Our Dumb First Amendment: The Case of the Foul-Mouthed Cheerleader

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OUR DUMB FIRST AMENDMENT: 
THE CASE OF THE FOUL-MOUTHED CHEERLEADER

D. A. JEREMY TELMAN*

ABSTRACT

This Article applies the rights mediation model from Jamal Greene’s book How Rights Went Wrong in the context of public-school students’ rights to free expression. Doing so highlights the flaws in the rights absolutism that currently informs our constitutional jurisprudence. Under rights absolutism, once a court determines that state action burdens First Amendment interests, courts protect the First Amendment interest with such rigor that they ignore all other interests implicated in the litigation. In the case of the foul-mouthed cheerleader, Mahanoy Area School District v. B.L., a rights mediation model might not have changed the outcome, but it would have accorded more weight to the interests of teachers, coaches, the school district, and other students affected by B.L.’s expression.

Extrapolating from this case, the Article illustrates how rights mediation changes the nature of rights adjudication. Rights absolutism encourages litigants to pursue impact litigation in the hope of establishing broad precedents that occupy the field. As B.L.’s case demonstrates, such precedents limit courts’ options, encourage extreme positions, and prevent parties and localities from working towards compromise solutions suitable for their own communities and tailored to their circumstances. First Amendment absolutism infantilizes us by treating all speech as equally valuable, dumbing down civil discourse. Rights absolutism generally infantilizes our politics by allowing distant courts to make decisions better worked out through democratic processes.

Courts are still necessary as a check on a tyranny of the majority. Courts must intervene where Equal Protection or procedural Due Process interests are implicated. Those doctrines suffice to safeguard the free expression rights of

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public-school students. Allowing Equal Protection and Due Process analyses to inform free speech doctrine would make our First Amendment jurisprudence more consistent with that of other doctrinal areas affecting the constitutional rights of public-school students.

I. INTRODUCTION ..............................................................563

II. B.L. AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY ......................................................566

III. THE PATH FROM BLACK ARM BANDS TO “FUCK EVERYTHING” .567

   A. First Amendment Law in the Shadow of Tinker ...............567

   B. The Lower Courts’ Decisions in B.L.’s Case ..................570

   C. Applying First Amendment Precedent to B.L. ...............575

      1. Justice Breyer’s Majority Opinion in B.L. ..........575

      2. Justice Breyer’s Crabbed Pragmatism ....................577

      3. B.L. Is Wrong, Even under Tinker .........................581

   D. Regulation of Public-School Student Expression after B.L. 583

IV. B.L. AND THE PURPOSES OF FIRST AMENDMENT SPEECH PROTECTIONS.................................................584

   A. Grounding First Amendment Jurisprudence in the First Amendment .................................................................584

      1. The Argument from Truth .....................................586

      2. The Argument from Democracy ..............................586

      3. The Argument for Toleration ..................................587

      4. The Arguments from Autonomy and Dignity ...............588

      5. The Slippery Slope .............................................589

   B. The Reasons for Protections of Expression Are Not Implicated in B.L.’s Expression ........................................590

      1. The Truth and Tolerance Justifications ....................591

      2. Speech and Democratic Process ..............................593

      3. Autonomy and Self-Actualization Arguments ............594

      4. Slippery Slope Arguments ....................................597

   C. Conclusion: The Principles Underlying Constitutional Protections Are Not Furthered by Protecting B.L.’s Snaps ..597

V. REPLACING RIGHTS ABSOLUTISM WITH A MEDIATION OF INTERESTS..........................................................597

   A. The Constitution Does Not Require Rights Absolutism ....598

   B. An Alternative Rubric .............................................602

      1. The Nature of the Expression ................................602

      2. The Level of Disruption to Curricular or Extra-Curricular Activities ..................................................603

      3. Speech Meriting Lesser Protection ..........................603

      4. Violation of School Rules or Undertakings ...............604

      5. Effect on Others .................................................606

      6. The Appropriateness of the Discipline .....................607
C. The Role of Courts in Policing Due Process and Equal Protection Violations ........................................ 609
   1. Procedural Due Process ........................................ 610
   2. Equal Protection ............................................. 611

VI. CONCLUSION: A FIRST AMENDMENT FOR ADULTS AND THEIR CHILDREN ................................................................. 612

I. INTRODUCTION

In 2021, the U.S. Supreme Court determined that a public school violates the First Amendment when it disciplines a teenager for a profane Snap expressing her outrage upon being passed over for the school’s varsity cheerleading squad.\(^1\) People may differ on whether such speech should be legally protected. I could happily live in a world in which communities were left to themselves to weigh all the facts and determine whether the school’s response, a one-year suspension from cheerleading, was appropriate. I regret that I live in a world in which we think that such matters raise constitutional questions that require the attention of the U.S. Supreme Court.

In its first case addressing the free-expression rights of public-school students, *Tinker v. Des Moines Independent Community School District,*\(^2\) the Supreme Court faced a legal question for which the constitutional text provided no useful guidance. The Tinkers were engaged in a political protest of the Vietnam War at their public school that took the form of “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”\(^3\) Faced with core expression on the most important political issue of the day, the Court reasoned that the First Amendment required that such expression be protected so long as it did not cause “material disruption” of classroom activities or an “invasion of the rights of others.”\(^4\) The Court has subsequently cabined *Tinker* in response to particular circumstances without articulating a new standard.\(^5\)

This Article focuses on two independent problems: the expansion of First Amendment speech protections to encompass nearly all sensible utterance and the rights absolutism\(^6\) that creates a rigid rights hierarchy and forces all competing interests to bow before the right to freedom of expression. In our system, certain rights are accorded near-absolute protection (heightened scrutiny), while others are accorded almost none (rational basis review). As a

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\(^1\) Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
\(^3\) *Id.* at 508.
\(^4\) *Id.*
\(^5\) *See* discussion *infra* Part II.A.
\(^6\) *JAMAL GREENE, HOW RIGHTS WENT WRONG* (2021). Greene’s preferred term is “rightsism” but I prefer to avoid that neologism. *Id.* at xix.
consequence of rights absolutism, courts issue sweeping rules in response to conflicts over utterances and lower courts struggle to apply those broad rules to very different fact scenarios. Jamal Greene, drawing inspiration from foreign models, proposes that courts engage in rights mediation rather than winner-take-all adjudication. If our Supreme Court took more cases but decided them more narrowly, it would eventually have to decide fewer cases, because the small stakes in such cases would not justify the costs of litigation. The result would be what many, both right and left, have long advocated: taking the Constitution away from the courts and allowing legal conflicts to be addressed through local political processes.  

The Constitution need not resolve every conflict among adults, including adults who litigate on behalf of their children. As Gary Simson recently remarked, “[i]n recent years a broad, but unspoken, consensus has existed on the Court for deciding free speech cases with an almost insuperable presumption of unconstitutionality and . . . the result is a system of freedom of expression in the United States that indefensibly and dangerously favors speech.” We can be a better version of ourselves if we engage in self-regulation through democratic processes and treat the Constitution as laying out general substantive and procedural floors below which our conduct may not permissibly sink. When we absolutize the right to freedom of expression, we protect a lot of petty, nonsensical, trivial, inconsequential, and apolitical statements that merit no more constitutional protection than other interests to which the court accords only rational basis protection. As a result, we dumb down the level of public discourse and render insipid our civic engagement with and through our political institutions. 

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The Article proceeds as follows. Part I lays out the facts of Mahanoy Area School District v. B.L. Part II reviews the Supreme Court’s jurisprudence on the free-expression rights of public-school students and the courts’ attempts to apply that jurisprudence to B.L.’s case. This Part also lays out the procedural history of B.L., including a discussion of some Third Circuit precedent on which the lower courts relied in deciding B.L.’s case.

Part III reviews the justifications that courts and legal scholars have traditionally provided for granting broad constitutional protection for free expression. Those theoretical grounds for broad constructions of the First Amendment do not justify the level of protection granted to B.L.’s speech. While the B.L. opinion gestures towards the “truth” and “democratic accountability” justifications for free-speech protections, the opinion does a poor job of establishing a connection between those goals and the Court’s decision to insulate a cheerleader from discipline for engaging in precisely the sort of speech in which she had agreed not to engage when she joined the cheerleading squad. Moreover, prior caselaw did not mandate the outcome in B.L. The Court, applying precedent mechanically, determines that, once speech falls within the ambit of the First Amendment, courts must accord that speech maximal protection. In so doing, the Court did not further any purpose that the First Amendment is supposed to serve. On the contrary, treating frivolous expression the same as serious expression devalues all expression.

Part IV proposes an alternative jurisprudence of the free expression rights of public-school students, one that does not engage in rights absolutism and does not treat every rights claim as necessitating court intervention. The Framers created a document for adults to use. We engage in auto-infantilization when we look to courts to resolve all interpersonal conflicts in accordance with their interpretation of an eighteenth-century document. Instead, we should first identify the free-expression interests that the First Amendment endeavors to protect. The next step is to determine what level of protections the Constitution ought to provide for student speech in light of the interests implicated in each particular case. Conflicts among competing interests are not best resolved through an application of abstract principles derived from prior fact patterns. They are resolved through an individualized weighing of the particular facts of each case. This is the rights-mediation approach.

The alternative approach developed here suggests that most of the Court’s post-Tinker interventions in this area were unnecessary. Given the complexities involved, courts should be hesitant to second-guess the resolutions of such conflicts achieved through local institutions. Courts need to step in where procedural due process or equal protection violations lead to discriminatory or heavy-handed treatment by local officials. Absent such violations, courts ought to defer to local decision-making processes about student discipline, unless the school engages in the suppression of political speech that does not disrupt public schools’ educational missions. Such a due-process approach would bring the
Court’s public-school jurisprudence relating to the First Amendment in line with its jurisprudence relating to the interaction between the regulations needed to foster a safe learning environment and other constitutionally-protected rights. Part V briefly concludes.

II. B.L. AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY

After participating as a junior-varsity cheerleader during her freshman year, B.L. tried out for the varsity cheerleading squad. She also wanted to be the right fielder on a softball team in a private league. She did not get either of her wishes, and she was especially irked because the cheerleading coaches chose an incoming freshman for the varsity cheerleading team, while she was relegated to another year on the junior-varsity team. According to Justice Breyer, B.L. “used, and transmitted to her Snapchat friends, vulgar language and gestures criticaising both the school and the school’s cheerleading team.” Specifically, B.L. posted two photos to her Snapchat “story,” which made them visible to her 250 Snapchat “friends” for twenty-four hours. The first showed B.L. and a friend raising their middle fingers to the camera. It bore the caption, “fuck school fuck softball fuck cheer fuck everything.” The second Snap read, “Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn’t matter to anyone else?”

Although Snaps disappear, they can be photographed. Other students photographed B.L.’s snaps and shared them with members of the cheerleading squad, and one cheerleader shared the images with her mother, one of the squad’s two coaches. According to Justice Breyer, “several cheerleaders and other students approached the cheerleading coaches ‘visibly upset’ about B.L.’s posts,” and discussion of the posts continued during an algebra class taught by one of the cheerleading coaches.

10 Id. at 2043.
11 See Joint Appendix at *27, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 (testimony of B.L. at preliminary injunction hearing of Oct. 2, 2017, stating that she was assigned to play left field).
13 Id. at 2042. As discussed infra Part II.C.2, Justice Breyer’s characterization of her posts as a “criticism” does not accord with B.L.’s understanding of her own communication.
14 Id. at 2043.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
The coaches, after discussions with the school principal, decided to suspend B.L. from the junior varsity squad for one year. Notwithstanding B.L.’s apologies, their decision was supported by the school’s athletic director, principal, superintendent, and school board. B.L.’s mother remonstrated with the school officials. B.L.’s father remonstrated with school officials. When their pleas for mercy failed, they sued the School District (the “District”).

III. THE PATH FROM BLACK ARM BANDS TO “FUCK EVERYTHING”

B.L. illustrates what happens when rights absolutism hijacks a commonsense rule produced by common-law constitutionalism. The Tinker standard now applies to nearly all student expression, which schools can only regulate if disruptive or if it falls into a category of unprotected speech. For the lower courts in B.L., the only question was whether schools had any authority to regulate off-campus speech. The Court, cognizant that students do not shed their communicative abilities at the schoolhouse gate, wisely rejected a bright-line rule. Still, it missed an opportunity in B.L. to formulate a more contextual approach to the mediation of free speech rights and school and the need for discipline and order when teachers engage in oversight of extra-curricular teams.

A. First Amendment Law in the Shadow of Tinker

In Tinker, the Court famously observed that students do not “shed their constitutional rights to freedom of expression at the school house gate.” In that case, a group of students wore black armbands to school to protest the Vietnam War. Warned to desist or face disciplinary action, some of them refused. The school suspended them indefinitely. The Court held that doing so violated the students’ First Amendment rights.

None of the Supreme Court cases subsequent to Tinker have addressed such overtly political speech. In Fraser v. Bethel School District No. 403, a student delivered a vulgar speech, purporting to advocate for a friend’s election

20 Id.
21 Id.
22 Id.
25 Tinker, 393 U.S. at 504.
26 Id.
27 Id. at 514.
to a student government position. Fraser set himself the challenge of filling his short speech with as much puerile sexual innuendo as possible. He did this despite being warned that delivering the speech would have “severe consequences.” He was suspended for three days, eventually reduced to two.

While the Court recognized the difference between Fraser’s expression and the Tinkers’, the case turned on the disruptive nature of Fraser’s presentation. “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”

The Court could have held that lewd speech directed at fourteen-year-olds gets no First Amendment protection, as the Court recognized the power of schools “to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.” Instead, it treated Fraser’s speech no differently than it would have treated lewd political speech. “Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.”

But there was no need for the analogy. The school did not discipline Fraser for the political content of his speech, to the extent that it had any. Nobody claimed that he had been disciplined because he advocated for his friend’s candidacy. While a school could not single him out for punishment in a way that raised due process or equal protection concerns, his speech raised lesser constitutional concerns than did the Tinkers’.

