THE FUTURE OF THE FIRST AMENDMENT FORETOLD

Mary-Rose Papandrea[*]

TABLE OF CONTENTS

INTRODUCTION

For decades the Supreme Court has embraced a separate set of rules for contexts in which the government acts in a managerial or institutional capacity, such as an employer or as the operator of public schools. Although scholars have criticized these decisions for various reasons, and many have noted how they are out of step with the rest of the Court's jurisprudence, it is much less common for scholars to argue that these decisions might suggest what the future of the First Amendment will look like. This Essay undertakes that argument.

The Court's recent school speech case *Mahanoy v. B.L.*[1] offers a perfect vehicle for contemplating the future of the Court's First Amendment jurisprudence. At first blush, this may seem improbable. *Mahanoy* involved the one-year suspension of a disgruntled teenager from the cheerleading squad after she posted the message "fuck cheer" on Snapchat after she was not selected for the varsity cheer team.[2] But the Court's overt embrace of an ad hoc case-by-case approach to student speech issues suggests the possibility of a seismic shift in the doctrine away from a default categorical approach to one full of balancing tests, sliding scales, and proportionality inquiries. It also leaves unresolved a whole host of important questions about the role of originalism in First Amendment cases, the proper analytical

1. 141 S. Ct. 2038 (2021).
2. *Id.* at 2043.

framework for speech made through new communication technologies, what counts as, and how to treat, content and viewpoint-based speech discrimination, and so much more.

While it might be easy to dismiss Mahanoy as a sui generis case reflecting the typically less doctrinal approach the Court has taken in other special circumstances—such as the operation of prisons, the regulation of government employees, and government speech—scholars should take this case seriously. The Court's First Amendment jurisprudence stands at the precipice of great change. Given recent retirements at the Court and the willingness of at least some Justices to revisit its precedent in a host of other areas, *Mahanoy* may reflect the future of the First Amendment.

I. A CLOSE LOOK AT *MAHANOY*

In *Tinker v. Des Moines Independent Community School District*,[3] the Supreme Court famously held 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 gates."[4] Perhaps less famously, however, the Court recognized that these rights inside school were not the same rights regular citizens enjoyed outside of school but instead had to be applied "in light of the special characteristics of the school environment."[5] In holding that Mary Beth Tinker had a right to wear a black armband in protest of the Vietnam War, the Court did not apply its "normal" First Amendment rules.[6] Under the Court's usual approach to First Amendment questions, the school would have had to show either that the armband fell within a category of unprotected speech or that the school's prohibition satisfied strict scrutiny.[7] Instead, the Court held that the school authorities had failed to demonstrate that they "had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge on the rights of other students."[8] Although the *Tinker* standard certainly offers students some meaningful constitutional protections, it does not require actual or even imminent disruption of the function of the school, and the

3. 393 U.S. 503 (1969) (holding school violated the First Amendment when it suspended students for wearing black armbands in protest of the Vietnam War).

4. *Id.* at 506.

5. *Id.*

6. *Id.* at 513.

7. *See id.* at 505–06; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (applying a strict scrutiny standard and rejecting the argument that a rational basis standard should apply when evaluating the constitutionality of laws interfering with the free speech rights of students).

8. *Tinker*, 393 U.S. at 509.

meaning of the "imping[ing] upon the rights of others" standard remains unclear to this day.[9]

In *Mahanoy*, the Court considered whether schools should be able to use *Tinker*'s more relaxed constitutional standard to regulate student speech even when it does not occur on school grounds, as part of a school activity, or under school supervision.[10] This was an issue that the Court had explicitly dodged in *Morse v. Frederick*[11] and that had perplexed the lower courts for decades.[12] Rather than give a straightforward "yes" or "no" answer, the Court essentially said the answer to this important question is "sometimes."

A. The Court's Ad Hoc Analysis

Just like *Morse v. Frederick*, the *Mahanoy* case began "with teenagers acting like, well, teenagers."[13] At the end of her freshman year of high school, Brandi Levy tried out for her public school's varsity cheerleading team and did not make it.[14] She also was denied her preferred position on a private softball team.[15] She and a school friend met at the local Cocoa Hut on a Saturday and used their phones to make two posts on Snapchat.[16] In one, the girls held up their middle fingers, and the accompanying text stated, "Fuck school fuck softball fuck cheer fuck everything."[17] The second post had a blank image with the caption, "Love how me and [another student] got told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else."[18] Students at school saw the posts, and some cheerleaders were "visibly upset" about them when they spoke to their coaches.[19] Unmoved by Levy's apologies, the coaches decided to ban her from the team for a year.[20]

---

9. *Id.*

10. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021).

11. 551 U.S. 393 (2007) (noting "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, . . . but not on these facts," given that the student was under school supervision on a class outing when he unfurled his "Bong Hits 4 Jesus" banner).

12. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (5th Cir. 2004).

13. Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 210 (describing the facts of *Morse*, which involved a nonsensical "Bong Hits 4 Jesus" banner).

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

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

When Levy sued the school district for violating her First Amendment rights, the school argued that Levy had waived her speech rights when she agreed to the team's rules prohibiting profanity and the posting of "negative" information; that the school district could not be held vicariously liable for the coaches' actions; and that because Levy has no constitutional right to participate in an extracurricular activity, she could not bring a claim challenging her removal from that activity.[21] The school's secondary argument was that it was entitled to invoke *Tinker*'s substantial disruption test to punish Levy,[22] and it is that issue that found its way to the Supreme Court.

The precise question presented in *Mahanoy* was whether public schools can rely on *Tinker* to restrict their students' "off campus" expressive activities—i.e., when those students are not at school, under school supervision or otherwise participating in school activities.[23] The lower courts had developed a variety of approaches to this question,[24] and the development of the Internet and social media made it increasingly important to provide guidance to schools on this issue. The Third Circuit embraced a minority view that schools could not rely on *Tinker* to restrict off-campus speech and ruled in favor of Levy.[25] As the Third Circuit noted, the situations

21. B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 437–38 (M.D. Pa. 2019), *aff'd*, 964 F.3d 170 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

22. B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 181, 183 (3d Cir. 2020) (noting the district primarily relied on *Fraser* while "fall[ing] back on *Tinker*" as its secondary argument), *aff'd*, 141 S. Ct. 2038 (2021).

23. *Mahanoy*, 141 S. Ct. at 2044.

24. Some held that speech is considered student speech when there is a "reasonably foreseeable risk that [the speech] would come to the attention of school authorities" and cause a substantial disruption. Wisniewski v. Bd. of Educ., 494 F.3d 34, 38 (2d Cir. 2007); *see also* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir. 2011) (embracing "reasonably foreseeable" test). Another group of courts embraced a test asking whether the speech at issue has a sufficient "nexus" with the school's "pedagogical interests" to justify school action. *See, e.g.*, McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707–08 (9th Cir. 2019) (holding "courts considering whether a school district may constitutionally regulate off-campus speech must determine, based on the totality of the circumstances, whether the speech bears a sufficient nexus to the school" and noting that this standard is "always" met "when the school district reasonably concludes that it faces a credible, identifiable threat of school violence"); *see also* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (en banc) (declining to adopt any "rigid" jurisdictional standard but applying *Tinker* to threatening, off-campus speech that a student "intentionally direct[ed] to the school community"); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573–75 (4th Cir. 2011) (citing favorably both the "reasonably foreseeable" and "nexus" tests).

25. B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 179 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2020).

that have caused schools the most concern are ones involving bullying of other students, threatening and violent speech, and harassment of school staff and administrators.[26] *Mahanoy* did not arise out of any of these more troubling contexts, and the Third Circuit specifically declined to address whether schools might have some additional authority in these circumstances.[27]

Justice Breyer wrote the opinion for an almost unanimous Court; only Justice Thomas dissented.[28] The Court ruled in favor of Brandi Levy, but it did so only after rejecting the Third Circuit's holding that *Tinker* did not apply off campus.[29] Instead, the Court accepted the school district's argument that *Tinker*'s "highly general statement about the nature of a school's special interests" is applicable regardless of where or when student speech occurs.[30] Unlike most lower courts, the Court did not require schools to make any sort of threshold showing before they could take advantage of *Tinker*'s deferential substantial disruption test.[31] Without explanation, the Court rejected the "jurisdictional" approaches most lower courts had embraced that first asks whether the expression by students should be considered "student speech" subject to the school's authority under *Tinker* and the Court's other school speech cases.[32] Instead, the Court all but admitted that it is overwhelmed by the "different potential school-related and circumstance-specific justifications" for school regulation of off-campus student speech[33] and that it would "leave for future cases to decide where, when, and how" a school can regulate such expression.[34]

The Court offered up three "features" of off-campus speech that will "often, even if not always, distinguish school's efforts to regulate that speech from their efforts to regulate on-campus speech" and "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."[35] First, the Court

26. *Id.* at 190.

