the nature and purpose of public education remains the same, and "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[278]

Amendment, FIRE (June 23, 2021), https://www.thefire.org/news/victory-supreme-court-sides-high-school-cheerleader-rules-schools-punishment-snapchat-posts#:~:text=In%20an%20opinion%20issued%20this,%2C%20and%20%E2%80%9Ceverything%E2%80%9D%20in%20a; *Supreme Court Rules to Protect Students' Full Free Speech Rights* ACLU (June 23, 2021), https://www.aclu.org/press-releases/supreme-court-rules-protect-students-full-free-speech-rights; Emily Tate Sullivan, *In a Win for Student Speech, Supreme Court Rules in Favor of the 'Snapchat Cheerleader*,' EDSURGE (June 23, 2021), https://www.edsurge.com/news/2021-06-23-in-a-win-for-student-speech-supreme-court-rules-in-favor-of-the-snapchat-cheerleader.

277. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2041.

278. Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 512 (1969) (citing Shelton v. Tucker, 364 U.S. 479, 487 (1966)).