The next case in the Tinker line, Hazelwood School District v. Kuhlmeier, adds little to the analysis for our purposes because of its idiosyncratic facts. That case was about a school’s power to censor a school newspaper whose publication it funded. The Court found that the newspaper was not a public forum and that the school was entitled to regulate its content, “in any reasonable manner.” That standard, rather than Tinker, governed. Tinker applies when “determining whether a school may punish student

29 See id. at 687 (Brennan, J., concurring) (providing an extended quotation from the offending speech).
30 Id. at 678.
31 Id. at 678–79.
32 Id. at 681.
34 Fraser, 478 U.S. at 684.
35 Id. at 681.
37 Id. at 262 (noting that the school covered all but $1,166.84 of the $4,668.50 in costs for the publication of the newspaper).
38 Id. at 270.
39 Id.
expression,” not when determining whether “a school may refuse to lend its name and resources to the dissemination of students expression.” \(^4\) In its ruling on B.L.’s motion to preliminarily enjoin the school from punishing her, the district court found it notable that in her Snap, B.L. did not reference her school, nor were she or her friend wearing their school uniforms or anything else that would identify their school. \(^41\) These facts took the case outside of the Kuhlmeier framework. A more holistic view might recognize that some of the interests implicated in Kuhlmeier were also implicated in B.L.’s Snap. When a cheerleader speaks of her school and of cheerleading, she reflects on the school and its cheerleading program, even if she is not in uniform. Cheerleaders do not always have to be “on,” and they should be permitted to express negative views about their school or their cheerleading team at least to some degree. However, courts ought not to treat constitutional interests like on/off switches. Schools have an interest in the way their cheerleaders speak about their school and their cheerleading program.

In Morse v. Frederick, \(^42\) school principal Deborah Morse allowed students to observe the Olympic torch parade as it passed through town, in what the Court characterized as “an approved social event or class trip.” \(^43\) Joseph Frederick did not attend school that day, but he did attend the event, joining some friends across the street from the school to unfurl a large banner that read “BONG HiTS 4 JESUS.” \(^44\) Frederick’s behavior was hardly the most obnoxious on display that day. The Court noted that not all students waited patiently for the arrival of the torch. \(^45\) “Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates.” \(^46\) Principal Morse nonetheless immediately approached Frederick and his friends and demanded that they take down their banner. \(^47\) When Frederick refused, she suspended him for ten days. The banner allegedly encouraged drug use and thus undermined the school’s anti-drug message. \(^48\)

Morse should have presented the most difficult factual scenario in this line of cases, but the majority construed the facts so as to make it seem easy. Frederick’s expression did not take place within the school. However, it was enough for the Court that it occurred during what Chief Justice Roberts termed “a school-sanctioned and school-supervised event.” \(^49\) The Court found that

\(^{40}\) Id. at 272–73.
\(^{42}\) 551 U.S. 393 (2007).
\(^{43}\) Id. at 397.
\(^{44}\) Id.
\(^{45}\) Id.
\(^{46}\) Id.
\(^{47}\) Id. at 396.
\(^{48}\) Id. at 398. His suspension was later reduced to eight days. Id.
\(^{49}\) Id. at 396.
Principal Morse reasonably construed Frederick’s sign as promoting drug use in direct opposition to the school’s anti-drug educational priorities. The Court thus upheld Frederick’s suspension because his speech was disruptive under the Tinker standard, in the sense that it undermined one of the school’s educational priorities.

B. The Lower Courts’ Decisions in B.L.’s Case

Adhering to a hasty decision made on an incomplete record in a hearing for a preliminary injunction, the District Court found that B.L.’s Snaps had not caused “substantial disruption”\(^ {50} \) at the school, applying the standard that the Court first articulated in Tinker.\(^ {51} \) The Third Circuit adopted a blanket rule that the school could not discipline students for off-campus speech.\(^ {52} \) The District appealed to the Supreme Court, and the Court agreed to hear the case to address the Third Circuit’s blanket rule.\(^ {53} \)

This Article focuses on the Supreme Court’s attempts to adapt the Tinker rule to unique situations that cry out both for deference to local authorities and for a more contextual response than the Court’s application of idiosyncratic precedents provides. Before doing so, however, it is worth pausing to note that the lower courts’ interventions are, if anything, far worse. The District Court enjoined the District from disciplining B.L. In so doing, the District Court did not say that the punishment was excessive; because the District Court found that B.L. was engaged in constitutionally-protected behavior, the court held that the District could not discipline B.L. at all.\(^ {54} \)

The District Court seems to grant no deference whatsoever to the District’s decision-making process, making factual determinations that B.L.’s expressive activity was not disruptive in an expedited proceeding.\(^ {55} \) It adhered to

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\(^ {50} \) In ruling on B.L.’s motion for a preliminary injunction, the district court stated that the District had alleged no substantial disruption. B.L. v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607, 612 n.7 (M.D. Pa. 2017). Eighteen months later, in granting B.L.’s motion for summary judgment, the court rejected the District’s arguments that B.L.’s Snaps caused disruption. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 443–44 (M.D. Pa. 2019).

\(^ {51} \) See Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503, 509 (1969) (“Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”).

\(^ {52} \) Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021).

\(^ {53} \) Id.

\(^ {54} \) B.L., 376 F. Supp. 3d at 444 (summarizing precedent as establishing that “coaches cannot punish students for what they say off the field” unless it causes substantial disruption or bears the imprimatur of the school).

\(^ {55} \) B.L., 289 F. Supp. 3d at 612 n.7.
those determinations in its final ruling, despite evidence in the record that her Snap was in fact disruptive. According to the District Court, B.L. and her mother reviewed and signed forms laying out cheerleading rules before her tryouts for the varsity team. Those rules provide, among other things: “There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.” The District Court rejected B.L.’s contentions that the District’s policy was void for vagueness or overbreadth and that the District was categorically prohibited from regulating off-campus speech.

Nonetheless, the District Court felt itself constrained by prior Third Circuit authority to hold that the District could not punish a student for lewd or profane speech created off-campus. Following Third Circuit precedent, the District Court refused “to offer a different framework for analyzing student speech cases where the punishment for speech involved a suspension from an extracurricular activity as opposed to a suspension or expulsion from school.” In other words, the District Court chose not to consider the facts of the case before it. It elected to treat unlike cases alike. No Third Circuit precedent justified so broad a holding. The District Court’s decision is First-Amendment rights absolutism at its worst.

In two prior en banc cases decided on the same day, Layshock v. Hermitage School District and J.S. v. Blue Mountain School District, the Third Circuit recognized two contexts in which schools could discipline students for expression. Following Tinker, schools could discipline students for speech that causes substantial disruption. Following Fraser, schools could discipline students for profane speech. The District Court incorrectly treated Fraser as an exception to Tinker’s “substantial disruption” requirement.

56 See B.L., 376 F. Supp. 3d at 443 (finding that the District “has not shown that B.L.’s speech created any substantial disorder or likelihood thereof”).
57 See id. at 444 (characterizing repeated five-to-ten minute disruptions of Coach Luchetta-Rump’s math class as “admittedly brief”).
58 Id. at 432.
60 Id. at 613 (citing J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) (en banc)); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc).
61 B.L., 289 F. Supp. 3d at 614.
62 See Simson, supra note 8, manuscript at 3–4 (arguing that protection of free-speech rights has, since the Warren Court, become virtually absolute).
63 650 F.3d 205 (3d Cir. 2011) (en banc).
64 650 F.3d 915 (3d Cir. 2011) (en banc).
66 B.L., 289 F. Supp. 3d at 615 (stating that Fraser created a “profanity exception to Tinker”).
In Layshock, a student created a parody MySpace profile for his high school principal. The profile featured an image of the principal and his name but identified him as promoting the use of alcohol, steroids, and other illegal drugs, and made various references to his sexual promiscuity, small penis, homosexuality, and transgender identity. After Layshock shared it with his MySpace friends, the profile “spread like wildfire” at the school, and several students followed Layshock’s lead. Layshock also accessed the profile in school to share his work with his classmates. At one point, a teacher had to break up a group of students giggling at the fake profile during a computer lab class. The school limited students’ access to computers where access to the Internet could not be monitored, and they cancelled computer programming classes for the last week of the semester in 2005. The school disciplined Layshock in various ways for violation of the school’s disciplinary code, despite his apology, and despite not punishing his imitators.

The Third Circuit somehow concluded that Layshock’s fake profile of the principal “did not cause disruption in the school” and therefore concluded that it would be “unseemly and dangerous” to allow the school to discipline Layshock for having created the profile. This result is our dumb First Amendment at its worst. If courts could recognize that teachers and administrators are not immune to the harms associated with bullying and harassment, expressive activities arguably not protected under the First Amendment, they might be less rigid in their understanding of what constitutes substantial disruption. Nonetheless, the holding does not create a complete ban.

67 Layshock, 650 F.3d at 207.
68 Id. at 208.
69 Id.
70 Id. at 214.
71 Id. at 209.
72 Id. at 209.
73 Id. at 209–10.
74 Id. at 216. The trial court found that “a reasonable jury could not conclude that the “substantial disruption standard could be met on this record.” This conclusion was partly based on the fact that some of the disruption was caused by other students’ imitations of the original MySpace profile. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007). One wonders why a reasonable jury could not conclude that the imitation profiles were themselves a substantial disruption attributable to Mr. Layshock’s original profile. The profiles certainly undermined the principal’s authority far more effectively than Mr. Frederick’s intentionally comical and ambiguous banner undermined the school’s anti-drug policy.
75 In B.L., Justice Alito seemed open to permitting schools to discipline students for off-campus speech that “derides school administrators, teachers, or other staff members” and perhaps some bullying and harassment. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2057 (2021). (Alito, J., concurring). Unfortunately, the majority opinion provides much vaguer guidance, acknowledging that “First Amendment standards must give way off campus to a school’s special need to prevent, e.g., substantial disruption of . . . the protection of those who make up a school community.” Id. at 2045.
on the regulation of speech that takes place outside of a school building. Rather, the ruling was based on the utterly ridiculous finding that Layshock’s expression did not disrupt the school.\footnote{Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011).}

J.S. produced a more complicated split on the Third Circuit. J.S. was an eighth grader who, angry at being disciplined by her principal for violating the school’s dress code, created a fake MySpace profile, using the principal’s photograph but identifying him as a “bisexual Alabama middle school principal named ‘M-Hoe.’”\footnote{J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc).} According to the court, the profile contained “profanity and shameful personal attacks aimed at the principal and his family,” including his wife, a school guidance counselor.\footnote{Id.} At first a public profile, J.S. quickly switched the profile to private and shared it with twenty-two other students at her school. Another student shared the profile with the principal. After the principal met with J.S. and her parents, J.S. and her mother apologized. The school then imposed a ten-day suspension on J.S. and an accomplice.\footnote{Id. at 921–22.} After exhausting their appeals, J.S.’s parents filed suit, alleging violation of J.S.’s First Amendment rights.\footnote{Id. at 923.} At her deposition, J.S. testified that the profile was a joke, and it was comical because it was “outrageous.”\footnote{Id. at 921.}

The District Court, while finding that the profile had not caused “substantial disruption” under the \textit{Tinker} standard, nonetheless granted the school district’s motion for summary judgment.\footnote{Id. at 923.} In dismissing J.S.’s claims, the district court relied on \textit{Fraser} and held that the school was permitted to discipline J.S. for “vulgar, lewd, and potentially illegal speech that had an effect on campus.”\footnote{Id.} The Third Circuit reversed. Applying its own precedent, the Third Circuit noted that the \textit{Tinker} rule “has never been confined to” political speech.\footnote{Id. at 926.} It found that J.S.’s fake MySpace profile was no more disruptive than were the Tinkers’ armbands.\footnote{Id. at 929–30 (regretting the “unfortunate humiliation” suffered by the principal but finding the school could not have reasonably predicted substantial disruption in this case if none was foreseeable in \textit{Tinker}).} The majority then drops a telling footnote:

We recognize that vulgar and offensive speech such as that employed in this case—even made in jest—could damage the
careers of teachers and administrators and we conclude only that the punitive action taken by the School District violated the First Amendment free speech rights of J.S.  

Justice ‘I’s recent admonishment comes to mind: “There comes a point where we should not be ignorant as judges of what we know to be true as citizens.” In so doing, it makes much of dicta in Chief Justice Roberts’ majority opinion in Fraser, in which he observed that Fraser’s speech would have been protected outside of the school context. The majority at great pains to minimize the impact of J.S.’s speech within the school, more or less congratulating J.S. for taking “specific steps to make the profile ‘private’ so that only her friends could access it” and regarding it as an unlucky happenstance that J.S.’s MySpace “friends” happened to attend her school. The majority notes that a hard copy of the profile found its way into the school only because the principal asked a student to bring it in, but the principal knew of the profile because students brought their knowledge of it to school and discussed it with their peers. A student’s defamatory online profile of a school official shared with classmates and discussed on numerous occasions during class sessions is not, in any meaningful sense, speech conducted “outside of the school context.”

As the concurring opinions in Layshock, and the concurring and dissenting opinions in J.S., make clear, the prior en banc cases did not prohibit schools from regulating all off-campus speech. Nonetheless, in its B.L.

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86 Id. at 930 n.7.
89 Id. at 932.
90 Id.
91 Id. at 930.
92 Id. at 932–33.
93 See id. at 922–23 (detailing multiple class disruptions).
94 J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring) (writing, on behalf of five judges, that Tinker does not apply to off-campus speech); id. at 941 (Fisher, J., dissenting) (agreeing with the majority, on behalf of six judges, that off-campus speech can create a disruption justifying school action under Tinker and finding that the school’s actions in disciplining J.S. were justified); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–20 (3d
decision, the Third Circuit limited the application of *Tinker* to expression that occurred on school property. That ruling was in tension with both the Supreme Court’s precedent in *Morse v. Frederick*, and with daily life in the twenty-first-century, in which the Internet is ubiquitous.