27. *Id.*

28. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2042 (2021).

29. *Id.* at 2045.

30. *Id.*

31. *Id.*

32. The United States summarized this common approach in its brief, where it explained that "the question of which off-campus student speech may be treated as school speech is a different question from whether any particular regulation of such speech would violate the First Amendment." Brief for the United States as Amicus Curiae Supporting Petitioner, at 8, B. L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 141 S. Ct. 2038 (2021) (No. 20-255).

33. Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy, 141 S. Ct. 2038, 2046 (2021).

34. *Id.*

35. *Id.*

noted, schools rarely stand "*in loco parentis*" when regulating off-campus expression, which means that "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[36] Second, the Court recognized that expanding school authority to regulate off-campus speech means that student speech is subject to regulation twenty-four hours a day and may have the practical effect of preventing students from engaging in certain kinds of speech altogether.[37] The Court added that "[w]hen it comes to political or religious speech that occurs outside a school or school program or activity, a school will have a heavy burden to justify intervention."[38] Finally, the Court emphasized that a school must be mindful that it "has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[39] The Court implied that the protection of unpopular expression is limited to political speech that "facilitates an informed public opinion" and "helps produce laws that reflect the People's will."[40] The Court explained that "America's public schools are the nurseries of democracy."[41]

It is hard to know what to make of the Court's analysis of the three "features" of off-campus speech. The Court was plainly not offering a three-part test. None of the features are determinative one way or another; they seem to provide very little guidance at all given that all three features are present in almost every student speech case.[42] The Court suggests political and religious speech should get even more protection, but the Court does not embrace absolute protection or even presumptive protection for such speech.[43] The Court mentions the protection of unpopular ideas, but it does not specifically hold that schools are prohibited from engaging in viewpoint-based or content-based speech distinctions.[44] The upshot of this portion of the opinion is simply that the Court does not want to prohibit schools from regulating off-campus speech, but it has no idea when they should or should not be given that authority.

The Court's resolution of the case before it did little to clarify matters. The Court mentioned a hodgepodge of contextual factors

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See infra* Subpart II.A.
43. *Mahanoy*, 141 S. Ct. at 2055.
44. The Court does not typically refrain from condemning viewpoint-based speech distinctions, even in the school context. *See, e.g.*, Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) (holding viewpoint-based speech distinctions in the distribution of student activity funds is unconstitutional).

that may—or may not—make a difference in a future case.[45] For example, the Court noted that Levy made her posts off of school grounds and that she used her "personal cellphone" (and not a school-issued device, perhaps?) to transmit her messages.[46] These facts suggest that social media posts made within the geographic boundaries of school or on a school-issued electronic device are subject to school regulation, although it is not clear whether such facts would be determinative. The Court also noted that "[s]he did not identify the school in her posts or target any member of the school community with vulgar or abusive language"[47]; at the same time, the Court noted, she sent her messages to a circle of friends and "risk[ed] transmission to the school itself."[48] It is not clear whether the Court meant to embrace a sort of threshold "jurisdictional" inquiry common in the lower courts, some of which look at the content of a message and its intended (or foreseeable) audience to determine whether a student "targeted" the school environment.[49] Furthermore, the Court did not state that such facts would be determinative of whether a school has authority to regulate speech in any particular instance.[50] The Court refers to these facts as "features of her speech,"[51] which should not be confused with the three "features" of off-campus expression the Court highlighted earlier in its opinion.[52]

To add to the confusion, the Court held that schools face a "heavy burden" when regulating students' political speech, but the Court's analysis leaves unclear what should "count" as political speech.[53] The Court suggested Levy's posts are a matter of public concern because they constitute "criticism of the rules of a community of which [Levy] forms a part."[54] But political speech and speech on matters of public concern are not coextensive, interchangeable concepts.[55] And the Court asserts at the end of its opinion that "[i]t might be tempting to dismiss [Levy]'s words as unworthy of the robust First Amendment protections discussed herein," suggesting that the Court is not really so sure her speech was valuable expression worthy of heightened protection.[56]

45. *Mahanoy*, 141 S. Ct. at 2046–47.
46. *Id.* at 2047.
47. *Id.*
48. *Id.*
49. Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007).
50. *See supra* notes 31–34 and accompanying text.
51. *Mahanoy*, 141 S. Ct. at 2047.
52. *See supra* notes 35–41 and accompanying text.
53. *Mahanoy*, 141 S. Ct. at 2045–46.
54. *Id.* at 2046.
55. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 95, 101 (1940).
56. *Mahanoy*, 141 S. Ct. at 2048.

Although the school district did not argue to the Supreme Court that it should have authority under *Fraser*[57] to regulate Levy's social media posts, the Court manages to muddy the waters on this issue, too. Rather than state explicitly that *Fraser* should play no role in the regulation of student speech on social media, the Court instead concludes that the school lacked a strong interest in prohibiting students from using profanity because it "presented no evidence of any general effort to prevent students from using vulgarity outside of the classroom."[58] This holding is confusing for multiple reasons. Levy and other athletes had, in fact, agreed, as a condition of participating in school sports, that they would not use profanity.[59] Perhaps even more importantly, by asserting that the school failed to show a general policy against student profanity, the Court suggests in a future case that a school could rely on *Fraser* as long as it could point to some sort of general policy.[60] Finally, the Court concludes that the school failed to satisfy *Tinker*'s "substantial disruption" standard or "any serious decline in team morale."[61] Although the Court suggests that *Tinker*'s standard would apply in the extracurricular context, it does not expressly reject the school's waiver arguments or address what would count as substantial disruption.[62]

Notably, only Justice Thomas refused to join the majority's opinion, criticizing the majority for choosing "intuition over history."[63] He argued that the school has authority to regulate any speech or conduct occurring off campus "so long as it has a proximate tendency to harm the school, its faculty or students, or its programs."[64] Justice Thomas's position was not a surprise given his concurring opinion in *Morse v. Frederick*, where he urged the Court to use history to interpret the First Amendment and overrule *Tinker*.[65] There, Thomas asserted that "[c]ases and treatises from [when the Fourteenth Amendment was ratified] reveal that public schools retained substantial authority to discipline students."[66] In *Mahanoy*, Thomas contended that this authority extends to off-campus speech because "although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm

57. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
58. *Mahanoy*, 141 S. Ct. at 2047.
59. *Id.* at 2043.
60. *Id.* at 2047.
61. *Id.* at 2047–48.
62. *Id.* at 2047.
63. *Mahanoy*, 141 S. Ct. at 2061 (Thomas, J., dissenting).
64. *Id.*
65. Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring).
66. *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting) (citing *Morse*, 551 U.S. at 419 (Thomas, J., concurring)).

the school environment."[67] Although Thomas expressed gratitude that the majority "at least . . . acknowledges that schools act *in loco parentis* when students speak on campus,"[68] he faulted the Court for not following the historical rule, which, in Thomas's view, provides virtually no limits on a school's authority.[69] He noted that the Court might have argued for a departure of the historical rule by recognizing that the delegation of authority to public schools is not entirely voluntary given compulsory education laws, but the Court did not take that approach.[70] He concluded that "the Court's foundation is untethered from anything stable, and courts (and schools) will almost certainly be at a loss as to what exactly the Court's opinion today means."[71]

Justice Alito wrote a concurring opinion joined by Justice Gorsuch.[72] Both Justices Alito and Gorsuch joined Justice Breyer's majority opinion;[73] Alito therefore must have intended for his concurrence to complement that opinion, perhaps by offering some structure for Breyer's ad hoc analysis as well as offering a response to the originalist argument Thomas makes (which the majority does not bother to address).

Unlike the majority opinion, Justice Alito's concurrence directly addressed the scope of the *in loco parentis* doctrine in the context of this case as well as Justice Thomas's other originalist arguments.[74] In a footnote, Justice Alito argued that "[t]here is no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech."[75] Alito noted that "public education was virtually unknown" when the First Amendment was ratified, and in any event, that amendment did not apply to the States.[76]

Alito then attempted to offer an explanation of why the "special circumstances" of public schools give them special authority to

67. *Id.* at 2059.

68. *Id.* at 2062.

69. *Id.* at 2059, 2061.

70. *Id.* at 2061–62.