C. Applying First Amendment Precedent to B.L.

The Court issued a holding in *Tinker* that set out some broad principles and resolved the dispute in that important case. In cases that followed *Tinker*, the Court has attempted to apply *Tinker* to very different factual scenarios. It has done so mechanically and without much reflection on how its rulings relate to the purposes behind the First Amendment. Meanwhile, the Court has expanded protections for freedom of expression. Courts now disdain any distinctions between types of speech. Unwilling to endanger any of the values that underpin the protection of core political speech, the Court has dumbed down our First Amendment and, as a result, dumbed down our public discourse.

1. Justice Breyer’s Majority Opinion in B.L.

Until his retirement, Justice Breyer’s pragmatic approach came the closest on the Roberts Court to the rights-mediation model that Jamal Greene proposes. Justice Breyer would consider context and formulate multi-prong balancing tests, much to the agitation of his formalist colleagues. In *B.L.*, however, Justice Breyer fails to consider all of the interests at stake in the litigation, giving almost no weight to anything other than B.L.’s interest in being allowed to post inane Snaps. Moreover, Justice Breyer follows the lower courts in construing the facts so as to exaggerate the substantive content of B.L.’s Snaps.
and minimize their impact on the school, her coaches, and her team. A rights-mediation approach likely would have yielded a different outcome. And once one has the rights-mediation perspective in mind, it is clear that extending First Amendment protections to B.L.’s Snaps does not follow from Tinker.

After recounting the facts and procedural history of B.L.’s case, Justice Breyer begins his analysis by recognizing only three narrowly-described limitations on Tinker. Schools may regulate: indecent speech at a school assembly (Fraser), speech that advocates illegal drug use (Morse), and speech that bears the school’s imprimatur (Kuhlmeier). As Justice Breyer sees B.L.’s Snaps as falling within none of the three identified exceptions to Tinker, he grants B.L.’s speech the strongest First Amendment protection, and treats her Snaps as expressing a criticism of the team, of its coaches, and of the school. Justice Breyer then moves on to some contextual factors: B.L.’s speech occurred outside of school hours, outside of school on a personal cellphone shared in a private network. The way Justice Breyer characterizes B.L.’s speech sets up a strict-scrutiny analysis that the school could not possibly satisfy. The school’s interest in “teaching good manners” cannot overcome B.L.’s interest in free expression.

From a rights mediation perspective, we would not want schools to employ disciplinary measures as a means of teaching students good manners on social media. Their role and their legally-cognizable interest in regulating students’ use of vulgarity is far more narrow in B.L.’s case. It is set out in the undertaking that she and her mother signed when she joined the cheerleading squad. Justice Breyer faults the school for disciplining B.L. without presenting “evidence of any general effort to prevent students from using vulgarity outside the classroom.” It had no interest in doing so, but it had a strong interest in team cohesion and in the messages cheerleaders communicated about the team and the school. Justice Breyer was unconvinced by the school’s evidence of classroom disruption, nor could he credit the coaches’ concern about team morale arising from B.L.’s Snap.

100 Id.  
101 Id. at 2045.  
102 Id.  
103 Id. at 2047.  
104 See id. at 2046 (“Putting aside the vulgar language, the listener would hear criticism, of the team, the team’s coaches, and the school.”). On the absurdity of the notion that a reasonable view could ignore the “machine-gun repetition” of “fuck” in an eight-word caption to a Snap, see Simson, supra note 8, manuscript at 28.  
105 B.L., 141 S. Ct. at 2047.  
106 Id.  
107 Id.  
108 Id. at 2047–48.
2. Justice Breyer’s Crabbish Pragmatism

Justice Breyer complements the Court’s strategy of fitting new situations into existing common-law boxes with just a smidge of pragmatism. Because the Internet can easily pass through the school-house gate, the Court rejects the Third Circuit’s arbitrary determination that the school is powerless to discipline students for off-campus speech. Justice Breyer’s opinion does not resolve all possible issues regarding off-campus speech, but schools can certainly regulate bullying or harassment, threats, failure to follow the rules regarding online school activities, and breaches of school security. Justice Breyer suggests that school discipline for off-campus activity should be rare because: (1) schools rarely stand in loco parentis with respect to off-campus behavior; (2) schools cannot police student behavior 24/7 and will bear a heavy burden with respect to political or religious speech; and (3) schools have “an interest in protecting a student’s unpopular expression” because schools have a role in our democracy in protecting the “marketplace of ideas.”

Justice Breyer’s first limiting principle is irrelevant and also likely false. It is irrelevant because Justice Breyer is applying Tinker, and Tinker rejects the in loco parentis doctrine. Justice Thomas introduced the idea that the common-law doctrine of in loco parentis applies in this context. The contours of the doctrine and its applicability are unclear in general, as the authority for Justice Thomas’s theory is rather thin, consisting of Blackstone and nineteenth-century caselaw that reflects different times, different attitudes towards parenting and education, and different educational institutions. Justice Thomas himself notes that Tinker is, at the very least, in tension with the in loco parentis doctrine. Justice Breyer’s nod to in loco parentis is a credit to his diplomatic skills, but it comes at the expense of legal coherence. But no good deed goes unpunished. Justice Thomas, in his B.L. dissent, nonetheless laments “the Court’s longtime failure to grapple with the historical doctrine of in loco parentis.”

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109 Id. at 2045.
110 See id. at 2046 (leaving it for future cases to decide when the speaker’s off-campus location is dispositive).
111 Id. at 2046.
112 Id.
113 Morse v. Frederick, 551 U.S. 393, 413–16 (Thomas, J., concurring).
114 See id. at 413 (acknowledging that the doctrine related to tutors and private schools).
115 See id. at 416 (“Tinker effected a sea change in students’ speech rights, extending them well beyond traditional bounds.”); see also B.L., 141 S. Ct. at 2061 (Thomas, J., dissenting) (citing Tinker and lamenting the Court’s abandonment of in loco parentis without even mentioning it).
116 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2061 (2021) (Thomas, J., dissenting). Frances Williamson makes the interesting point that, while Justices Thomas and Alito both think that the in loco parentis doctrine was relevant in B.L., they drew different conclusions based on their differing approaches to originalist interpretation. Frances Williamson, The Meaning Of “Public Meaning”: An Originalist Dilemma Embodied by Mahanoy Area School District, 46
Until this case, the other Justices had not taken Justice Thomas’s *in loco parentis* theory seriously, and with good reason.117 In modern times, school discipline does not stand in the place of parental discipline; the former supplements the latter. Justice Breyer rattles off a number of situations in which school discipline for off-campus speech/conduct would be appropriate.118 Justice Alito supplements the list in his concurrence.119 In *Morse v. Frederick*, the Court already permitted a school to discipline Frederick for off-campus behavior, a fact that the Court airbrushed away by characterizing watching a parade on a public street as “a school-sanctioned and school-supervised event.”120

Justice Alito devotes some space to the *in loco parentis* doctrine in his concurring opinion in *B.L.*121 He takes the doctrine seriously, but he acknowledges that it needs to be adjusted to apply to modern schooling.122 He adopts a consent-based approach to school discipline, concluding that “parents are treated as having relinquished 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 . . . .”123 Justice Alito in the end stresses, “In our society, parents, not the State, have the primary authority and duty to raise, educate and form the character of their children.”124 Fair enough, but schools’ authority to maintain discipline so as to carry out their state-mandated educational mission, which is the basis for *Tinker*, is better understood as a supplement to, rather than a substitute for, parental discipline. Schools can and do discipline students for behaviors their parents might indulge and vice versa.

Justice Breyer’s second principle seems largely inapplicable to *B.L.* as B.L.’s speech was neither political nor religious. There was no religious dimension to B.L.’s speech, and no party claimed otherwise. Her speech also was not political. The District conceded that it would have had no authority to discipline students for off-campus political speech.125

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117 The Court makes a passing reference to the *in loco parentis* doctrine in *Fraser*. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (citing “the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech”).
118 *Id.* at 2045.
119 *Id.* at 2054–57 (Alito, J., concurring).
120 *Morse v. Frederick*, 551 U.S. 393, 396 (Thomas, J., concurring).
121 *B.L.*, 141 S. Ct. at 2052 (Alito, J., concurring).
122 *Id.*
123 *Id.*
124 *Id.* at 2053 (Alito, J., concurring).
125 *Id.* at 2056 & n.17 (Alito, J., concurring) (crediting the school district’s attorney for acknowledging that a school cannot punish a student for off-campus speech, even if it would cause
Justice Breyer treats B.L.’s Snaps as political because he regards them as critical of the school and the team. But B.L. intended no criticism. The first Snap is so general, it is hard to read it as a criticism of anything in particular. Even if B.L had written “Fuck Coach X” on Snapchat, her statement could be just as plausibly construed as an expression of anger as of criticism. In the actual Snap, B.L. drops her f-bombs with abandon, naming “school,” “cheer,” “softball,” and “everything.” The best construction may be that she was expressing her impotent rage. Clearly she was upset, but her anger seems too diffuse to constitute a criticism of anything. B.L. herself said that she used Snap to joke around or to “rant.”

When she was told that she would be suspended from the junior varsity team for one year, B.L. cried and apologized. When asked in a hearing on her motion for a preliminary injunction why she cried, she answered, “[b]ecause I really enjoy cheerleading.” It follows that, when B.L. wrote “fuck cheer,” she did not mean to criticize cheer or her coaches. She was just mad, and she chose to express herself profanely and share that profanity with 250 followers. Originally, B.L. argued that the School District violated her First Amendment rights because it engaged in “viewpoint discrimination.” But she abandoned that position early in the litigation, and her attorney at the preliminary injunction hearing argued that the case was “now solely about the District’s censure of profanity.”

B.L. also wrote “fuck school,” and when she was asked why she was mad about school, she said, “[b]ecause of finals.” Even the credulous Court did not read that part of her Snap as an incipient rebellion against testing, grades, or the quaint notion that students should, on occasion, be subject to examination as part of the process of formative and summative assessment. Somehow, the distinction between political speech worthy of the most exacting First Amendment protection and profane speech devoid of political import eludes the Court.

The contrast with Tinker could not be more striking. Mary and John Tinker never apologized for wearing black armbands. They were sincerely committed to expressing their opposition to the Vietnam War. Neither B.L. nor her two predecessors before the Third Circuit, Layshock and J.S. were interested in pursuing free expression. Layshock, “without any prompting from anyone,"

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127 Id.
128 Id. at *22.
130 Id.
apologized to the principal for creating the profile. J.S. and her mother apologized for J.S.’s expression, and J.S. independently wrote to her principal and his wife to apologize. It is puzzling that the Court would think that the First Amendment insulates students from disciplinary consequences when they engage in expressive activities that the students themselves do not defend. It is one thing for the courts to defend the rights of persons expressing their sincere, if unpopular, perspectives. It is something else entirely if children, overtaken by whims and tempers, misbehave, and public authorities are completely powerless to discipline them for their misbehavior. Indulging their misbehavior does not further the First Amendment’s purposes. It just contributes to the devolution of public discourse into uncivil cacophony.

Justice Breyer’s final principle articulates a dogmatic version of the notion that the solution to speech of which we disapprove is more speech, a very weak justification for extensive First Amendment protections. The longevity of even the most absurd of QAnon conspiracy theories suffices to refute such misplaced faith in the power of the marketplace of ideas. Even if that hokum were attractive, it also has no application to B.L.’s speech. She was not punished because she expressed “unpopular ideas” worthy of protection. To the extent that her remarks could be construed as a criticism of her coaches or of cheerleading, we know that she herself did not believe the ideas that she, perhaps inadvertently, expressed. She was angry because she wanted to be part of that team with those coaches. She was punished for vulgarity, as was Fraser, notwithstanding the Court’s valiant attempts to turn her into some sort of social critic. Because the objects of B.L.’s rage include “everything,” we cannot attribute to her use of the word “fuck” the same sort of emotive content that the Court attributed to Mr. Cohen in Cohen v. California. As Gary Simson pointed out, Mr. Cohen

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133 J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 922 (3d Cir. 2011) (en banc).
134 See, e.g., Giovanni Russonello, QAnon Now as Popular in U.S. as Some Major Religions, Poll Suggests, N.Y. TIMES (Aug. 12, 2021), https://www.nytimes.com/2021/05/27/us/politics/qanon-republicans-trump.html (reporting on a poll that indicated that fifteen percent of Americans believe that “the levers of power are controlled by a cabal of Satan-worshiping pedophiles”); Sara Swann, Poll Finds Most Conservatives Believe at Least One QAnon Conspiracy Theory, THE FULCRUM (July 19, 2021), https://thefulcrum.us/big-picture/qanon-conspiracy-theory (reporting on poll results indicating that, while only 10% of center-right adults have a favorable view of QAnon, 62% of conservatives believe in at least one conspiracy theory embraced by the movement).
135 See Joint Appendix at *22, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 (explaining in testimony at a preliminary injunction hearing that she cried as she apologized for her Snaps because “I really enjoy cheerleading”).
136 See 403 U.S. 15, 25–26 (1971) (commenting on the “dual communicative function” of Mr. Cohen’s “Fuck the draft” jacket).
happened upon *le mot juste* to express his view that the draft itself was not just wrong but *obscene*.\(^\text{137}\)

There is reason to be concerned whenever the government disciplines a person for their speech. It would be a First Amendment problem if the District had disciplined B.L. for the content of her message rather than for profanity and violation of her agreement not to post negative information relating to cheerleading on the Internet. We should also be concerned with the prohibition on “negative information,” but rights mediation considers context. Only cheerleaders are subject to the prohibition. In that context, the prohibition may well be within the realm of reasonableness. In addition, it only applies to the Internet. B.L. was free to and did make negative comments in other contexts and faced no discipline as a result.