71. *Id.* at 2063. Justice Thomas included a similar sentiment in *Morse*. *See Morse*, 551 U.S. at 418 (2007) (Thomas, J., concurring) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators.").

72. *Mahanoy*, 141 S. Ct. at 2048 (Alito, J., concurring).

73. *Id.* at 2042 (majority opinion).

74. *Id.* at 2049 (Alito, J., concurring).

75. *Id.* at 2053 n.14.

76. *Id.* ("At the time of the adoption of the First Amendment . . . the Amendment did not apply to the States.").

restrict speech and how these "special rules . . . fit into our broader framework of free-speech case law."[77] He first noted "[a]s a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based speech restrictions in the classroom" and "other in-school activities like auditorium programs attended by a large audience."[78]

But Alito pushed on past the practicality arguments and searched for a theoretical basis. He concluded that the basis for school authority over student speech is that parents have implicitly consented to relinquish some of their children's free speech rights by enrolling them in public school.[79] He picked up and expanded upon the majority's reference to the common-law doctrine of *in loco parentis*, a doctrine Blackstone developed in the context of private tutors in eighteenth-century England.[80] Because in the modern United States, parents are required to send their children to school, the doctrine "is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[81] To put it another way, Alito explained, the scope of parental consent is "the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree," such as when they "giv[e] permission for a child to participate in an extracurricular activity or to go on a school trip."[82] When students are not engaged in a school activity and are off school grounds, however, "parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children."[83] The authority of schools to restrict student speech "depends on the nature of the speech and the circumstances under which it occurs."[84]

Applying this framework, Alito set up a spectrum of school authority over student speech. On the one hand, schools have robust authority to restrict student speech that is part of a regular school program, extracurricular activity, or after-school program, regardless of whether the speech takes place physically on campus or online.[85] At the other end of the spectrum, schools "almost always" lack

77. *Id.* at 2050.
78. *Id.*
79. *Id.* at 2051.
80. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (Oxford, Clarendon Press 1765)).
81. *Id.* at 2052.
82. *Id.*
83. *Id.* at 2053.
84. *Id.* at 2054.
85. *Id.*

authority over student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations."[86] Alito contended that schools cannot embrace the "heckler's veto"; schools may suppress disruption but not the student whose speech caused the disruption.[87] He noted that speech in between these two poles has caused the most litigation in the lower courts.[88] After suggesting that students should be given leeway "to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence," Alito easily concluded that Levy's posts did not fall into any of the three most common categories of student speech cases and concludes the school's punishment violated the First Amendment.[89]

Although Alito's analysis of the facts of the case largely tracked the majority opinion, he added the observation that in the context of a team sport, a coach "may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time," but that schools cannot punish students for "blowing the whistle on serious misconduct" and should consider whether the speech renders a student ineffective in the activity at issue.[90]

B. Impact of Mahanoy

Both sides claimed victory in *Mahanoy*, but the truth is that there is something for everyone to like—and hate—about Justice Breyer's rambling opinion.[91] David Cole, the plaintiff's lawyer, told NPR's Nina Totenburg that "[i]t's a huge victory for student speech rights" because "when students leave school every day, they don't have to carry the schoolhouse on their backs."[92] That is an overly optimistic reading of *Mahanoy*, which seems to leave open the very possibility that schools can regulate off-campus student speech under the right circumstances. Instead, as Professor Justin Driver has said, "[t]he

86. *Id.* at 2054–55.

87. *Id.* at 2056.

88. *Id.* at 2056–57.

89. *Id.* at 2057–58.

90. *Id.* at 2058.

91. *See* Frank LoMonte, *The Supreme Court's Cheerleader Decision Has Something to Frustrate and Disappoint Everyone*, SLATE (June 25, 2021, 12:07 PM), https://slate.com/technology/2021/06/supreme-court-snapchat-cheerleader-student-speech-rights.html. For an in-depth evaluation of the *Mahanoy* decision, see Mary-Rose Papandrea, Mahanoy v. B. L. *& First Amendment "Leeway*,*"* 2021 SUPREME COURT REV. 53.

92. Nina Totenberg, *Supreme Court Rules Cheerleader's F-Bombs Are Protected by the 1st Amendment*, NAT'L PUB. RADIO (June 23, 2021, 4:48 PM), https://www.npr.org/2021/06/23/1001382019/supreme-court-rules-cheerleaders-f-bombs-are-protected-by-the-first-amendment.

primary reason for celebrating stems from the simple fact that the Supreme Court declared victory for a high school student in a free-speech case at all."[93] After all, students lost the last three student speech cases to come before the Court.[94] Those prior cases gave little weight to the students' expressive interests and afforded great deference to school authorities as they chipped away at the First Amendment protections of *Tinker*.[95] In two of the other major student speech cases decided between *Tinker* and *Mahanoy*, the Court regarded the speech at issue as low-value speech entitled to little constitutional weight, especially in the face of the asserted interests of school administrators.[96] In these cases, the Court carved out exceptions to *Tinker*, but while doing so, muddied the waters about the appropriate mode of analyzing the First Amendment rights of public school students.[97]

The case is also a victory for students because it reaffirms the importance of protecting their speech rights to prepare them to be active citizens in a democracy. Between *Tinker* and *Mahanoy*, the Court gave lip service to this sentiment but ultimately gave much more deference to the interests of school officials.[98] Perhaps less profoundly, the Court's opinion also holds that the First Amendment provides at least some protection to minors who use profanity, even when speaking to other minors.[99] Surely this is a right most teenagers assumed they already had (although they are still subject to their parents' authority), but the Court had never addressed that issue directly, and some of its prior cases suggested it might very well hold the opposite.[100] *Mahanoy* also makes clear that schools should recognize that the tolerance of opposing views is an important part of democratic education, but the opinion emphasizes protection for

93. Justin Driver, Opinion, *A Cheerleader Lands an F on Snapchat, but a B+ in Court*, N.Y. TIMES, June 24, 2021, at A23; *see also* David L. Hudson Jr., Mahanoy Area Sch. Dist. v. B. L.: *The Court Protects Student Social Media but Leaves Unanswered Questions*, 2020 CATO SUP. CT. REV. 93, 107 (expressing a similar view).

94. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding the First Amendment does not restrict school authority to regulate lewd, vulgar, and offensive speech); Morse v. Frederick, 551 U.S. 393, 410 (2007) (rejecting First Amendment claim challenging punishment of student who held "Bong Hits 4 Jesus" sign at school-supervised event); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

95. *See generally Fraser*, 478 U.S. 675; Morse v. Frederick, 551 U.S. 393 (2007).

96. *See* cases cited *supra* note 95.

97. *Id.*

98. *See* discussion *infra* Subpart II.A.

99. *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046–47 (2021).

100. For a more extensive discussion of this issue, see Papandrea, *supra* note 91.

political and religious speech only.[101] Although young people clearly contribute to our political marketplace of ideas, lots of their speech does not.

The obvious downside of *Mahanoy* for students is that its ad hoc approach significantly expands the authority of school officials to regulate the speech of their students regardless of where that expression occurs or what kind of expression it is. The National School Boards Association issued a statement claiming that the school district may have lost this particular fight but public schools more generally won the war: "[W]hile the school district lost on the facts of this particular case, it represents a win for schools, as well as students, who can still be protected from off-campus speech that bullies, harasses, threatens, disrupts, or meets other circumstances outlined by the Court."[102] Because the Court did not embrace any threshold test for the application of its student speech cases, the Court even left open the possibility that schools would have the power to regulate core political speech made plainly outside of school, holding only that schools will have to meet a "heavy burden" to do so.[103] The majority also fails to take advantage of the opportunity to make clear that under *Tinker*, a hostile audience's reaction to political speech cannot satisfy the substantial disruption test. Instead, the Court reiterates the much weaker statement from *Tinker* that schools must show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[104]

Perhaps most importantly, students—who generally have less power and fewer resources than school officials—will be at the mercy of how broadly school principals and school boards interpret the power *Mahanoy* grants them. Furthermore, although the question presented in the case was whether *Tinker* applied to off-campus speech, the opinion raises the possibility that all student speech rights will be subjected to vague ad hoc tests in the future. As one lower court has already declared, "[w]hile the boundaries are not entirely clear, the Court's decision does yield one definite principle: a clear rejection of Third Circuit case law that had held students' First Amendment rights were 'coextensive' with those of adults."[105]

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

102. Press Release, Nat'l Sch. Bds. Ass'n, Nat'l Sch. Bds. Ass'n Commends U.S. Sup. Ct.'s Decision in Landmark Student Speech Case (June 23, 2021), https://www.nsba.org/News/2021/mahanoy-decision.

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

104. *Id.* at 2048 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

105. Stepien v. Murphy, Civ. No. 21-CV-13271, 2021 WL 5822987, at *9 (D.N.J. Dec. 7, 2021) (citing *Mahanoy*, 141 S. Ct. at 2045–46).

II. THE MOST OBVIOUS EXPLANATIONS FOR *MAHANOY*

In "ordinary" First Amendment cases, the Court abhors free-form balancing tests and ad hoc inquiries. In *United States v. Stevens*,[106] for example, the Court rejected the government's argument that additional categories of unprotected speech could be determined "on the basis of a simple cost-benefit analysis" balancing the "relative social costs and benefits" of protecting and not protecting the speech.[107] When considering cases involving the government acting in a managerial or institutional capacity, however, "First Amendment leeway" (as Breyer calls it[108]) is all the rage. The most obvious explanation for the mode of analysis the Court embraces in *Mahanoy* is therefore simply that the Court has long since abandoned its categorical approach in these areas, which the Court apparently regards as offering uniquely strong government interests that it cannot accommodate through the application of its usual rules.

A. Student Speech Cases

The Court's previous student speech cases reveal a growing unwillingness to apply traditional or standard First Amendment doctrine in the school context. The most obvious explanation for *Mahanoy*'s ad hoc mode of analysis is that it is just a continuation of the Court's apparent decision that its usual First Amendment principles are impracticable and unworkable in public schools.[109]

It was not always this way. The Supreme Court first recognized that public school students had free speech rights in *West Virginia State Board of Education v. Barnette*.[110] In that case, the Court ruled in favor of a group of Jehovah's Witnesses who challenged a state law requiring them to salute the flag and say the Pledge of Allegiance at school each day.[111] The Court went on to reject the argument that a rational-basis standard should apply when evaluating the constitutionality of laws interfering with the free-speech rights of students; instead, there must be a showing of a "grave and immediate danger to interests which the State may lawfully protect."[112] The Court also rejected the suggestion that it lacked "competence" to judge what is best for public education, stating that "we act in these [schoolhouse] matters not by authority of our competency but by force of our commissions."[113] The Court concluded that schools "have, of

106. 559 U.S. 460 (2010).
107. *Id.* at 470–71.
108. *Mahanoy*, 141 S. Ct. at 2046.
109. *See* discussion *infra* pp. 115–18.
110. 319 U.S. 624 (1943).
111. *See id.* at 629, 642.
112. *Id.* at 639.
113. *Id.* at 639–40; *see also id.* at 640 ("We cannot, because of modest estimates of our competence in such specialties as public education, withhold the

course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[114] Indeed, the Court emphasized that it is essential for schools to respect the constitutional rights of their students: "[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[115] *Barnette* does not defer to school officials, balance the schools' interests against the students' interests, or develop some other new way of analyzing the regulation of student speech. Instead, its approach to the West Virginia law looks like the same "clear and present danger" approach the Court took to all First Amendment cases at that time.[116]

Tinker is often hailed as representing the high-water mark for student speech rights, but that might be because the Court dramatically scaled back student speech rights in subsequent decisions. *Tinker* famously proclaimed that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[117] But unlike *Barnette*, *Tinker* balanced students' constitutional rights against the need for smooth operation of the school enterprise.[118] In other words, even though *Tinker* involved pure political speech, the Court did not embrace a "clear and present danger" test but rather held that schools could restrict student speech when the school reasonably predicts that the speech will "substantially interfere with the work of the school or impinge upon the rights of other students."[119] The Court also left open the possibility that student speech could be silenced in the face of a "heckler's veto" and abandoned *Barnette*'s unwillingness to defer to school official's judgments.[120]

Of course, the decision was, in many ways, an important victory for students. The *Tinker* majority completely ignored its holding in *Ginsberg v. New York*,[121] decided just a year before *Tinker*, that suggested that minors did not have the same First Amendment rights as adults even when they are not at school.[122] In *Ginsberg*, the Court

judgment that history authenticates as the function of this Court when liberty is infringed.").

114. *Id.* at 637.

115. *Id.*

116. *Id.* at 633–34.

117. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

118. *See id.* at 507, 513–14.

119. *Id.* at 509.

120. *See id.* at 507–09.

121. 390 U.S. 629 (1968).

122. *See Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (noting he did not agree minors have the same First Amendment rights as adults because they are

held that restrictions on communications to minors—even outside of the school setting—do not have to meet the same standards as restrictions applicable to adults given society's interest in protecting minors from harmful materials and in promoting their well-being.[123] The *Tinker* test appeared to rest more on the needs of schools and not the status of students as minors.

The rollback of student speech rights, expanding deference to school officials, and ad hoc decision-making at odds with the rest of the Court's First Amendment doctrine continued in *Fraser*, *Hazelwood*,[124] and *Morse*. *Fraser* reads like the *Tinker* dissent, in that it emphasized the need to defer to school officials to teach students how to engage in civil discourse and therefore prohibit the use of lewd, profane, or offensive speech at school.[125] Concerns about the need to strike the right balance between student speech rights and the needs of the school are gone. The Court did not apply the *Tinker* standard; instead, the Court simply believed schools should not be forced to tolerate crass speech at school, especially at a school assembly. Furthermore, the Court discounted the value of the student's sexually suggestive speech—even though it was given as part of a speech nominating a fellow student for office—criticizing the lower court for failing to consider "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case."[126] As the Court later explicitly recognized, "[t]he mode of analysis employed in *Fraser* is not entirely clear."[127] The only thing that is clear is that the Court did not want students to swear at school, and it was not entirely concerned about doctrinal consistency to reach that result.

In *Hazelwood School District v. Kuhlmeier*, which upheld the use of prior restraints on school newspapers, the Court expanded upon *Fraser*'s statement that the school could "disassociate" itself from speech inconsistent with its educational mission,[128] at least with respect to "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," such as theatrical productions and school-sponsored publications.[129] As in *Tinker* and *Fraser*, *Hazelwood* did not follow the Court's usual First Amendment doctrine. It abandoned the guiding principles of the public forum doctrine and instead construed

"not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees").

123. Ginsberg v. New York, 390 U.S. 629, 637–38 (1968).

124. Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260 (1988).

125. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

126. *Id.* at 680.

127. Morse v. Frederick, 551 U.S. 393, 404 (2007).

128. *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685–86).

129. *Id.* at 271.

the newspaper as "part of the school curriculum because" it was produced under faculty supervision as part of a journalism course.[130] Some lower courts have expansively applied *Hazelwood* to restrict student speech occurring on "school walls, fences, hallways, and classrooms."[131]

If the Court revisited *Hazelwood* today, it might explicitly rely upon the government speech doctrine for justification.[132] Some commentators have even suggested that while that doctrine is not easily applied, *Hazelwood* "does not . . . present a particularly difficult application of the government speech doctrine."[133] After all, they argue, the schools must be able to exercise some editorial discretion and viewpoint-based control over the content of student newspapers or theatrical productions, even though First Amendment law strongly disfavors prior restraints like this.[134] The problem with this argument is that it concedes too much. *Hazelwood* is not limited to curricular activities, like Journalism 101, but instead applies to any expression that a reasonable person believes bears the imprimatur of the school, even if instead the school has simply provided a forum for student expression.[135] Furthermore, it is hardly clear who this reasonable person is and on what basis this person is concluding that the school has approved of the expression at issue. Indeed, *Hazelwood* is in tension with the Court's public forum doctrine, which generally requires the government to satisfy strict scrutiny to engage in viewpoint-based speech restrictions.[136]

The Court continued to give virtually unbridled deference to school officials in *Morse*, where it held that a school could suspend a student who unfurled a banner reading "Bong Hits 4 Jesus" while watching the Olympic Torch Relay with his classmates.[137] At the outset, the Court specifically noted it did not have to decide the scope of public schools' authority over their students' off-campus speech because this speech occurred under school supervision.[138] The Court then held that school authorities reasonably interpreted this banner as promoting drug use.[139] Relying on its school drug-testing cases, the Court held that schools have "an 'important—indeed, perhaps

130. *Id.* at 270–71.

131. Frank D. LoMonte, *Shrinking* Tinker*: Students Are "Persons" Under Our Constitution—Except When They Aren't*, 59 AM. U. L. REV. 1323, 1336 (2009).

132. *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE 108 (2018) (arguing *Hazelwood* was correctly decided but should have been based on government speech doctrine).