3. **B.L. Is Wrong, Even under *Tinker***

Under *Tinker*, the school can discipline B.L. if her expression “involves substantial disorder or invades the rights of others.”\(^\text{138}\) There is simply no question that, if the Tinkers’ protest had caused the amount of disruption that B.L.’s Snaps caused, they would have lost their case.

Justice Breyer does not give a fair reading of the record. One of the coaches was asked whether, “this particular incident” disrupted school activities “other than the fact that kids kept asking . . . about it.” She answered “No.”\(^\text{139}\) The coach may well have considered the persistent questions from other cheerleaders a substantial disruption that justified B.L.’s suspension. She described that disruption in her deposition:

> It was continuous over several days that they were approaching me about the Snap. So it did take away essentially in my algebra class, the one that D. was in. That one was disrupted quite a bit for just a couple days after it happened. But then we continuously told them that we could not discuss it, then it settled down.\(^\text{140}\)

These disruptions lasted five-to-ten minutes each, and the coach described the students as “visibly upset.”\(^\text{141}\) They were upset because they viewed B.L. as deserving punishment, and they wanted to know how she would be punished. If

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\(^\text{137}\) See Simson, *supra* note 8, manuscript at 32 (contending that the repetition of “fuck” in B.L.’s Snap deprives the word of the cognitive and emotional conduct it might have if used more selectively).


\(^\text{140}\) See Joint Appendix at *83–84, Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 (deposition testimony of Nicole Luchetta-Rump on October 10, 2018).

\(^\text{141}\) *Id.*
this level of disruption had attended the Tinkers’ silent protests, they would have lost their case. After the District Court ordered the coaches to permit B.L. to return to the team, other cheerleaders thought that ruling unfair. 142 A year later, the coach testified, some of the varsity cheerleaders continued to express anger about B.L.’s presence on the team. 143

Justice Breyer does not mention that many of the other cheerleaders (at least half of the JV team and one-third of the varsity cheerleaders) expressed their displeasure to the coaches when the court ordered them to let B.L. return to the team. 144 Years later, when B.L. was on the varsity cheerleading team, other cheerleaders were still angry about the Snap and about B.L.’s jealousy of a younger girl admitted to the team before her freshman year. 145 B.L.’s continued presence on the team caused substantial disruption on the team. 146 Her coaches’ inability to discipline B.L. exacerbated that disruption. 147

It is not clear that the First Amendment protects profane speech in the schools, and so arguably no First Amendment interest is violated if speech such as B.L.’s is chilled by the threat of discipline. That much should be clear from Fraser, 148 in which the Court permitted a school to suspend a student for making a profane speech during a school assembly. 149 There the Court observed that schools may discipline student speech, regardless of its form or content, if it undermines the purposes of public education. 150 "The schools . . . may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ." 151 B.L. knew that speech like hers would be unprotected if she spoke that way at school. Although she testified that, as a general matter, she wrote on Snapchat using her normal diction, 152 she explained that she would not have spoken at school as she

142 Id. at *85.
143 Id. at *87.
144 Id. at *86–87.
145 See id. at *88–89 (testifying that the cheerleaders were “still upset with B. and the fact that she’s on the team after what she did.”).
146 Id.
147 Id.
149 See Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2061 (2021) (Thomas, J., dissenting) (citing Fraser for the proposition that “it is well settled that schools can punish ‘vulgar’ speech”).
150 Fraser, 478 U.S. at 683.
151 Id.
did in the offending Snaps, “[b]ecause I know I’d get in like big trouble if like a
teacher or something hears it.” 153

The only distinction between B.L.’s speech and Fraser’s is that she was
not physically on campus when she spoke. For two reasons, that difference
should not be given dispositive weight. First, the relevant test is whether the
speech causes substantial disruption and invades the rights of others. Arguably,
substantial disruption and invasion of the rights of others occurred in both cases.
Second, unlike Fraser, B.L. agreed to a code of conduct when she signed up to
be a cheerleader. 154 If anything, her school was justified in holding her to a higher
standard than that applied to Fraser. Yet he was suspended from school; she was
suspended only from an extra-curricular activity.

D. Regulation of Public-School Student Expression after B.L.

_Tinker_ was an important case, enshrining in our constitutional doctrine
limited protection for political expression within the context of the public
schools. The crucial limitation on that freedom of expression was the school’s
need to deliver its curriculum and protect other students from forms of expression
that encroach upon their rights. Justice Breyer’s _Mahanoy_ opinion wisely rejects
the Third Circuit’s blanket prohibition on public school regulation of students’
off-campus speech. However, he provides very little guidance on when such
regulation would be appropriate, and that resulting uncertainty could chill
student speech.

The holding of _B.L._ was not that B.L.’s punishment was excessive; the
Court held that the District could not punish B.L. at all. That holding is
misguided. Because B.L.’s apolitical Internet gripes did not merit the same sort
of protections as did the Tinkers’ considered political protest, she was not entitled
to the same level of protection that the _Tinker_ standard imposed. Moreover, even
under that standard, as a matter of constitutional law, the District was entitled to
discipline her, both because her Snaps caused disruption both in class and within
the cheerleading team and because she was punished not for the content of her
message but for her use of profanity. Under _Fraser_, public schools may
discipline students for profane speech that causes disruption within the school.
Justice Breyer’s opinion will potentially effect great damage on the ability of
public schools, their teachers, and their coaches to enforce team discipline, team
rules, and decorum. It also creates a constitutional controversy where there really
is none. We do not need nine Justices to weigh in every time a high-school coach
disciplines a student.

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153 _Id._ at *18.

154 See Joint Appendix at *12–15, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021)
(No. 20-255), 2020 WL 8669753 (Mahanoy Area High School Cheerleading Rules that B.L. agreed
to a code of conduct when she signed up to be a cheerleader).
IV. B.L. AND THE PURPOSES OF FIRST AMENDMENT SPEECH PROTECTIONS

At no point does Justice Breyer’s majority opinion in Mahanoy reference the text of the First Amendment. At no point does he pause to consider the Amendment’s purposes or whether those purposes at the time of the First Amendment’s adoption changed in any way at the time the First Amendment was made applicable to the states through the Fourteenth Amendment.155 Instead we get an aphorism: “I disapprove of what you say, but I will defend to the death your right to say it.”156 This is the stuff of rights absolutism. Why would anybody defend “to the death” B.L.’s right to rant on Snapchat? Such a perspective turns rights claims into outcome-determinative “trump cards,” which they were not at the founding.157

Distinguishing cases is the very stuff of common-law adjudication. We can value speech without valuing all speech equally. In fact, in valuing all speech equally, we lose sight of why speech merits protection. We can protect important speech without protecting all speech, and we can consider values and interests other than free expression in determining whether speech regulation accords with the values informing the First Amendment. But first we have to identify those values.

This Part first lays out five traditional justifications for strong protections for freedom of expression. It then argues that none of them are adequate to explain the outcome in B.L. Justice Breyer’s opinion makes passing reference to a couple of these traditional justifications for First Amendment protection of freedom of expression. As we shall see, in this instance, interests that advocates of First Amendment protections have articulated are not advanced through protection of B.L.’s Snaps.

A. Grounding First Amendment Jurisprudence in the First Amendment

The first step in any First Amendment case should be some inquiry into the meaning and purposes of the First Amendment’s protections of freedom of expression.158 We would not expect every Supreme Court opinion to review such

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155 See Gitlow v. New York, 268 U.S. 652 (1925) (regarding the free expression rights of the First Amendment as “fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”).
157 See Jud Campbell, Natural Rights and the First Amendment, 127 YALE L.J. 246, 253 (2017) [hereinafter Campbell, First Amendment] (arguing that, while natural rights shaped the Founders’ thoughts about government, “they were not legal ‘trumps’ in the way that we often talk about rights today”).
158 Justice Thomas purports to take an originalist approach in these cases. But his original-expected-applications approach is misguided. He takes as his point of departure his view that schools had “near plenary” authority to discipline students at school at the time the Fourteenth Amendment was passed. B.L., 141 S. Ct. at 2059 (Thomas, J., dissenting). Even if correct, Justice
principles, but it would help if the opinions could connect, in a considered, well-reasoned manner, speech protections to at least some basis for caring about such protections. Such a discussion is especially important, given that existing theoretical defenses of a free speech principle are not entirely convincing. In each case of challenged regulation, the Court ought to do the work of tying the need for protection to a plausible theory of why the challenged expression or the category of expression subject to regulation is entitled to First Amendment protection.

There are four main justifications for expansive protections of freedom of expression: the truth justification, the closely-related argument from toleration, the democratic accountability justification, and the autonomy/human dignity justification. In addition, undergirding all of these arguments are slippery-slope concerns that if the government can regulate expression in some ways, it will do so in ways that undermine all of the interests that the First Amendment is designed to protect.

In B.L., the majority and concurring opinions assume the most sweeping possible scope of free-speech protections and barely address how protecting B.L.’s speech in this context can be justified in accordance with any of these four approaches or their slippery-slope extensions. For the sake of analytical clarity, we begin by laying out the justifications for free speech protections.

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159 Frederick Schauer, Free Speech: A Philosophical Enquiry 5–6 (1982) [hereinafter Schauer, Free Speech] (arguing that we ought to take seriously the possibility of a free speech principle even if it is philosophically unsound).


161 See Frederick Schauer, Slippery Slopes, 99 Harv. L. Rev. 361, 363 (1985) [hereinafter Schauer, Slippery Slopes] (noting the frequency with which slippery slope arguments arise in the context of discussions of freedom of speech).
1. The Argument from Truth

According to the truth rationale, “protecting freedom of speech creates a marketplace of ideas in which truth ultimately prevails over falsity.” The truth rationale may have the finest intellectual pedigree, with roots in John Milton and John Stuart Mill, and having been embraced and articulated by Thomas Jefferson and Oliver Wendell Holmes among others. Although the truth rationale still has its defenders, most scholars reject the notion that truth inevitably wins out in most situations. Secular scholars doubt the ability of human beings to identify ultimate, transcendent truths. Statements relevant to transcendent truths can never amount to anything more than statements of belief. Such beliefs may be worthy of protection on other grounds, but not because they help us arrive at truth. Nonetheless, in a world where we cannot know the truth, the state ought not to have the power to repress any person’s ability to strive towards truth. As Fred Schauer points out, “[t]he reason for preferring the marketplace of ideas to the selection of truth by the government may be less the proven ability of the former than it is the often evidenced inability of the latter.”

2. The Argument from Democracy

Justice Breyer links the truth justification to the democratic accountability justification, a position most associated in the United States with

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163 SCHAUER, FREE SPEECH, supra note 159, at 15.

164 See Thomas Jefferson, A Bill for Establishing Religious Freedom, THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., 1950) (arguing that truth “will prevail if left to herself” as truth “is the proper and sufficient antagonist to error,” as errors cease to be dangerous when they can be contradicted).

165 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (contending that the Constitution adopts the theory that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”).


167 See SCHAUER, FREE SPEECH, supra note 159, at 3–5 (distinguishing independent principles from instances when those principles are implicated).

168 Frederick Schauer, Free Speech, the Search for Truth, and the Problem of Collective Knowledge, 70 SMU L. REV. 231, 236 (2017); see also CATHERINE ROSS, A RIGHT TO LIE: PRESIDENTS, OTHER LIARS AND THE FIRST AMENDMENT 151 (2021) (noting the government’s inability “to arbitrate between truth and falsehood”); Helen Norton, Distrust, Negative First Amendment Theory, and the Regulation of Lies, KNIGHT FIRST AMEND INST. (Oct. 19, 2022), https://knightcolumbia.org/content/distrust-negative-first-amendment-theory-and-the-regulation-of-lies (articulating a negative theory of the need for protections for free expression because “the government is so dangerous in its capacity to abuse its regulatory power”).
the work of Alexander Meiklejohn. It would be folly to suggest that democracy can function without legal protections for political speech. It is thus sensible that our jurisprudence on free expression accords a position of prominence to speech relating to public affairs. Such speech can provide the “electorate with the information it needs to exercise its sovereign power and to engage in the deliberative process requisite to the intelligent use of that power.” It also facilitates the criticism of public officials, thus holding them accountable to their sovereign masters.

Related to the democracy justification for free speech protections is the so-called “safety valve” theory, according to which speech provides a mechanism for relieving societal tension which otherwise might explode into violence. Justice Brandeis supplemented his view that good arguments should prevail in the exchange of viewpoints with the idea that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.” Thomas Emerson contended that allowing the airing of such grievances “results in a release of energy, a lessening of frustration, and a channeling of resistance into courses consistent with law and order.”

3. The Argument for Toleration

The truth defense of speech protections underpins the idea that we need broad protections for speech in order to reinforce our commitment to tolerance. Oliver Wendell Holmes linked the argument for toleration to the arguments from truth and democratic accountability: we ought not to be so certain in our own beliefs that we do not welcome uncomfortable challenges. Toleration is necessary for the functioning of a proper marketplace of ideas.

It is better to endure hateful speech than to err in the other direction and suppress speech that meaningfully contributes to public discourse. According to Lee Bollinger, the leading proponent of the argument for toleration, toleration of unpopular views was a necessary corollary to Alexander Meiklejohn’s argument from democracy in favor of strong free speech protections. As Bollinger explains,
An individual or society could not claim to be self-governing if it decided, even unanimously, not to consider or hear a particular idea, and especially not if the reason behind the exclusion or suppression was that the idea was determined to be hateful, frightening, or wrong.\(^\text{177}\)

Absence of censorship on this model is the very essence of self-government and necessary to the creation of a "democratic personality."\(^\text{178}\)

Bollinger cannily noted the tension at the heart of the tolerance justification for freedom of speech. While Meiklejohn’s call for toleration was based on the need to confidently inscribe a commitment to open expression as a democratic value, Holmes’ tolerance was an acknowledgment of self-doubt.\(^\text{179}\)

While Meiklejohn’s work celebrates the role of free speech as component of our democratic system, Holmes regards protections of freedom of expression as a necessary bulwark against majoritarian tyranny. Bollinger attempts to move beyond this internal contradiction in the tolerance argument. He maintains that the society “adds something important to its identity” through acts of extreme tolerance; that is, by tolerating extremist speech.\(^\text{180}\)

4. The Arguments from Autonomy and Dignity

These last two justifications for strong protections of free speech, arguments from autonomy and dignity, can be handled together as both treat free speech as furthering individual interests rather than societal interests.\(^\text{181}\) For some First Amendment theorists, facilitating self-actualization is the “one true value” underlying free-speech protections.\(^\text{182}\) Justice Thurgood Marshall expressed this view of the First Amendment’s free-expression protections, concurring in a case challenging a prison’s policy of censoring inmates’ mail.

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress


\(^\text{178}\) Id.

\(^\text{179}\) *Id.* at 464 (observing that while tolerance constituted an affirmation of a set of beliefs for Meiklejohn, and for Holmes, it was a product of self-doubt).


expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.\textsuperscript{183}

That said, respecting individual autonomy and dignity relates to the view that unrestrained speech, or at least unrestrained political speech, is necessary to a democratic society to function. The state must treat individuals as rational, equal, and autonomous moral beings, and that entails respecting people’s choices, including their understandings of themselves.\textsuperscript{184}

We ought not to lose sight of the fact that individual interests can thrive both through freedom from government constraint and through governmental fostering of individual development.\textsuperscript{185} In the context of student speech in public schools, the Tinkers have a constitutional interest in giving expression to their opposition to the Vietnam War. A student’s interest in targeting another student for bullying by questioning the other student’s sexual orientation or gender identity, for example, might be outweighed by the bullied student’s interest in having the school protect them from such abuse.\textsuperscript{186} Hate speech is undoubtedly expressive speech tied to self-actualization. It may even be core political speech. Nonetheless, there are strong arguments that such speech does not merit First Amendment protections precisely because of the harms it inflicts on others.\textsuperscript{187} These arguments against the autonomy/self-actualization defense of speech protections also apply to the argument from toleration.

5. The Slippery Slope

Finally, even if one is unpersuaded by any of the foregoing arguments, free-speech advocates often contend that broad protections of speech are


\textsuperscript{184} See Baker, supra note 181, at 991–92 (adopting what he calls a “widely accepted conclusion that individual self-fulfillment and participation in change are fundamental purposes of the first amendment”); Redish, supra note 182, at 595 (treating other values served by First Amendment protections as sub-values not in tension with self-actualization).

\textsuperscript{185} See Catriona MacKenzie & Denise Meyerson, Autonomy and Free Speech, in \textit{The Oxford Handbook of Freedom of Speech} 61, 61–62 (Adrienne Stone & Frederick Schauer eds., 2021) (observing that, apart from Nozickian libertarians, “most people would agree” that the state has both negative and positive duties with respect to individual autonomy).

\textsuperscript{186} See Adrienne Stone, \textit{Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech}, 32 \textit{CONST. COMMENT.} 687, 688–89 (2017) (arguing that freedom of speech has a double-sided nature because the values underlying speech can be wielded both for and against protection).

necessary because if we allow the state to restrict marginal speech, we will not be able to prevent more draconian limitations. Justice Breyer invokes this sentiment when he acknowledges, in finding for B.L., “sometimes it is necessary to protect the superfluous in order to preserve the necessary.”\textsuperscript{188} Helen Norton similarly advocates applying strict scrutiny to the regulation of lies.

Some lies have First Amendment value in their own right. In other instances, the government’s regulation of even valueless lies threatens government overreaching or the chilling of valuable speech in ways that undermine important First Amendment interests. The very ubiquity and diversity of lies thus supports a presumption that lies are fully protected by the First Amendment such that government generally may not regulate them unless it satisfies strict scrutiny.\textsuperscript{189}

Many things in our society can be described as ubiquitous and diverse: motor vehicles, weapons, drugs and medications, restaurants, clothing stores, and athletic competitions. And yet, it is not impossible to imagine ways in which the government can reasonably regulate these diverse phenomena. As is typical for those who make slippery slope arguments, Professor Norton concedes that we can distinguish among categories of lies. That being the case, courts that engage in rights mediation do not have to adopt a presumption that lies merit the protections of strict scrutiny.

As we shall see in Part IV, it is discouraging to see Justices and scholars committed to the value of expression act as though nothing were at stake when people express themselves and that the only thing we have to fear is that someone will face government sanction for expression. They treat expression as insipid and protect it because they do not trust the government to be able to distinguish the insipid from the constructive. If the Court were more committed to deciding the cases before it and less committed to rights absolutism, Justices would not feel compelled to protect the superfluous in order to preserve the necessary. They could defer to political processes to address the superfluous and rouse themselves to issue opinions only when compelled by necessity.

\textbf{B. The Reasons for Protections of Expression Are Not Implicated in B.L.’s Expression}

For reasons given below, none of the justifications provide an adequate explanation of the extraordinary breadth of free speech protections accorded under our First Amendment doctrine. However, even if these justifications for such protections were wholly satisfactory, other than the slippery slope

\textsuperscript{188} Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021).

argument, addressed separately in Part IV, protecting B.L. from discipline for her Snaps would not further the interests that the First Amendment purportedly serves.

1. The Truth and Tolerance Justifications

If the purpose of the First Amendment is to promote the discovery of truths, B.L. had no First-Amendment interest in her Snaps. Although Justice Breyer references the “marketplace of ideas” justification in *B.L.*, it has no applicability to the case. B.L. was not making a truth claim. B.L.’s serial f-bombs cannot reasonably be construed as stating her true beliefs. At no point in the litigation did she express critical views of cheerleading, softball, school, or indeed everything. On the contrary, B.L.’s parents brought the case because B.L. very much wanted to continue to be a cheerleader. She has consistently stated that she did not believe what she wrote. She did not want her message, “fuck cheer,” to win out, or even to compete in the marketplace of ideas. Imagine that the Tinkers had insisted throughout their litigation that their armbands were just a form of venting and that they were in fact planning to enlist in the war effort. Their case would have come too trivial to justify the Court’s attention.

It might be that the truth justification for free-speech protections is itself outdated. Our First Amendment is neutral as between truth and falsity. It affirmatively protects the right to lie. In her book on the subject, Catherine Ross writes that, while there is “powerful social value in combatting falsehood,” legal regulation of lies is untenable because of “the First Amendment and definitional challenges.” In her conclusion, she observes that “[t]ruth is essential to democracy, while lies subvert it . . . , and yet she concludes that “no simple solution for pervasive public falsehoods exists in the United States.”

It is not immediately apparent why the First Amendment should protect anybody’s “right” to lie. As Jud Campbell notes, “the First Amendment did not enshrine a judgment that the costs of restricting expression outweigh the benefits.” The best evidence suggests that the First Amendment was not

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190 *See B.L.*, 141 S. Ct. at 2046 (“Our representative democracy only works if we protect the ‘marketplace of ideas.’”).
191 *See Joint Appendix at *30, Mahanoy Area Sch. Dist. v. B.L.,* 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 (explaining in testimony at a preliminary injunction hearing that she cried as she apologized for her Snaps because “I really enjoy cheerleading”).
192 *See United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (finding that the Stolen Valor Act, which imposed criminal penalties on persons claiming falsely to have received military honors, violated the First Amendment).
193 *Ross, supra* note 168.
194 *Id.* at 90.
195 *Id.* at 150.
196 Campbell, *First Amendment, supra* note 157, at 257.
originally intended to protect attempts to lie or mislead. Professor Ross, in explicating the *Alvarez* case, cites Judge Kozinski’s view that, if lies were not protected, “a wide range of expression would be subject to criminal penalty.”

Yes, legislatures can and do pass absolutely idiotic laws, but that does not mean we have to render the First Amendment incoherent by claiming that it protects lies in order to protect the search for truth. Nonetheless, our modern First Amendment jurisprudence protects at least some lies. That aspect of our current law is at odds with other justifications for broad protections of freedom of expression.

The truth justification need not result in the rights absolutism of current doctrine. Even if we value truth, we need not assume the interest in arriving at truth takes precedent over all other social interests. In this case, even if we concede that B.L. has a right to the view, “fuck school, fuck cheer” etc., a court should consider the District’s strong interest in emphatically rejecting that message. Just as a school might determine that a sign reading “BONG HiTS 4 JESUS” undermines the school’s anti-drug campaign, “fuck school, fuck cheer” undermines the pro-school, pro-athletics message that is the very purpose of having a cheerleading program.

Justice Breyer waves away objections that B.L.’s utterance is unworthy of full First Amendment protection because “sometimes it is necessary to protect the superfluous in order to preserve the necessary.” But perhaps the key word in that sentence is “sometimes.” If utterances such as B.L.’s were chilled by the threat of discipline, the march towards truth would not be impeded. She placed nothing up for exchange on the marketplace of ideas. If we are going to find a principled basis for protecting B.L.’s speech, we must look elsewhere.

Similarly, the argument for toleration does not really come into play here. B.L. had no message towards which the District was intolerant. B.L. agreed that her Snaps were inappropriate. She apologized for them. She did not sue because she wanted her “fuck cheer” perspective to be tolerated; she sued because she wanted to remain a cheerleader. She also was not advocating for some abstract right for cheerleaders to share with their classmates profane Snaps referencing cheerleading. She regretted her Snap and acknowledged that she had been wrong in sending it. She recognized that her message would have been inappropriate if made at school. Her argument boils down to the idea that she should not be punished because she expressed herself while off campus and

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197 *Id.* at 310.
198 *Ross,* supra note 168, at 27.
199 See Simson, *supra* note 8, at 20 (“[T]he inherent First Amendment value of knowingly false statements of fact is minimally positive at best.”).
201 *Schauer,* *Free Speech,* *supra* note 159, at 23.
outside of school hours. It is not clear why her interest in doing so merits constitutional protection, let alone strict scrutiny.

2. Speech and Democratic Process

Justice Breyer’s reading of B.L.’s Snaps, and of the motivation for the coaches’ response, is unconvincing. B.L. was punished for violating team rules and for using profanity, not for criticizing her coaches. If her coaches were that tetchy about criticism, B.L. had given them cause to discipline her prior to their discovery of her Snaps. B.L.’s coaches were quite tolerant of criticism, including criticisms that B.L. expressed to her coaches, directly, rudely, and without consequence.

B.L. texted a coach to get information about a team rule. Upon receiving an answer that she did not care for, B.L. wrote, “That’s stupid, but ok.” The “stupid” rule permitted incoming freshmen to join the varsity squad. B.L. exhibited hostility to a cheerleader who was admitted to the varsity team despite being an entering freshman. Her coach described B.L.’s expression, which was essentially a form of bullying, as a violation of team rules, but not one that would necessarily result in discipline. B.L. was informed that she was being suspended because her Snap was “disrespectful” towards her coaches, the school, and other students. Telling a coach in a text that her rules are “stupid,” is also disrespectful. Clearly, what mattered to the coaches was not the challenge to their authority. Rather, they were concerned that B.L.’s expressive activity, if it remained unaddressed, would be detrimental to team cohesion.

B.L.’s coach’s testimony was absolutely clear on this point. In response to a series of hypotheticals posed by B.L.’s attorney, the coach made clear that she did not and would not punish B.L. for criticizing any of the team’s policies, but that B.L.’s use of profanity was a violation of team rules. Those rules left it to the coaches’ discretion to determine what disciplinary measures were appropriate.

Justice Breyer characterizes B.L.’s punishment as retaliation for comments critical of her coaches. He must do so in order to justify treating B.L.’s Snap as “the kind of pure speech to which, were she an adult, the First Amendment gives protection.”

203 See Joint Appendix at *27, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 (testifying that her coach pointed to the words “fuck cheer” in an image of the Snap and informed her that she was suspended from cheerleading for being “disrespectful towards her, the school, and everyone—like all the students”); id. at *34–35 (explaining that B.L. was disciplined for her use of profanity directed at cheerleading).

204 Id. at *34.

205 Id. at *78.

206 Id. at *27.

207 Id. at *78.

208 See Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) (portraying her speech as communicating “criticism, of the team, the team’s coaches, and the school”).
Amendment would provide strong protection.” However, nothing in the record supports Justice Breyer’s characterization. On the contrary, the record is clear that B.L. intended no criticism. When asked why she sent her Snap, B.L. answered, “I was just mad about everything.” When asked whether it was directed at a particular purpose, she answered, “No.” Her mother said of the Snap, “She didn’t mean anything by it. She was just [expressing] frustration.” So viewed, B.L.’s speech might merit constitutional protection under the “safety valve” theory. However, that theory aims at releasing societal pressures that might otherwise lead to violence. B.L.’s speech was not of that sort.

To the extent that we protect freedom of speech because unfettered speech promotes democratic processes, there is no need to protect B.L.’s speech. She intended no criticism of her coaches or her team, apologized for her intemperate remarks, and pursued her case because her actual position is the very opposite of “fuck cheer.”

3. Autonomy and Self-Actualization Arguments

The autonomy and self-actualization defenses of expansive free-speech protections both suffer the same flaws: if free speech must be protected in order to safeguard individual autonomy and to respect individual dignity, so must a lot of other things that are not accorded the status of fundamental rights. Indeed, protecting freedom of expression based on autonomy or dignity interests spotlights the absurdity of rights absolutism. If the United States were committed to the protection of individual autonomy and human dignity, our politics would focus on meeting the primary needs of every resident, including adequate housing, food, potable water, education, health care, and group rights associated with the protection of cultural rights.