133. *See id.* at 111 n.124.

134. *Id.* at 109–10.

135. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

136. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 55 (1983).

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

138. *Id.* at 400–01.

139. *Id.* at 402.

compelling' interest" in deterring drug use.[140] The Court emphasized that it was important for the principal to act "on the spot" to "send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use."[141]

Although in *Morse* the Court carved out yet another exception to *Tinker*, the Court did not go as far as the government had asked: the Court did not extend *Fraser* to give school officials authority to restrict "offensive" speech[142] or any speech that interferes with its educational mission.[143] In addition, the Court emphasized that the banner did not express a political or religious message.[144] The Court distinguished *Tinker* as a case "implicating concerns at the heart of the First Amendment,"[145] where the only discernable interest of the school was "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[146] Not surprisingly, lower courts have used *Morse* to uphold restrictions of student speech even when the speech does not advocate drug use. Most commonly, courts have used *Morse* to uphold restrictions on violent speech without having to satisfy *Tinker*'s substantial disruption standard. As one of the first courts to apply *Morse* this way explained, "[i]f school administrators are permitted to prohibit student speech that advocates illegal drug use because 'illegal drug use presents a grave and in many ways unique threat to the physical safety of students,' . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole."[147] In many of these cases, students claim that their expression was taken out of context—that they were joking or engaging in creative writing or art—but courts typically reject such arguments, instead affording school officials substantial

140. *Id.* at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

141. *Id.* at 410.

142. *Id.* at 409 ("We think this [argument] stretches *Fraser* too far.").

143. *Id.* at 423 (Alito, J., concurring).

144. *Id.* at 402–03 (majority opinion) (noting that the student did not even make that argument); *id.* at 406 n.2 ("there is no serious argument that Frederick's banner is political speech . . .").

145. *Id.* at 403.

146. *Id.* at 403–04 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

147. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771–72 (5th Cir. 2007); *accord* Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007) (taking same approach).

deference in their determination that severe discipline is appropriate.[148]

The Court's distinct analytical approach to student speech cases does not track the rest of the Court's First Amendment doctrine.[149] Given this tendency to abandon its commitment to its "usual" First Amendment principles, *Mahanoy*'s embrace of an ad hoc mode of analysis is not too surprising.

B. Other "Special Circumstances"

Mahanoy is also consistent with the way the Court treats other "special circumstances" of the First Amendment, particularly when the government is acting in an administrative or institutional capacity, such as when it operates prisons, acts as an employer, or engages in government speech. In these contexts, the Court likewise abandons its usual First Amendment doctrine in favor of balancing tests and increased deference to government officials.

In the government employee speech context, the Court has, over time, set up an analytical framework that attempts to strike a balance between the employee's speech rights and the government's right, as an employer, to run an efficient and effective enterprise. In its first public employee case, *Pickering v. Board of Education*,[150] the Court expressly embraced a balancing test weighing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[151] The Court rejected the public employee's argument that the much more rigorous actual malice test from *New York Times Co. v. Sullivan*[152] should apply to any false and defamatory statements about the school board.[153] Instead, the Court held that given the "enormous variety of factual situations" involving public employee criticisms of their superiors, "we do not deem it either appropriate or feasible to attempt to lay down a general standard

148. *See* J.R. *ex rel.* Redden v. Penns Manor Area Sch. Dist., 373 F. Supp. 3d 550, 564, 564 n.5 (W.D. Pa. 2019) (rejecting this argument and citing several other similar cases).

149. I am hardly the first to note this disconnect. *See, e.g.*, Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 721 (2009) ("[S]o much of the confusion in [the student speech] area results from the discontinuity between free speech doctrine as it applies to the public schools and the doctrinal framework employed across the spectrum of all other free speech disputes.").

150. 391 U.S. 563 (1968).

151. *Id.* at 568.

152. 376 U.S. 254 (1964).

153. *Pickering*, 391 U.S. at 569.

against which all such statements may be judged."[154] The Court "indicate[d] some of the general lines along which an analysis of the controlling interests should run" by "evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case."[155] The Court then engaged in a highly fact-specific inquiry that noted, among other things, that the teacher's challenged statements were not directed to his immediate supervisors or co-workers and therefore did not undermine discipline or harmony in the workplace[156]; his position did not demand loyalty and confidence to the Board of Education[157]; that they were statements of opinion on a matter of "general public interest" that did not have any impact on the operation of the public schools, aside from "anger[ing] the Board,"[158] and they did not undermine his ability to teach or call into question his fitness to teach.[159]

In *Garcetti v. Cebellos*[160] and *Connick v. Myers*,[161] the Court added two threshold requirements public employees must satisfy before reaching the ephemeral protections of *Pickering*'s balancing test. First, under *Garcetti*, the speech at issue must not have been made as part of the employee's job duties; if the employee's speech is part of his job, the speech has no constitutional protection whatsoever.[162] Second, in *Connick*, the Court held that the employee's speech must relate to a matter of public concern to receive protection.[163] The Court made clear it was not declaring speech on matters of private concern to be outside the protections of the First Amendment; instead, it was holding merely that the protections for government employees against adverse employment consequences for their speech are not the same as those for "the man on the street" and cover only statements that involve a matter of public concern.[164] The Court explained that *Pickering* and its other public employee cases were based on "the common sense realization that government offices could not function if every employment decision became a constitutional matter."[165] In applying its new limitation on public

154. *Id.*
155. *Id.*
156. *Id.* at 569–70.
157. *Id.* at 570.
158. *Id.* at 571.
159. *Id.* at 572–73, 573 n.5.
160. 547 U.S. 410 (2006).
161. 461 U.S. 138 (1983).
162. *Garcetti*, 547 U.S. at 423.
163. *Connick*, 461 U.S. at 146.
164. *Id.* at 147.
165. *Id.* at 143; *see also id.* at 147 ("[A]bsent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a

employee speech rights, the Court took a very narrow view of what constitutes speech on a matter of public concern, holding that most of the employee's concerns about discipline and morale in the District Attorney's office fell outside of that category.[166]

It is not difficult to make connections between the Court's public employee cases and its student speech cases. *Hazelwood* and *Garcetti* both afford schools expansive authority to restrict speech that might be reasonably construed as the government's own speech, even when individual citizens are the ones speaking.[167] *Mahanoy*'s statement that restrictions on political and religious speech face a "heavy burden"[168] is similar, although obviously not identical, to the protections for speech related to a matter of public concern in *Pickering* and *Connick*.[169] Both public employees and public school students have some protection for their speech on matters of public concern. The main difference is that *Connick* stripped public employees' private speech of all First Amendment protection, while *Mahanoy* did not.[170] Nevertheless, *Mahanoy*'s ad hoc approach, which considers the totality of the circumstances, is very similar to *Pickering*'s balancing test,[171] even if *Mahanoy* did not expressly label its approach as a balancing test.

The Court has also struggled to determine the contours of "government speech" that falls outside of the purview of the First Amendment. As the Court has explained, "'it is not easy to imagine how government could function' if it were subject to the restrictions that the First Amendment imposes on private speech."[172] At the same time, the Court recognizes that the government speech doctrine "is

---

personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

166. *Id.* at 147–48. The dissent hotly disputed the majority's conclusion that her statements were not matters of public concern. *Id.* at 156 (Brennan, J., dissenting) (arguing that speech about "'the manner in which government is operated or should be operated' is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment") (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

167. *See* Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 260 (1988); Garcetti v. Ceballos, 547 U.S. 410, 410 (2006).

168. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

169. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); *Connick*, 461 U.S. at 147.

170. It is possible to construe the Court's prior student speech cases as offering little or no protection for non-political speech. *See*, *e.g.*, Bethel v. Fraser, 478 U.S. 675, 686 (1986) (holding that student's lewd speech at a school assembly was not protected); Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding "Bong Hits 4 Jesus" banner was not protected speech).

171. *Pickering*, 391 U.S. at 575.

172. Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009)).

susceptible to dangerous misuse" because the government could assert it to "silence or muffle the expression of disfavored viewpoints."[173] In the last several years, the Court has decided several cases that required it to choose whether to apply its public forum doctrine, which prohibits viewpoint-based speech discrimination, or whether to regard the speech at issue as government speech.[174] The doctrine continues "to operate on an intuitive, even inchoate, sense of what government speech is."[175]

In *Pleasant Grove City v. Summum*,[176] the Court rejected the application of the public forum doctrine in a case involving permanent monuments in municipal park.[177] The Court recognized that sometimes it is difficult to determine whether the government has created a forum for private speech or is engaging in its own speech, but "this case does not present such a situation."[178] The Court did not set up a test for determining how to make this determination in future cases. Instead, it considered all the circumstances of the case, including the history of permanent monuments and the rights of property owners, the perspective of a reasonable observer, and the unpleasant ramifications of a contrary holding that would require "most parks to refuse all private donations."[179] The Court recognized that there might be "limited circumstances" when it is appropriate to apply the public forum doctrine to permanent monuments—such as when the government allows private parties to place messages or names on a permanent structure.[180] But the Court stopped far short of offering any sort of definitive "test" to determine what counts as government speech.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[181] the Court embraced the common-sense approach of *Summum* to hold that Texas's specialty license plate program, which banned "offensive" license plates, constituted government speech.[182] In a 5-4 majority opinion authored by Justice Breyer, the Court noted that

173. *Id.* at 1758.

174. *See* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1269 (2010) (discussing recent case law addressing whether it was necessary or not to create the category of government speech).

175. *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1436 (2001); *see also* Gey, *supra* note 174 at 1286 (arguing the Court's attempt to define and apply the government speech doctrine is "utterly baffling").

176. 555 U.S. 460 (2009).

177. *Id.* at 464.

178. *Id.* at 470.

179. *See id.* at 471, 480.

180. *Id.* at 480.

181. 576 U.S. 200 (2015).

182. *Id.* at 208-09.

Summum considered the history of public monuments, the control over their display, and the perceptions of ordinary observers, "and a few other relevant considerations."[183] As in *Mahanoy*, Breyer examined these three "considerations" and determined that they supported the conclusion that the license plates constituted government speech, which tipped the balance in favor of the government.[184] First, Breyer held that the history of license plates suggested that they have traditionally displayed government messages.[185] Second, license plates are issued by the State, and reasonable observers would think that the government endorsed any messages appearing on them.[186] Finally, Breyer said it was significant that Texas exercised control and final approval authority over any messages appearing on the plates.[187] As I have argued elsewhere at some length, the three factors Breyer cited in *Walker* are highly malleable, and his analysis for the majority was less than convincing.[188] But even the dissenters in that case argued for a holistic inquiry; if anything, they argued that the Court should consider additional facts that distinguished *Walker* from *Summum*, such as the practical upshot of the holding.[189]

While the Court has subsequently described *Walker* as representing the "outer bounds" of the government speech doctrine,[190] it has continued to embrace "a holistic inquiry" to determine whether the government has created a forum for private speech or using private speakers to spread the government's own message.[191] Most recently, in *Shurtleff v. City of Boston*,[192] Breyer again wrote for the Court and emphasized that "[o]ur review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors."[193] The Court concluded that although tradition and history supported Boston's government speech argument, and it was not clear what conclusions reasonable observers would draw, the pivotal factor

183. *Id.* at 210.

184. *See id.* at 213 (discussing how the weight of the considerations and legal precedent supports the finding of government speech).

185. *Id.* at 210–12.

186. *Id.* at 212.

187. *Id.* at 213.

188. *See* Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1227 (2016); *see also Walker*, 576 U.S. at 222 (Alito, J., dissenting) (arguing that the majority's "capacious understanding of government speech takes a large and painful bite out of the First Amendment").

189. *See Walker*, 576 U.S. at 228 (noting spatial limitations was an issue in Summum but not in Walker).

190. Matal v. Tam, 137 S. Ct. 1744, 1760 (2017) (remarking *Walker* "likely marks the outer bounds of the government-speech doctrine").

191. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022).

192. *Id.* at 1583.

193. *Id.* at 1589.

was that the city did not exercise any control over the content of the messages of third-party flags.[194] In his concurrence, Justice Alito took issue with Justice Breyer's suggestion that there is a "factorized" approach to addressing "the question of whether the government is actually expressing its own views or the real speaker is a private party."[195] Alito claims that the Court's prior decisions "employed a fact-bound totality-of-the-circumstances inquiry" that "did not set out a test to be used in all government-speech cases" or "purport to define an exhaustive list of relevant factors."[196] He stresses that it is important to consider these factors only in service of determining the answer to the ultimate question: is the government speaking?[197] In isolation, he contends, any of the factors Breyer identified could lead a court astray.[198] For example, government control can be a relevant factor, but by itself it might lead to constitutionalizing censorship.[199] Likewise, Alito argues, relying on the perception of the hypothetical "reasonable viewer" inappropriately "encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government."[200]

Although Breyer and Alito nominally disagree about how to go about deciding whether the government is speaking, their approaches to this question are really not that different; they both embrace a totality-of-the-circumstances approach. As a result, in 2022, the government speech doctrine does not look a whole lot different than it did in 2001, when Randall Bezanson and William Buss described the government speech doctrine cases as "an experiment borne of felt necessity on the one hand, and theoretical confusion on the other hand, tried out gingerly on a case-by-case basis."[201]

As in the school speech context, the Court in its public employee and government speech cases has regarded the questions it was resolving as particularly difficult and the government interest at stake particularly strong. The Court also has a keen eye trained on the practical ramifications of its decisions in these areas. In the government speech context, for example, the Court has expressed concern about forcing the government to accept all private monuments donated for display in public parks (*Summum*)[202] or to

194. *See id.* at 1592 (remarking the lack of control "is the most salient feature of this case").

195. *Id.* at 1596–97 (Alito, J., concurring).

196. *Id.* at 1596.

197. *Id.*

198. *Id.* at 1596–98.

199. *Id.* at 1596.

200. *Id.* at 1597.

201. Bezanson & Buss, *supra* note 174, at 1509.

202. Pleasant Grove City v. Summum, 555 U.S. 460, 479–80 (2009).

place offensive language on its license plates (*Walker*).[203] In the public employee context, the Court is concerned about "constitutionalizing" all workplace grievances.[204] In the student speech context, the Court has expressed concern that giving schools authority over off-campus speech threatens the ability of minors to speak at all.[205] In these contexts, the Court does not even pretend to follow its usual jurisprudential rules for resolving First Amendment cases.

In place of its usual doctrinal approaches, the Court has embraced analytical approaches that invite case-by-case analysis. Although in the context of public-employee speech, the Court has established an alternative, multi-step framework beginning with *Garcetti* and ending with *Pickering*,[206] the application of these steps is subject to fact-specific manipulation. *Pickering* requires courts to engage in the uncertain exercise of balancing incommensurate values: the value of the speech and the government's interest in regulating that speech.[207] In the government speech and student speech contexts, there are no analytical frameworks. Instead, the Court has directed lower courts to consider a variety of factors that may or may not be determinative in any particular case.[208]

III. A WINDOW TO THE FUTURE

It is easy to dismiss the Court's decisions in "special" or "managerial" contexts as existing separate and apart from the rest of the Court's First Amendment jurisprudence. Indeed, the Court makes very little effort to reconcile its decisions in these areas with the rest of its case law.[209] But as the Court's First Amendment jurisprudence continues to evolve, another way to look at these cases is that they indicate where the Court's decisions in this area are

203. Walker v. Tx. Div., Sons of Confederate Veterans, 576 U.S. 200, 210–14 (2015).

204. Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).

205. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

206. *Garcetti*, 547 U.S. at 421; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

207. The Court's approach to the *Garcetti* inquiry in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2002), was also highly fact specific. There, the Court held that a football coach praying quietly at midfield at the end of football games was private speech and not speech within the scope of his job duties. Instead, the Court held, he engaged in that speech during a time when he was free to engage in personal matters. *Id.* at 2425. The dissent disagreed, arguing that "[f]or students and community members at the game, Coach Kennedy was the face and the voice of the District during football games." *Id.* at 2443 (Sotomayor, J., dissenting).

208. *Mahanoy*, 141 S. Ct. at 2046–48.

209. *Id.* at 2046, 2059–61 (Thomas, J., dissenting).

heading. A close look at *Mahanoy* exposes several issues in the Court's First Amendment jurisprudence that it has never fully resolved, including the role of history and tradition; whether speech on matters of public concern receives more protection than other types of speech; and whether content-based speech restrictions should always be subject to strict scrutiny.

A. Originalism

Originalism is a "contentious and contested" mode of constitutional interpretation.[210] Originalists vary in their approaches but typically attempt to determine the "original" meaning of the Constitution. They believe the Constitution has a "fixed, knowable meaning."[211] Early originalists focused on the intent and expectations of the drafters ("original intent") and then the understanding of the ratifiers ("original understanding").[212] In light of criticisms that subjective expectations and intentions should not control interpretation of the law, that the Constitutional Convention met in secret, and that it is "virtually impossible to reconstruct" the intentions of the many members of the ratifying conventions,[213] most originalists these days ask what people around at the time of ratification of the Constitution (or the Fourteenth Amendment) would have thought it meant ("public-meaning originalism").[214] Another way to put this is to ask for the views of "an ordinary and reasonable and informed user of the English language at the time the Constitution was promulgated."[215]

---

210. Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 329 (2010).