Freedom of speech, while significant and important, pales in significance when compared with the needs of the homeless, the malnourished, or those dying of some treatable malady for want of health insurance. Psychologists place the categories associated with free speech at the top the hierarchy of needs that contribute to human flourishing, which means that those

209 Id. at 2047.
211 Id.
212 Id. at *110.
214 See SCHAUER, FREE SPEECH, supra note 159, at 49 (calling the argument that communication is integral to improvement and self-development “fundamentally misguided”).
215 See id. at 56 (pointing out that self-fulfilling arguments that favor a right to free speech could just as easily support “a right to eat, a right to shelter, a right to a decent wage, a right to interesting employment, a right to sexual satisfaction and so on ad infinitum”).
needs are not basic or fundamental.  

Physiological and safety needs come first, but those needs are accorded little constitutional protection. In fact, the United States has not ratified the International Covenant on Economic, Social and Cultural Rights, which safeguards the aforementioned rights, nor has it passed domestic legislation that might achieve the same ends.  

The fight over the Affordable Care Act demonstrates the astonishing indifference of many Americans to the provision of rights protections far more closely associated with autonomy and dignity than is the right to free speech.  

It is widely agreed that the First Amendment, even with respect to core political speech, was largely concerned with prior restraints on speech.  

The Framers did not necessarily view the First Amendment as a bar to government punishment for speech. As Justice Story put it, “Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.”  

Beginning in the twentieth century, courts have interpreted the First Amendment as insulating people from punishment for their political speech short of incitement.  

Speech such as B.L.’s, which was not political, could fall in a middle ground, in which prior restraints would be impermissible, but discipline could follow, if consistent with respect for B.L.’s autonomy or dignity interest.  

There is no reason to think that B.L.’s autonomy or dignity interest would have been harmed had the courts allowed her punishment to stand. After all, those who engage in civil disobedience should not expect to be spared punishment.  

At least since Socrates, submission to state sanctions established  

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217 See International Covenant on Economic, Social and Cultural Rights, art. 6, Dec. 16, 1996, 993 U.N.T.S. 3 (recognizing a right to gainful employment and to educational programs necessary to achieve that goal); id. at art. 7 (recognizing a right to fair wages, safe and healthy work conditions, and reasonable work hours); id. at art. 11 (recognizing a right to adequate food, clothing, and housing); id. at art. 12 (recognizing a right to affordable health care); id. at art. 13 (recognizing a right to education).  


219 See Carroll v. President & Comm’rs of Princess Anne, 393 U.S. 175, 181 n.5 (1968) (“The elimination of prior restraints was a ‘leading purpose’ in the adoption of the First Amendment.”) (internal citation omitted).  


a dedication to principles above those recognized by secular authorities. John Rawls also believed that willingness to accept sanctions was crucial to civil disobedience, as willingness to accept punishment distinguished civil disobedience from ordinary law-breaking. Those who engage in civil disobedience celebrate their willingness to accept sanctions as evidence of their commitment to their ideals. Advocates of civil disobedience endorse state-imposed penalties for civil disobedience while arguing against criminal punishment. Similarly, those who engage in free speech cannot claim that their autonomy and self-actualization goals are negated if they suffer non-criminal sanctions for engaging in prohibited forms of speech.

The safety valve theory could support an argument that the state ought not to stifle expressions of rage such as B.L.’s, even if the suppression of such expression is unlikely to result in violence. People ought to be able to vent their rage as a mode of self-expression without fear of government reprisal. True enough, but the constitutional interest at stake in B.L.’s expression should not be considered outside of its context. B.L. spoke profanely and disparagingly about her school and cheerleading. But when she signed up to be a cheerleader, she signed an undertaking in which she agreed not to do those very things. A rights-mediation approach can take such contextual factors into account. Or rights absolutism does not.

The autonomy/dignity arguments in favor of free expression should not apply in situations such as this one, where the government’s disciplinary response has to do with context-specific factors unrelated to content. B.L.’s sense of herself is not enhanced if she is able to skirt her commitments and avoid hard choices between full expression of her views and participation in activities that she enjoys. Protecting the rights of children to speak in any way they please does not necessarily help them develop the character and identity. It may just as well prolong an infancy in which indulgent adults coo in approbation of every selfish act. Nor do the interests promoted under safety valve theory, even if viewed as


224 JOHN RAWLS, A THEORY OF JUSTICE 322 (1999) (“[F]idelity to law is expressed . . . by the willingness to accept the legal consequences of one’s conduct.”). While some disagree, they do not do so on the ground that accepting punishment somehow negates the autonomy or dignity of the person engaged in civil disobedience. See Moraro, supra note 222, at 505 (distinguishing respect for the law from obedience to it and arguing that once a person has appropriately responded to criminal charges, they are not morally culpable for refusing to accept punishment).

225 See, e.g., JOEL FEINBERG, Civil Disobedience in the Modern World in FREEDOM & FULFILLMENT: PHIL. ESSAYS 152–74 (1992) (arguing that penalties such as fines have a different expressive content, as they do not entail moral condemnation); David Lefkowitz, On a Moral Right to Civil Disobedience, 117 ETHICS 202, 219 (2007) (arguing that the state should not punish citizens exercising their moral right to engage in suitably constrained acts of civil disobedience).

sounding in a right of self-expression, clearly override the other interests implicated in B.L.’s speech.

4. Slippery Slope Arguments

This last justification for broad First Amendment protections of expression will be treated more extensively in Part IV. For now, it suffices to observe that, as Fred Schauer has noted, slippery slope arguments are usually either invalid or greatly exaggerated: “there must be some reason why the slope is especially slippery in this area.”227 It is hard to see what harms necessarily follow from allowing coaches the discretion to discipline student athletes by suspending them from participation in team activities. It happens every day and, in many contexts, discipline is said to “build character.”

C. Conclusion: The Principles Underlying Constitutional Protections Are Not Furthered by Protecting B.L.’s Snaps

The first question one poses with respect to any rights claim is whether the challenged conduct is covered under the right.228 The Court provides only the most perfunctory arguments for why any free speech principle should cover B.L.’s speech. None of the bases for First Amendment protections applies to B.L.’s Snaps. According constitutional protections to forms of expression that do not merit the same protections as core political speech cheapens constitutional rights and perpetuates the dumbing down of the First Amendment.

V. REPLACING RIGHTS ABSOLUTISM WITH A MEDIATION OF INTERESTS

Fred Schauer’s distinction between coverage and protection229 provides a useful framework. Questions about rights can be divided into two separate inquiries. The first inquiry is whether the expression at issue is covered by the rights protection provided by law. In this case, the question would be whether B.L.’s Snaps merit First Amendment protection. The next inquiry addresses the level of protection provided to covered rights. As Schauer points out, a suit of armor covers the body, but it provides no protection against artillery fire.230 So it might be the case that, even if the First Amendment covers B.L.’s Snaps, it may not protect her against school discipline. That is, the District’s interest in maintaining team cohesion might outweigh B.L.’s free speech rights.

227 See Schauer, FREE SPEECH, supra note 159, at 84.
228 Id. at 89. I am grateful to my colleague Marc Blitz for productive conversations about this aspect of Schauer’s work.
229 Id. at 89–92.
230 Id. at 89.
Fred Schauer’s metaphor likening rights protection to a suit of armor needs to be tweaked in light of Jamal Greene’s call for rights mediation and a movement away from rights absolutism. The First Amendment need not be a uniform suit of armor. It may provide strong protection against government suppression of core political speech but more limited protection of other forms of speech. More generally, the protection provided may be stronger or weaker depending on the context, the type of expression, and the reasonableness of the regulation. Rather than a suit of armor, the First Amendment may operate more like anti-virus software, blocking absolutely speech restrictions that threaten harm to the body politic and preventing more contingently expression that infringes on the rights of others, but allowing through limitations on expression that preserve that body’s overall well-being.

The rights mediation approach has broader consequences. If courts limit themselves to determining only the proper solution to the constitutional challenge presented to them, the stakes of litigation are lowered. Fewer cases would then be worth litigating and more matters would be left to be worked out through political processes, rather than having courts establish relatively firm rules based on the idiosyncratic facts of a particular case. There is no need to allow relatively benign restrictions of trivial expression to become the stuff of constitutional principles. The Due Process and Equal Protection doctrines suffice to address regulations of non-political speech, as they do in other areas in which the individual rights of public-school students are addressed. This Article expresses no view on whether the courts have struck the right balance in addressing the protection of public-school students’ constitutional rights other than their rights to free expression. It only highlights the imbalance in our rights jurisprudence if rights to free expression are accorded more protection than, for example, the right to be free from searches and seizures, including random drug-testing regimes.

A. The Constitution Does Not Require Rights Absolutism

Even if one thinks that the Framers were natural law theorists who believed that humans were endowed with “inalienable rights,” Jud Campbell has shown that those rights, while inalienable, are for the most part subject to reasonable government regulation. In the First Amendment context, the Framers can only be said to have agreed that everyone possessed “the inalienable natural right to make well-intentioned statements of one’s thoughts.”

231 See, e.g., Jud Campbell, Natural Rights, Positive Rights, and the Right to Keep and Bear Arms, 83 L. & CONTEMP. PROBS. 31, 31 (2020) [hereinafter Campbell, Bear Arms] (charting the complicated relationship between natural rights and positive rights in the founding era in connection with gun regulation); Jud Campbell, Republicanism and Natural Rights at the Founding, 32 Const. Comment. 85, 85–86 (2017) [hereinafter Campbell, Republicanism] (contending that “natural rights” were not viewed at the Founding as determinate legal privileges or immunities but entailed a “mode of reasoning”).

232 Campbell, First Amendment, supra note 157, at 256.
“well-intentioned,” the Framers understood the freedom to express one’s thoughts to be limited to honest statements. There were no assumed protections of statements made with intent to deceive.\textsuperscript{233} Beyond such limited inalienable rights, the fact that the Constitution recognizes certain rights does not render such rights inviolable.\textsuperscript{234} Rather, under the social contract theory that informed the founding, such rights could only be restricted through democratic process involving representative legislatures and juries. Moreover, any such regulation had to promote the common good rather than the interests of any particular group.\textsuperscript{235} The people themselves, directly through popular institutions such as the militia or juries, or indirectly, through elected officials or courts, regulated their own natural rights to promote the common good.\textsuperscript{236} As Campbell notes, “natural rights called for good government, not necessarily less government.”\textsuperscript{237} James Wilson emphasized that government could not exist, “unless private and individual rights are subservient to the public and general happiness of the nation.”\textsuperscript{238} The Framers did not imagine a role for courts in enforcing natural rights,\textsuperscript{239} as they expected courts to have a limited role, intervening only where constitutional violations were clear and not establishing the boundaries of jurisprudential doctrines where no fixed standards applied.\textsuperscript{240}

The original understanding of rights distinguished positive and natural rights.\textsuperscript{241} Positive rights “operated as determinate rules about what the government had to do or could not do, regardless of legislative assessments to the contrary.”\textsuperscript{242} While natural rights entail things that people can do without government assistance, like eating, praying, or thinking, positive rights can

\begin{itemize}
  \item \textsuperscript{233} Id. at 282.
  \item \textsuperscript{234} See, Campbell, Republicanism, supra note 231, at 97 (noting the consensus view among the Founders that individuals could consent to restrictions on their natural rights through legislative acts); Campbell, First Amendment, supra note 157, at 256 (noting that the First Amendment generally “left unresolved whether certain restrictions of expression promoted the public good”).
  \item \textsuperscript{235} Campbell, Bear Arms, supra note 231, at 35–36.
  \item \textsuperscript{236} Id. at 37–38; see also Campbell, Republicanism, supra note 231, at 96 (noting “broad agreement” among the Founders “that the government could restrict natural liberty in the public interest”).
  \item \textsuperscript{237} Campbell, Republicanism, supra note 231, at 87.
  \item \textsuperscript{238} Id. at 93 (quoting James Wilson, The Substance of a Speech Delivered by James Wilson, Esq. Explanatory of the General Principles of the Proposed Federal Constitution 8 (Philadelphia, Thomas Bradford 1787)).
  \item \textsuperscript{239} See id. at 107 (observing that “natural rights were not a source of determinate, judicially enforceable law” at the Founding); Greene, supra note 6, at 7 (observing that “within Founding-era political thought, the institutions best suited to reconcile the competing demands of rights holders were not courts but rather state and local political bodies. . . .”).
  \item \textsuperscript{240} Campbell, First Amendment, supra note 157, at 311.
  \item \textsuperscript{241} See id. at 252 (describing the distinction commonly made among American elites at the time of the Founding between natural rights and positive rights).
  \item \textsuperscript{242} Campbell, Bear Arms, supra note 231, at 39.
\end{itemize}
include the right to a jury trial or to a writ of habeas corpus that arise only in society. Positive rights can entail absolute prohibitions on government interference with private enjoyment of a right. However, in the First Amendment area, only the prohibition on prior restraints was considered a positive right at the founding.

We need not conclude that we are constrained by the original meaning of the First Amendment, but if we are interested in adhering to original meaning, we must concede that our contemporary interpretation of the First Amendment utterly fails to do so. Jud Campbell’s account is consistent with Jamal Greene’s insight that today’s rights absolutism evolved only during the twentieth century. Campbell shows that the original meaning of the First Amendment does not support our current understanding of its scope. Jamal Greene’s call for rights mediation instead of rights absolutism provides a normative basis for a new approach to adjudicating First Amendment rights.

Rights mediation acknowledges the presence of rights or interests on multiple sides of a conflict. Jamal Greene illustrates his model with the example of the West German constitutional court’s decision involving a woman who challenged a city ordinance prohibiting feeding pigeons on streets or public facilities. The difference between Germany’s rights-mediation approach and our own did not change the result. The woman lost. However, under the German model, the court acknowledged her right to feed the pigeons but found that the city had a good reason for prohibiting her conduct. Greene comments:

Justice means we must confront the government’s actual behavior, the legislators’ or the executive’s actual motives, the actual evidence available, and the degree to which individuals are actually burdened by government practices that restrict our liberty or favor one person’s rights over another’s. These questions are empirical, not interpretive, because justice isn’t

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243 Campbell, Republicanism, supra note 231, at 91–92.
244 Campbell, Bear Arms, supra note 231, at 39; Campbell, First Amendment, supra note 157, at 288–90.
245 See Campbell, First Amendment, supra note 157, at 320 (“The First Amendment . . . was not designed or originally understood to provide a font of judicially crafted doctrines protecting expressive freedom.”).
246 See GREENE, supra note 6, at xxiii (explaining that the American legal profession’s aversion to proportionality analysis in the adjudication of rights emerged as a mistake of protecting the wrong rights in the early twentieth century); see also Campbell, First Amendment, supra note 157, at 263 (calling modern speech doctrine “fundamentally inconsistent with Founding Era law”).
247 See GREENE, supra note 6, at xx (calling for rights mediation).
248 Id. at 13.
249 Id. at 92–93.
abstract or literary or historical, but rather depends on the facts in the here and now.\textsuperscript{250}

In our winner-takes-all model of rights adjudication, sophisticated entities spend their considerable resources, both intellectual and monetary, lining up the perfect case for maximal impact. The Supreme Court dutifully provides broad rulings that determine which rights triumph, and which go unrecognized in the gladiatorial jousts that rights adjudication has become in this country.

The rights mediation model addresses the last defense of our dumb First Amendment: the slippery slope argument. Slippery slope arguments begin with the concession “that the proposed resolution of the instant case is not itself troublesome.”\textsuperscript{251} If courts engage in rights mediation instead of rights absolutism, they decide only the instant case. An advocate might raise slippery slope arguments, but the court should reject them and reply in good faith, “That is a different case, and it is not before us today.”

Moreover, the slippery slope argument, in conceding that the instant case is not itself troublesome, acknowledges the possibility of line-drawing between the instant case and some more borderline case.\textsuperscript{252} Such line drawing is the very stuff of common-law adjudication. However, as Fred Schauer points out, the concessions of the slippery slope argument do not rob it of its power because of linguistic imprecision. Despite the theoretical possibility of line-drawing, in reality legislators and courts cannot anticipate the universe of future cases and so cannot be trusted to establish sufficiently flexible criteria for distinctions.\textsuperscript{253} For example, in the \textit{Tinker} context, the Court has imposed on the schools the burden to establish that the expression in question caused “significant disruption,” a phrase rife with linguistic imprecision. The solution, described in more detail below, is to consider that criterion as only one of numerous factors taken into account in determining the reasonableness of the school’s actions.

Those who make slippery slope arguments appropriately worry that fact-finders confronted with linguistic imprecision will construe regulations in tendentious ways. In the realm of speech, adjudication often involves the rights of marginal groups. We have no difficulty protecting the expressive rights of people with whose views we are in general agreement.\textsuperscript{254} However, the constitutional mechanism for protecting minority expression does not require the protection of all expression. As argued in Part IV.C below, Equal Protection and Due Process doctrines address those slippery slope concerns.

\textsuperscript{250} \textit{Id.} at 93.
\textsuperscript{251} Schauer, \textit{Slippery Slopes, supra} note 161, at 368–69.
\textsuperscript{252} \textit{Id.} at 369–70.
\textsuperscript{253} \textit{Id.} at 370–73.
\textsuperscript{254} \textit{See id.} at 377 (“The decisionmaker’s negative view of the parties is likely to lead to mistakes of a particular kind, to oversuppression rather than undersuppression, in the application of free speech principle.”).
Finally, the ultimate problem with slippery slope arguments is that they invariably can be used by both sides in a constitutional standoff. Those who seek to defend B.L.’s rights of free expression postulate that, if the District can discipline B.L. for off-campus speech, public schools then become the round-the-clock monitors of student expression, and they can always fabricate some argument for why the expression that they want to ban threatens to disrupt school activities. However, those who defend the District’s right to discipline B.L. can spin out equally persuasive hypotheticals about the dangers of unchecked student speech that causes disruption, undermines discipline, and makes it impossible for teachers and staff to deliver a curriculum. In keeping with Jud Campbell’s understanding of the proper guardians of our rights, such questions might be properly left to a jury.

B. An Alternative Rubric

_Tinker_ and its progeny set out a simple test: the court first inquires whether the student engaged in protected speech. If so, that speech is protected unless it causes significant disruption or infringes on the rights of others. A rights mediation approach would favor a balancing approach in which numerous factors are considered, including the nature of the expression; the level of disruption or foreseeable disruption; whether the disruption was to curricular or extra-curricular programs; whether the expression was profane, abusive, or otherwise merited lesser protection; whether the expression violated school rules or an undertaking of the student and/or their parents; the effect of the expression on other students, teachers, or other employees; whether remedies other than school discipline suffice; the student’s disciplinary history; the school’s past history of discipline for similar expressive activity; and the nature of the discipline imposed, given all of the surrounding circumstances, including the student’s intent. Where the speech occurred may matter, but the focus of the inquiry turns on whether the expression caused disruption in school, regardless of its original source.

1. The Nature of the Expression

In B.L.’s case, because her speech did not implicate the expressive interests that the First Amendment protects, it should not have commanded the same level of protection to which it otherwise would have been entitled. Unlike the Tinkers, B.L. was not making a political statement. She was not making any statement to which she had any commitment whatsoever. In addition, her speech may be considered vulgar and offensive, and the Court has repeatedly held that the government can respond to such speech differently from how it responds to

255 See _id._ at 381 (noting that “in virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim”).
non-profane speech with the same content, especially when that speech is
directed at children.\textsuperscript{256}

2. The Level of Disruption to Curricular or Extra-Curricular
Activities

Under a rights-mediation approach, an adjudicator might be more
willing to tolerate some disruption caused by a sincerely-felt expression that
conveys an important message than frivolous expression. B.L. has no strong
interest in the message contained in her Snaps. She repeatedly apologized for
them, and her actions in bringing her suit suggest that her true beliefs were the
opposite of those expressed in her Snaps. Nonetheless, they caused more
disruption than did the Tinkers’ armbands.\textsuperscript{257} Significantly, the disruption caused
by B.L.’s Snaps affected not only the cheerleaders’ extra-curricular activities, but
also their math class.\textsuperscript{258}

3. Speech Meriting Lesser Protection

The courts that considered B.L.’s case gave little consideration to the
broader disciplinary context in which she inserted her Snaps. B.L. was upset
about two things: that she did not make the team and that team rules permitted
freshmen to join the varsity cheerleading team. Before her coaches became aware
of B.L.’s Snaps, B.L. texted one of her coaches to ask because her “mom was
wondering,” whether a student has to “DK” a year of JV before making the
varsity team. The answer was “no,” to which B.L. responded with “That’s stupid,
but okay.”\textsuperscript{259} This rather disrespectful exchange with her coach resulted in no
punishment because, her coach explained, it violated no rules.\textsuperscript{260} While her “fuck
cheer” Snap gained a lot of attention, her second Snap articulated an actual

\textsuperscript{256} See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (noting that offensive
speech, such as Cohen’s “Fuck the Draft” jacket, might be permissible among adults but can be
regulated in public schools); Fed. Commc’n Comm’n v. Pacifica Found., 438 U.S. 726, 749–50
(1978) (recognizing a state interest in protecting minors from exposure to vulgar and offensive
language).

\textsuperscript{257} Compare B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 444 (M.D. Pa. 2019)
(acknowledging multiple disruptions of Coach Luchetta-Rump’s math class and her concern of
“chaos” that might ensue if the coaches did not address B.L.’s Snaps), with Tinker v. Des Moines
Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 n.3 (1969) (observing that the school cited only fear
that permitting the armbands might cause future disruption). Justice Black’s \textit{Tinker} dissent offers
a different account, citing a math teacher who claimed that her class session was “wrecked” and
an out-of-class warning from a football player to other students that they should leave the Tinkers
alone. \textit{Id.} at 517 (Black, J., dissenting).

\textsuperscript{258} See \textit{supra} text accompanying notes 140–143.

\textsuperscript{259} Joint Appendix at *34, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-
255), 2020 WL 8669753.

\textsuperscript{260} \textit{Id.} at *87.
complaint about team policies. “Love how me and [another student] get told we need a year of jv before we make varsity but that doesn’t matter to anyone else? That Snap was relevant to B.L.’s coaches’ concern that she had been giving a teammate “a hard time” by making the teammate feel that she did not deserve to be on the squad. However, that conduct also did not lead to discipline because the coaches did not have sufficient evidence that B.L. had violated team rules requiring that teammates be respectful towards one another.

These facts raise complications. B.L. actually did express substantive criticisms of the team rules. However, she was not disciplined for voicing her criticisms, even though her coaches might have objected to the form of her criticisms. That said, while B.L. was entitled to her views about whether freshmen should be allowed to be on the varsity team, it would be odd if the courts were to determine that the First Amendment protected her right to bully a teammate. B.L.’s expressive activity placed her coaches in a treacherous situation. They did not want to punish B.L. for expressing her opinions, but they had to protect B.L.’s teammate from B.L.’s attempts to rally other cheerleaders to her anti-freshman cause. Rights absolutism prevented the Court from considering that context in relation to B.L.’s Snaps. Fear of conceding that there was some substance to the second, less sensational, Snap may have deterred the District from highlighting B.L.’s bullying behavior.

The Court is simply wrong to characterize B.L.’s punishment as a response to her critical comments. It was a response to her vulgarity and to her violation of the team rules. B.L.’s lawyer walked B.L.’s coach through a series of hypothetical Snaps that B.L. could have posted. The coach had no difficulty identifying which Snaps would be violations and which would not. The coaches tolerate criticism; negative comments about cheerleading may lead to a conversation, but profane negative comments on social media result in discipline.

4. Violation of School Rules or Undertakings

Jamal Greene notes a curiosity of our constitutional history. We moved from a regime in which the Court strictly protected economic rights, such as freedom of contract, to a regime in which such rights merit no protection

263 Id. at *79 (testifying that she did not know what viewpoint B.L. was trying to express in her Snaps and that she was suspended from the team for using profanity).
264 Id. (testifying that she did not know what viewpoint B.L. was trying to express in her Snaps and that she was suspended from the team for using profanity).
Even where a state provides no reasonable justification for economic regulation, courts uphold such regulation if the courts can imagine such a justification. In *Williamson v. Lee Optical*, the Court upheld an Oklahoma economic regulation that constituted a “needless, wasteful requirement in many cases.” It did so not because it concluded that the Oklahoma regulation was, on the whole, reasonable, nor because Oklahoma had provided an adequate justification for its regulation. Rather, it was enough for the Court that “it might be thought that the particular legislative measure was a rational way” to address a problem. Rights absolutism prevents courts from even considering the relevance of parties’ private legislation. A rights-mediation approach, by contrast, gives due consideration to the parties’ contracts, undertakings, representations, or, in this case, conditions of participation in extra-curricular activities.

None of the Supreme Court opinions in *B.L.* mention the Cheerleading Rules that the school district thought bound B.L. to a code of conduct. Those rules are neither lengthy nor complex. The entire document consists of about three pages, and the last item on it provides that “There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.” The coaches reviewed these rules with the team, and each student was required to sign a form promising to abide by them before cheerleading tryouts. In Justice Alito’s concurrence, he notes that whether a school has power to regulate speech on a laptop that the school provides for student use outside of school would turn on “the terms of the agreement under which the laptop was provided.” And yet the Court ignores the agreement between the school and B.L. regarding conduct expected of cheerleaders. Under Justice Alito’s consent-based approach to school discipline, B.L.’s parents clearly delegated to B.L.’s coaches the authority to impose disciplinary measures in connection with B.L.’s participation on the team. While one might reasonably raise questions regarding B.L.’s consent to the terms of an agreement entered into under these conditions, courts routinely enforce such contracts of adhesion, absent clearly one-sided terms.

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265 See *Greene*, supra note 6, at 51 (describing the post-*Lochner* Court as creating a two-track system in which some constitutional rights receive special treatment, while other rights receive none).


267 *Id.* at 488 (emphasis added).


269 *Id.* at *32.


271 See, e.g., KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (arguing that assenting to standard form terms means agreeing to the transaction in general but not to any not unreasonable or indecent terms); Randy E. Barnett, *Consenting to Form Contracts*, 71 *Fordham L. Rev.* 627, 638 (2002) (arguing that form terms should be enforceable so long as they
matter and concluded that B.L. and her parents were not bound by their agreement to abide by the District’s rules for cheerleaders. The Court did not consider the District’s interest in enforcing its agreement with B.L. at all.

Justice Alito thinks it is not reasonable to infer that B.L.’s parents “gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity.”272 So put, it is hard to disagree. However, the school is not trying to regulate B.L.’s language with respect to all matters and all subjects. B.L. agreed that she was only eligible to be a cheerleader under certain conditions. She violated those conditions and so was subject to discipline. This is not an uncommon occurrence. A daughter of one coach had been suspended for four games three years earlier for a negative Internet post about a rival cheerleading squad.273 In her deposition, one of B.L.’s coaches testified that the coaches regularly chastise the cheerleaders about unpleasant things they text to one another, even if they say those things in private text messages.274 All of this context seems relevant to the District’s decision to discipline B.L. as it did, but the Court considered none of it.

5. Effect on Others

A balanced approach to rights would consider not just the rights of the student who brings a First Amendment claim but, as Tinker itself urged, the impact of the exercise of First Amendment rights on others.275 The rights of other cheerleaders are not trivial in this context. It is not just that they were upset. It is not just that their experience as cheerleaders was diminished. As B.L. herself admitted, cheerleaders have to trust one another, not only because they work closely together and often perform in unison, but also because they lift one another and catch one another when they perform dramatic falls out of lifts.276 B.L.’s coaches did have reasons to be concerned about substantial interference with their work; they also had reasons to be concerned that B.L.’s presence on the team would undermine the coaches’ ability to discipline students and foster team coherence.