211. Mary Sarah Bilder, *The Emerging Genre of* The Constitution*: Kent Newmyer and the Heroic Age*, 52 CONN. L. REV. 1263, 1266 (2021); *see also* Lawrence B. Solum*, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019) ("Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors.").

212. *See* Bunker & Calvert, *supra* note 210, at 329–31.

213. Michael C. Dorf, *Why Not to Be an Originalist*, DORF ON LAW (Nov. 14, 2019, 7:00 AM), http://www.dorfonlaw.org/2019/11/why-not-to-be-originalist.html.

214. *See* Bunker & Calvert, *supra* note 210, at 331–32; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–52 (1989) (discussing originalism); Robert W. Bennett, *Originalism: Lessons from Things that Go Without Saying*, 45 SAN DIEGO L. REV. 645, 646 (2008) ("Originalism . . . is the view that the appropriate guideposts for constitutional interpretation are 'original' ones, sources that probe constitutional 'meaning' by reference to the meaning entertained by the people around at the time the Constitution was enacted.").

215. Bennett, *supra* note 214, at 647.

At the end of its 2021 Term, the Court decided three blockbuster cases in which it relied on a "text, history, and tradition" version of originalism. In *Dobbs v. Jackson Women's Health Organization*,[216] Justice Alito's majority opinion attacked *Roe v. Wade*[217] as lacking "any grounding in the constitutional text, history, or precedent" and "ma[king] little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based."[218] The Court asserted that questions about what constitutes a "liberty" interest protected under the Due Process Clause should be based on history and tradition and not on the basis of "unprincipled," "freewheeling judicial policymaking."[219] Similarly, in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[220] Justice Thomas's majority opinion held that means-end scrutiny, such as strict or intermediate scrutiny, does not apply in the Second Amendment context.[221] Instead, the Court held any governmental gun regulation "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[222] The Court explains that strict and intermediate scrutiny, or interest-balancing approaches, are inappropriate because "the very enumeration of the right" means that the government does not get to determine that scope of that right on a case-by-case basis.[223] Finally, in *Kennedy v. Bremerton School District*,[224] the Court overruled the *Lemon* test in favor of a focus on "historical practices and understandings" with a focus on "original meaning and history."[225]

Some commentators have attacked the Court's text-and-history approach to fundamental rights, and these attacks have included arguments that the Court distorted and cherrypicked from the historical record.[226] More generally, many scholars have attacked

216. 142 S. Ct. 2228 (2022).
217. 410 U.S. 113 (1973).
218. *Dobbs*, 142 S. Ct. at 2237.
219. *Id.* at 2248.
220. 142 S. Ct. 2111 (2022).
221. *Id.* at 2127.
222. *Id.*
223. *Id.* at 2129 (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).
224. 142 S. Ct. 2407 (2022).
225. *Id.* at 2428 (quoting Town of Greece v. Galloway 572 U.S. 565, 576 (2014)).
226. *See, e.g.*, Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen's Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/; *see also* Aziz Huq, Roe *Was Overturned Because of Politics, Not the Constitution*, POLITICO (June 28, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/28/politics-

originalism as a mode of constitutional analysis.[227] In the early days of originalism in the late 1970s and early 1980s, it was closely linked with judicial restraint, but that is no longer the case.[228] Although originalism claims to offer a more definitive method for interpreting the Constitution than "living constitutionalism," it does not offer definitive answers and is not apolitical.[229] The Constitution is full of ambiguities, especially when it comes to phrases like "the freedom of speech," "equal protection," and "due process." The drafters, ratifiers, and the public did not necessarily share a common understanding of what the Constitution meant.[230] Sifting through the historical record requires expertise most lawyers and judges do not possess.[231] Another issue is what level of specificity or generality to give the historical understanding when drawing analogies between historical laws and understandings and contemporary ones.[232] For example, in *Kennedy*, the Court said that historical practice is what determined the meaning of the Establishment Clause, but it did not ask whether it was the historical practice for teachers to pray at football games either when the Constitution was ratified or at any other potentially relevant time.[233] Some scholars have also questioned whether the drafters or ratifiers intended for future jurists to use originalism as an interpretive tool or that they intended the text of the Constitution to be the only source of higher law.[234]

---

overturned-roe-00042625 (arguing the Court's recent opinions reveal that "its constitutional method combines the patina of rigidity with a practical elasticity to allow for wide-ranging social change").

227. *See, e.g.*, Dorf, *supra* note 213 (offering criticisms of originalism, including the observation that public-meaning originalism is not much different from living constitutionalism).

228. *Id.*

229. *Id.*

230. *Id.*

231. Bennett, *supra* note 214, at 647 (noting "historiographic problems" with originalism and questions about "whether judges, or law professors for that matter, are equipped to do, or to evaluate, that kind of work").

232. *Id.*; *see also* Joseph Blocher & Darrell A.H. Miller, *A Supreme Court Head-Scratcher: Is a Colonial Musket 'Analogous' to an AR-15?*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html (arguing that determining whether a challenged firearms regulation is analogous to a historical regulation is "perilous work" and "will certainly depend on the level of generality at which courts conduct the inquiry—an interpretative choice that often enlarges rather than reduces judicial power").

233. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (citing Town of Greece v. Galloway 572 U.S. 565, 576 (2014)).

234. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (arguing that "the founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law").

The point here is not to weigh in on the merits of these recent opinions or their methodology but rather simply to point out the dramatic contrast between them and most of the Court's First Amendment cases. Although Justice Thomas's majority opinion in *Bruen* asserted that the Court's First Amendment jurisprudence relies on history and tradition,[235] this is not entirely correct. At best, text, history, and tradition have played a very limited and inconsistent role in the Court's free speech cases. As former Judge Robert Bork once said, relying on originalist intent in freedom of expression cases is tricky because the "framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."[236] Under a Blackstonian view of the First Amendment, the freedom of speech and the press means simply no prior restraints; subsequent civil or criminal sanctions are permissible.[237] The question then is whether there is any reason to doubt that this Blackstonian view was the public understanding of what the First Amendment meant. Some scholars have suggested looking at the acquittal of Peter Zenger and the defeat of the Sedition Act of 1798 as providing a more robust view of how the public understood the First Amendment close to the time of its ratification, but it is hardly clear what these events truly tell us about the original understanding of the First Amendment.[238] The Supreme Court relied on the repudiation of the Sedition Act in its landmark *New York Times Co. v. Sullivan* decision, where it held that false defamatory statements about public officials could be actionable only upon proof of actual malice (knowledge of falsity or reckless disregard to truth or falsity).[239] At the same time, common-law defamation claims appear to have been alive and well at this time, which makes it hard to determine the historical lesson.[240] Looking to the public understanding of the First Amendment throughout the nineteenth century until ratification of the Fourteenth Amendment (which made the First Amendment applicable to the States) is not fruitful given

235. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct.2111, 2130 (2022) (stating that considering only text, history, and tradition to evaluate Second Amendment questions "accords with how we protect other constitutional rights").

236. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

237. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 32 (1992) ("If Blackstone's view of free speech was the *real* original meaning of the First Amendment, then arguably 90 percent of modern free speech jurisprudence—which goes well beyond Blackstone's prohibition against prior restraints—is intellectually dishonest and historically illegitimate.").

238. *See, e.g.*, Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 17–22 (2011) (discussing the *Zenger* trial and Sedition Act of 1798).

239. 376 U.S. 254, 276, 279–80 (1964).