272 B.L., 141 S. Ct. at 2058 (Alito, J., concurring).


274 See id. at *73 (calling such conversations “a fairly typical occurrence”).


276 See Joint Appendix at *99–100, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 (listing the stunts that cheerleaders do and acknowledging that cheerleaders depend on each other to do what they are supposed to do in order to avoid injury).
6. The Appropriateness of the Discipline

A decision-maker should consider at least four factors in determining whether discipline for student expression is warranted. First, in some cases, a school need not discipline a student because other remedies are available. Second, a school might be justified in dealing more harshly with a student who has repeatedly violated rules or whose oppositional behavior itself is a source of disruption. Third, the justice of the discipline can be measured against other disciplinary measures imposed in comparable circumstances. Fourth, the decision-maker should consider whether and to what extent the student intended whatever disruption their speech caused. Finally, the punitive nature of the discipline should not be disproportionate to the harm caused by the student’s expression.

In prior cases coming from the Third Circuit in which students had posted defamatory profiles of school officials, the officials who were subjected to such abuse referred the students’ conduct to the police.277 But if B.L. were to be disciplined in any meaningful way for her Snaps, that punishment could only have come from the school. For the first time in B.L., the Court has suggested that schools should refrain from disciplining students where they have no authority to act under the in loco parentis doctrine.278 Neither law nor logic compel the application of the in loco parentis doctrine here. B.L. was disciplined for violating school rules. Her parents may or may not have an interest in disciplining her for violation of school rules, and they have neither the means nor any responsibility for safeguarding the interests of others, as schools do, under Tinker. The record suggests that B.L.’s parents did not punish her for her Snaps. Her mother explained that she thought no punishment was necessary because B.L. did not ordinarily use such language.279

As indicated above, the Court did not consider the full context of which B.L.’s coaches were aware when they disciplined her. B.L. had criticized a team rule, which she has every right to do, but the coaches had some evidence that, in addition to sharing her critical perspective with her coaches, she was also encouraging teammates to make a freshman varsity cheerleader feel unwelcome. They may have viewed her “fuck cheer” Snap as a part of that campaign. That Snap merited discipline, in the eyes of her coaches, because it was profane and it disparaged cheerleading on social media, in violation of team rules. The discipline imposed was harsh, perhaps because it was connected to B.L.’s

277 See J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 922 (3d Cir. 2011) (en banc) (noting that, at victim’s request, the students involved and their parents were summoned to the state police station); Layshock v. Hermitage Sch. Dist. 650 F.3d 205, 209 (3d Cir. 2011) (en banc) (observing that although the victim spoke with the police, no criminal charges were filed).

278 See Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) (noting that schools “rarely stand in loco parentis” with respect to students’ off-campus expression).

bullying campaign targeting a freshman cheerleader. The Court’s rights absolutism prevented it from considering this context, but a rights mediation approach would have permitted the District to present this evidence without fear that its discipline might have been viewed as motivated as a punishment for B.L.’s criticism of a team rule. In a rights mediation context, the District could have made clear that B.L.’s criticisms were permitted; her bullying expressive activity was not.

The record reveals only one other instance in which a cheerleader was disciplined for inappropriate posts on social media. That instance is telling. The daughter of one of the coaches posted disparaging comments about another cheer team’s uniforms. She was suspended for those comments for the remainder of the season—four games. This example indicates that the coaches enforced their rules, including the prohibition on negative comments relating to cheerleading on the Internet. B.L.’s discipline, while severe, was not inconsistent with this prior incident.

B.L. sent the Snap to her 250 followers. Most teens’ followers are other teens that they know from school. The fact that Snaps disappear after twenty-four hours counsels in favor of a relatively light punishment for B.L. The fact that her Snap was shared with classmates, including other cheerleaders, makes it harder for her to claim that she intended no disruption. If she had only shared her Snap with friends from summer camp who attended different schools and might reside in different states, no discipline would have been necessary because her Snap never would have come to the attention of her coaches. The intent of the speaker to disrupt school activities can be difficult to discern, but the nature of the communication and the audience targeted for the communication are helpful indicators of intent.

Finally, a rights mediator would need to consider whether B.L.’s punishment was excessive. One advantage of rights mediation is that, absent the winner-takes-all consequences of rights absolutism, parties to rights mediation might quickly agree to a compromise in which B.L. is punished, but not for an entire year. If they could not do so, the consequences of B.L.’s suspension ought to be considered. Despite B.L.’s attorneys’ efforts, they provided paltry evidence that B.L. would have suffered any lasting injury from her suspension. Her mother testified that B.L. was “upset” for “a few weeks” but that she needed neither medical attention nor therapy as a result. B.L.’s coach rebuffed B.L.’s attorney when he tried to suggest that the incident might hurt B.L.’s chances to get into the college of her choice.

280 Id. at *71.
281 Id. at *27.
282 Id. at *108.
283 Id. at *37 (suggesting that a college would not know that a student had been kicked off of a team).
Although this Article contends that the District’s decision to discipline B.L. for her Snaps should not have triggered heightened scrutiny and thus should have been upheld under current law, it takes no position on whether the District imposed the right level of discipline on B.L. under a rights-mediation approach. Applying rights absolutism, the Supreme Court concluded that the District could not discipline B.L. in any way. Our law should be more nuanced. Our courts should be more deferential to democratically-accountable officials, and they should only apply strict scrutiny when there are indicia that democratic processes provide an insufficient check on local authorities.

Rights absolutism has become a tool of self-infantilization. The Framers adopted the Bill of Rights in order to “preserve the primacy of local representative bodies.”

Courts were to defer to the judgments of such bodies, so long as their decisions were not plainly at odds with clear legal rules. They did not envision subordinating the wills of local, democratically-accountable bodies to the whims of distant jurists. Adults make decisions. Adults make mistakes. Unless those mistakes cut at the very fabric of our system of government, adults learn to live with such mistakes, or those mistakes become the reason why voters remove incompetent officials from office. Democratic accountability is not enhanced when courts throw a wrench into carefully-calibrated disciplinary rules that are the product of decades of experience. B.L.’s development is not enhanced by having courts undercut the local authorities with whom she will continue to interact.

C. The Role of Courts in Policing Due Process and Equal Protection Violations

Public schools can burden students’ rights in ways that are far more intrusive than regulation of speech. They can search students’ personal property, and they can require students to undergo random drug screenings. Lower courts have upheld requirements that students pass through metal detectors before entering a school building, as well as searches of student

284 See GREENE, supra note 6, at xxix.

285 See New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985) (upholding search of a student’s purse upon report that she had been smoking cigarettes and allowing evidence of marijuana dealing found in the purse to be introduced in juvenile delinquency proceedings).


287 See Jason P. Nance, Student Surveillance, Racial Inequalities, and Implicit Racial Bias, 66 EMORY L.J. 765, 777 n.78 (2017) (citing cases, while noting some disagreement regarding whether students enjoy a reasonable expectation of privacy regarding the contents of their lockers).
lockers. The Court granted qualified immunity to public school personnel who subjected a middle-school student to an unjustified strip search.

In all of these cases, students retain their rights to procedural due process. In B.L., amici appropriately raised concerns regarding the danger that seemingly neutral school disciplinary policies are not implemented in a racially-neutral way, especially when school administrators are empowered to make discretionary decisions. Courts countenance limitations of Second and Fourth Amendment rights in public schools, subject to due process and equal protection challenges. Those same provisions can safeguard public-school students’ First Amendment rights. That is, schools should be permitted to discipline students for their expression, within the boundaries set out for political speech in Tinker, or subject to rights mediation, so long as that discipline is meted out in a non-discriminatory manner with adequate procedural safeguards, including notice and an opportunity to be heard.

1. Procedural Due Process

The test for procedural due process is contextual. A student facing suspension or other school discipline is not entitled to the same procedural protections as a suspect facing criminal sanction. But notice and an opportunity to be heard remains standard, at least for more significant suspensions, and courts will invalidate school discipline if procedural safeguards are not met. And indeed, sometimes they are not. For lesser disciplinary measures, a lower standard applies. As the Eleventh Circuit explained.

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288 *See id.* at 777 n.77 (citing cases).
290 *See Brief of Advancement Project, Juvenile Law Center, and 38 Other Organizations as Amici Curiae in Support of Respondent at *5–27, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 1268312 (arguing that expanding Tinker to off-campus speech will have a disproportionate effect on students of color, students with disabilities and students who identify as LGBTQ+).
291 *See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (creating a three-factor weighing test to determine the quantum of process that is due).
292 *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (finding that notice of school rules and warnings from teachers satisfied procedural due process); Jennings v. Wentzville R-IV Sch. Dist., 397 F.3d 1118, 1124 (8th Cir. 2005) (cheerleader was not denied due process when she was suspended for ten days after notice, where she and her parents refused to avail themselves of an opportunity to be heard).
293 *See Goss v. Lopez, 419 U.S. 565, 581 (1975) (finding that students had a due process right to “rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school”).
294 *See, e.g., Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556, 566–69 (6th Cir. 2011) (finding student had alleged that his procedural due process rights were violated based on evidence that the principal was biased against him and denied him a fair hearing); Lopez v. Bay Shore Union Free Sch. Dist., 668 F. Supp. 2d 406, 422 (E.D.N.Y. 2009) (finding that student had stated a claim that
Once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands. The only other requirement arises from the Court’s admonishment that the hearing come before removal from school “as a general rule,” unless a student’s continued presence is dangerous or disruptive. In these instances, removal can be immediate.295

Because B.L. was not suspended from school but only from the team, the lesser standard articulated here applied. B.L. did not allege that procedural due process standards were violated in her case. The facts of her case were never in dispute.

2. Equal Protection

Schools for the most part seem to comply with their procedural due process obligations in connection with student discipline. Equal protection challenges face considerable hurdles, as they rarely succeed despite ample evidence that Black and Latinx students, disabled students, and LGBTQ+ students are subject to discipline at disproportionate rates. Although “Black students make up only [16%] of our school population[,]” they account for 31% of all students who are suspended and “[40%] of students who are expelled.”296 Black public-school students “are three times more likely to be suspended and expelled” compared to white students.297

Students with cognitive or learning abilities are also far more likely to be subject to school discipline than are their neuro-typical peers. During the 2017–18 school year, students with disabilities accounted for 78% of those subject to seclusion or restraint in schools, despite accounting for only 13% of the student population.298 There is also evidence that students at the intersection of disability and race are disproportionately affected. 50% of students served under the Individuals with Disabilities Education Act are students of color.299

his school had violated his due process rights by denying him the right to confront his accusers and call and examine witnesses); Pomero v. Ashburnham Westminster Reg’l Sch. Dist., 410 F. Supp. 2d 7, 16 (D. Mass. 2006) (student stated a due process claim sufficient to withstand a motion to dismiss where he was forced to leave the hearing room when witnesses testified and, therefore, was denied a fair opportunity to rebut the evidence against him).

296 IEMO OLUO, SO YOU WANT TO TALK ABOUT RACE 124 (1st ed. 2018).
297 See Brief of Advancement Project, Juvenile Law Center, and 38 Other Organizations as Amici Curiae in Support of Respondent at *7, Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 1268312 (citing U.S. Department of Education statistics indicating that Black students are three times more likely to be suspended and expelled than white students).
298 Id. at *11.
299 Id. at *11–12.
LGBTQ+ students are also subjected to higher rates of discipline, and there are unsurprising indications that those rates increase again at the intersection of LGBTQ+ identification and race.300 These trends indicate the need for increased scrutiny when school discipline involves students in the groups disproportionately subjected to such discipline. They also necessitate a supplement to rights mediation in cases involving students who are members of groups disproportionately subjected to discipline.

Rights mediation assumes the adequacy of democratic mechanisms for holding local authorities accountable. In cases involving unrepresented groups who cannot protect themselves through democratic processes and may in fact be the victims of majoritarian biases, courts have a special role.301 As John Hart Ely explained, heightened scrutiny is appropriate not to protect certain favored rights. Rather, heightened scrutiny is concerned with participation in the political processes. Courts must intervene when “the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”302 Even under rights mediation, failures of democratic process still trigger heightened scrutiny from courts whenever they burden the rights of those whose voices are drowned out by populist impulses.

VI. CONCLUSION: A FIRST AMENDMENT FOR ADULTS AND THEIR CHILDREN

The Framing generation had more faith in our abilities to work out our conflicts through political process than we do ourselves. They imagined a small role for courts, anticipating court intervention only in cases of clear violations of constitutional norms.303 Much of our free expression jurisprudence in the past century relates to forms of expression that the Framers did not think worthy of constitutional protection. That does not mean that it is entitled to no protection. Rather, it means that we can use democratic processes to determine which forms of expression are to be protected.

However, the approach advocated in this Article goes beyond Frederick Schauer’s distinction between extent of coverage and level of protection. Rather, this Article argues for a contextual approach to the adjudication of free expression rights. One contextual factor is the nature of the challenged speech. The Court in B.L. treated B.L.’s Snaps no differently than the Tinkers’ armbands. One can accord some protection to speech such as B.L.’s, without absolutizing

300 Id. at *12–13.
302 JOHN HART ELY, DEMOCRACY AND DISTRUST 77 (1980).
303 See THE FEDERALIST PAPERS NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (calling for judicial review only in the case of an “irreconcilable variance” between an enactment and the Constitution).
all rights of expression. Courts ought to defer to our political institutions when they engage in rights mediation in pursuit of the common good.

However, rights mediation is a means for empowering communities, not courts. When litigants cannot expect courts to bestow on them the protections of rights absolutism, they are more likely to enter into negotiations or to lobby for principled restraint. Local officials too, unconcerned that an adverse court opinion will undermine their ability to establish the disciplinary regimes that they think optimal, will be less inclined to dig in their heels and insist on severe punishment when the off-ramp of settlement is available. Parties that decide to roll the dice and take their disputes to a court that engages in rights mediation can still get the satisfaction of vindicating their rights before a neutral arbiter, but the court will decide their fate and their fate alone, leaving other actors to chart a course informed but not predetermined by existing precedents.