240. Rosenthal, *supra* note 238, at 22.

the limited evidence suggesting that the public had moved away from a Blackstonian understanding.[241]

Many Justices across the political spectrum have invoked history and tradition at various times, but rarely does originalism play a key role in determining the outcome of a First Amendment issue. One key exception is when the Court is asked to recognize a new category of unprotected or lesser protected speech, although the Court embraced this approach only relatively recently. As mentioned earlier, in *Stevens* the Court rejected the government's argument that the recognition of new categories should be based on a cost-benefit analysis.[242] The Court said that the government's "ad hoc balancing test" was "startling and dangerous"[243] because it offered "freewheeling authority" that would be "highly manipulable."[244] To reach this holding, the Court had to somewhat unconvincingly distinguish its prior decision in *Ferber*[245] recognizing child pornography as a new category of unprotected expression, stating that the decision rested on the tight connection between the availability of these materials and harm to children.[246] Likewise, in *Brown v. Entertainment Merchants Ass'n*,[247] the Court applied its holding in *Stevens* and concluded that there was no "longstanding tradition" prohibiting children from accessing violent content.[248] Justice Thomas wrote a lonely dissent arguing that history demonstrated that there is "no right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians."[249]

In First Amendment cases, Justice Thomas has been unable to convince any of his fellow Justices to join his historical approach to the scope of these rights.[250] In *Mahanoy*, Thomas continued to struggle to win over his colleagues. Every other Justice signed on to Breyer's majority, even though its analysis did not rest on a discussion of the history and tradition of student speech rights in public schools.[251]

If Thomas ever is able to win majority support for his approach to First Amendment questions, his *Mahanoy* dissent demonstrates

241. *See id.* at 22–24.
242. United States v. Stevens, 559 U.S. 460, 471 (2010).
243. *Id.* at 470.
244. *Id.* at 472.
245. New York v. Ferber, 458 U.S. 747 (1982).
246. *Stevens*, 559 U.S. at 471.
247. 564 U.S. 786 (2011).
248. *Id.* at 795.
249. *Id.* at 821 (Thomas, J., dissenting).
250. Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMMC'N L. & POL'Y 385, 418 (2012).
251. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2042 (2021).

what the originalist approach might look like.[252] In addition to considering the text of the First Amendment, which reveals very little in most instances, originalists like Thomas consider what laws, practices, and "understandings" were in place when the relevant constitutional provision was ratified.[253] Perhaps because the historical record regarding the framers' understanding of the meaning of the First Amendment is so sparse, Thomas feels free to cite any historical materials, leaving him open to claims that his historical approach simply seeks to find whatever sources support the outcome he wants to reach.[254] His approach also does not consider any changes that may have occurred between that time and the present, including changes in technology.[255]

We have also seen Justice Thomas stand alone in his calls to overrule *New York Times Co. v. Sullivan* on the grounds that it is not true to the history and practice of defamation law.[256] Justice Gorsuch has authored his own separate opinions suggesting that the Court revisit *Sullivan*, but the primary basis for his argument is that the mass media landscape has changed significantly since *Sullivan* was decided.[257] Although it is possible that the Court might one day revisit *Sullivan*, the lack of votes to support Thomas's approach suggests a majority of the Court will not embrace an originalist approach to do so.

Mahanoy is certainly not the first time the Court engaged in interest balancing and not historical analysis in determining the scope of First Amendment protection. What is notable is that it was decided so close in time to other major constitutional decisions where a majority of the Court embraced originalism as the appropriate mode of constitutional analysis. At the very least, *Mahanoy* reveals that the Court is at best deeply ambivalent about the role originalism—of any kind—should play in interpreting free speech cases.

252. *Id.* at 2059 (Thomas, J., dissenting).

253. Bennett, *supra* note 214, at 646.

254. *See* Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretative Methodology, and Freedom of Expression*, 17 COMMC'N. L. & POL'Y 329, 344 (2012) ("The problem with Justice Thomas's amateur social history, of course, is that it in almost no way connects with anyone's (real or hypothetical) understanding of the Constitution or the First Amendment.").

255. *See* Huq, *supra* note 226..

256. McKee v. Cosby, 139 S. Ct. 675, 676, 682 (2019) (Thomas, J., concurring in denial of certiorari); Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., No. 21-802, slip op. at 3 (U.S. June 27, 2022) (Thomas, J., dissenting from denial of certiorari).

257. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2424 (2021) (Gorsuch, J., dissenting from denial of certiorari).

B. What Matters

Given that *Mahanoy* is consistent with the Court's general rejection of originalism as providing the appropriate analytical framework for resolving most First Amendment questions, it is useful to consider what the Court found useful instead. Because the Court regards public schools as offering a "special circumstance," it appears to be liberated from its usual approach to First Amendment questions.[258] It does not feel bound to apply strict scrutiny to every content-based, or even viewpoint-based, speech regulation. It wholeheartedly embraces greater protection for political and religious speech (and lesser protection for other kinds of expression).[259] It does not shy away from sliding scales and balancing tests, especially in the face of new technology.[260] Finally, the marketplace of ideas remains central to its conception of the purpose of the First Amendment.[261]

First, *Mahanoy* suggests that the Court may relax its adherence to its categorical approach to the First Amendment. In *Mahanoy*, the Court first notes that the speech at issue did not fall within any of the recognized categories of unprotected or lesser protected expression, but that observation only begins the analysis.[262] The Court recognizes that schools can have all sorts of important reasons to regulate student speech, including but not limited to the possibility that it will substantially disrupt the operation of the school.[263]

Second, although the Court has frequently stated that political speech, or speech on matters of public concern, receives the highest level of First Amendment protection, it rarely offers less protection for non-public-concern (or non-political) speech. (One exception is in the defamation context.[264]) *Mahanoy* suggests that in the future, the Court might embrace an approach to the First Amendment that actually offers more robust protection to political speech and lesser protection to speech that falls outside of this category. To be sure, defining what constitutes "political speech" or a "matter of public concern" can be a difficult inquiry depending on the context and other circumstances of the speech, but many scholars have called for this approach to the First Amendment for a very long time.[265]

---

258. *See supra* text accompanying note 77.

259. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

260. *Id.* at 2047–48 (weighing the interests of a school against those of a student and other factors in regulating off-campus speech).

261. *Id.* at 2046.

262. *Id.*

263. *Id.* at 2047–48.

264. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756–57 (1985).

265. *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 304, 307–08 (1982).

Third, *Mahanoy* suggests that the Court may move away from its categorical approach to viewpoint and content-based speech restrictions. Rather than suggest that viewpoint-based speech restrictions are subject to strict scrutiny and therefore often unconstitutional, *Mahanoy* embraces the lesser statement that schools need to teach students to tolerate unpopular speech.[266] The Court has never been entirely clear in its student speech cases whether viewpoint-based speech regulations are permissible, and the public employee cases also fail to embrace any sort of prohibition against such kinds of speech regulation.[267] What tends to matter instead is whether the regulated speech has value and how that value stacks up against the government's interest in restricting that speech.

Fourth, because *Mahanoy* is one of the Court's rare social media cases, it offers a window into how the Court will approach First Amendment cases involving new technologies. As in *Packingham v. North Carolina*[268] (and even in cases like *Brown v. Entertainment Merchants Ass'n*), the Court continues to approach new technology cautiously.[269] Although the Court recognizes that speech on new platforms can cause certain types of harm, it is not quick to condemn these platforms.[270] Instead, *Mahanoy* illustrates a desire to move slowly as the technology continues to develop, as well as an awareness that traditional First Amendment principles might not work as well in these new and changing circumstances.

Finally, in *Mahanoy*, almost the entire Supreme Court embraced the marketplace of ideas theory of the First Amendment. Liberals and conservatives alike signed on to an opinion noting the importance of the free exchange of ideas to our democracy.[271] This does not prove that other theories of the First Amendment will disappear from the pages of the Supreme Court reporter. Nevertheless, the Court's explicit embrace of the marketplace of ideas theory, despite the hefty criticism this theory of freedom of speech has received in recent years,[272] indicates that the Court will continue to cast a wary eye on any government speech regulations that attempt to silence unpopular or offensive speech.

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

267. *See supra* text accompanying note 155.

268. 137 S. Ct. 1730 (2017).

269. *Id.* at 1736; Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 790, 801 n.8 (2011).

270. *Packingham*, 137 S. Ct. at 1737.

271. *See supra* text accompanying note 261.

272. *See, e.g.*, Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1–2; Spencer Bradley, Comment, *Whose Market is it Anyway? A Philosophy and Law Critique of the Supreme Court's Free-Speech Absolutism*, 123 DICK. L. REV. 517, 537 (2019).

CONCLUSION

It is easy to dismiss the *Mahanoy* case as a relatively silly and inconsequential case that exists comfortably outside the heart of the Court's First Amendment jurisprudence due to the "special circumstances" of the public-school environment. But it is precisely because the Court views student speech rights as a special circumstance that it feels free to focus on the foundational values of the First Amendment. The Court's rejection of "originalism" as a mode of constitutional analysis and its embrace of an ad hoc balancing test that focuses on core values of the First Amendment may indicate the future direction of the Court's free speech jurisprudence. At the very least, it reveals that the Court is deeply confused about the path forward.