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Clarence Thomas and Student Speech Rights in *Mahanoy Area School District v. B. L.*

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Abstract

In a series of cases since the 1960s, the U.S. Supreme Court has determined when public k-12 students can exercise their right to free speech. Complicating this jurisprudence has been the rise of smart phones and social media platforms, at times blurring the distinction between on- and off-campus speech. In a 2021 case, Mahanoy Area School District v. B. L.*, the Court grappled with this issue. Especially notable about the Court's decision was the lone dissent by Justice Clarence Thomas, in which he maintained his longstanding belief that student speech rights are significantly limited, whether students are on or off campus. Thomas's dissent, informed by his judicial philosophy of originalism and the legal doctrine of* in loco parentis*, is problematic because it runs counter to the role of public schools as sites for inculcating democratic citizenship, a particularly important function when democratic norms and institutions are facing increasing attacks.*

Keywords: Clarence Thomas, *in loco parentis*, *Mahanoy*, student speech

1. Introduction

This article analyzes a recent U.S. Supreme Court decision, *Mahanoy Area School District v. B. L.* [hereafter, *Mahanoy*] (2021), with specific attention to the lone dissent by Justice Clarence Thomas, in which he articulated his view that public schools possess almost unlimited power to regulate student speech. This is significant not only because it illustrates how Thomas continues to be a judicial outlier on the current Court, but because it also underscores his conception of schools as authoritarian institutions, a notion at odds with those who believe that schools should instill democratic values and practices.

2. Overview of Mahanoy

The facts in *Mahanoy* were straightforward and undisputed. "B. L." was a student at the Mahanoy Area High School, which is approximately forty miles southwest of Wilkes-Barre, Pennsylvania. At the end of her freshman year, B. L. tried out for the varsity cheerleading squad and for a position on a private school softball team, though she was not selected for either. A few days later, while she and a friend were at a local convenience store (the Coco Hut), B. L. used her phone to upload two messages onto Snapchat, a social media platform. One message contained a photo of B. L. and her friend—their middle fingers raised—with the caption, "Fuck school fuck softball fuck cheer fuck everything" (*Mahanoy* [Breyer], 2021, p. 2). The second message contained no photos, just the question: "Love how me and [name of another student] got told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" (p. 2). Before the two messages automatically disappeared at the end of twenty-four hours, about 250 of B. L.'s Snapchat "friends" saw what she had posted.

Word of B. L.'s two Snapchat messages quickly circulated around Mahanoy Area High School. Some students were reportedly upset by the messages, and questions about them (the messages) briefly arose during an Algebra class taught by one of the two cheerleading coaches. After consulting the school's principal, the cheerleading coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. In justifying the suspension, the coaches maintained that the messages had violated school policy by directing profanity at an extracurricular activity. All of the school administrators supported the suspension, prompting B. L. and her parents to file suit in Federal District Court against the Mahanoy Area School District. The district eventually appealed the case to the U.S. Supreme Court, asking the Court to determine if school officials have the same power to regulate student speech that occurs off campus as they do when student speech occurs on campus.

3. Stephen Breyer's Majority Opinion

Justice Stephen J. Breyer authored the majority opinion in *Mahanoy*. Joined by all the other Justices except for Thomas, Breyer concluded that school officials had violated B. L.'s First Amendment right to free speech by suspending her from the junior varsity cheerleading squad. How the Justices reached this nearly unanimous decision is important for understanding the Court's current views on student speech—and why Thomas is such an anomaly.

The starting point for almost any student speech case is the Supreme Court's landmark 1969 decision in *Tinker v. Des Moines*, which clarified the speech rights of public school students, specifically (but not exclusively) the right of students to engage in political expressions—students had worn armbands to protest the Vietnam War. Breyer, at the beginning his opinion in *Mahanoy*, quoted one of the best-known passages from *Tinker*, noting that "[students do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" [interior quotation marks omitted] (*Mahanoy* [Breyer], 2021, p. 4). However, he was quick to add that the Court had never said that students' right to free speech was unlimited. School environments, he averred, possess special characteristics that can circumscribe this right (p. 5). Furthermore, he conceded that a student's on-campus speech can be limited if it is profane, promotes illegal drug use, or carries the school's sanction—for example, a school newspaper (p. 5). Returning to *Tinker*, Breyer asserted that the Court had also deemed it permissible for schools to regulate student speech that "materially disrupts classwork or involves substantial disorder" [interior quotation marks omitted] (p. 4).

Despite these guidelines, *Mahanoy* posed a novel problem: determining if any of the established strictures pertained to student speech that occurred *off* campus. Breyer made the majority's task easier by declining from the outset to formulate a general rule for deciding exactly what might count as off-campus activities or whether or how student speech could be limited during those activities. Instead, he began with the common-sense assumption that there had to be *some* limits to how schools regulated certain types of off-campus student speech—otherwise, those types of student utterances would be controlled by schools twenty-four hours a day. For instance, most schools have a zero-tolerance policy toward the use of profanity, but administrators cannot enforce such a policy once students leave school grounds.

The first of the school's arguments that Breyer addressed was its putative anti-vulgarity interest—in other words, "the school's interest in teaching good manners and consequently in punishing the use of vulgar language …" (*Mahanoy* [Breyer], 2021, p. 9). He asserted that the strength of this anti-vulgarity interest was "weakened considerably by the fact that B. L. spoke outside the school on her own time" (p. 9). Further, he stated that the message was an expression of "irritation with, and criticism of, the school and cheerleading communities," which located B. L.'s message within potential First Amendment protection (p. 10). Also important, the school had provided no evidence that it was engaged in a broader attempt to minimize vulgarity outside the classroom, making its punishment of B. L.'s speech less tenable.

Breyer then took issue with the school's allegation that B. L.'s speech was impermissible because of the school's attempt "to prevent disruption, if not within the classroom, then within the bounds of a school sponsored extracurricular activity" (*Mahanoy* [Breyer], 2021, p. 10). He pointed out that the school could not substantiate that B. L.'s messages had caused any such disruptions; in fact, one of the cheerleading coaches, when asked directly, had said there was no reason to believe that B. L.'s words "would disrupt class or school activities" (p. 10). Bolstering his argument, Breyer cited a key passage from *Tinker*, noting that "the prohibition of a particular expression of opinion" had to be justified "by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" [interior quotation marks omitted] (p. 10). He was

thus stressing the majority's belief that schools, even when serving as agents of socialization, could not punish student speech simply because it was objectionable, a key distinction in any community based on democratic norms.

As for whether B. L.'s messages had a negative impact on the cheerleading squad's camaraderie—something the school claimed—Breyer found there was nothing to suggest "any serious decline" in the cheerleaders' morale, certainly not "to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion" (*Mahanoy* [Breyer], 2021, p. 11). Without being able to prove that these disruptions had occurred, the school had erred in punishing B. L.'s speech.

Breyer made another important point, important because it formed the basis of very different arguments made by Justice Samuel Alito in his concurrence and—conversely—the arguments made by Justice Thomas in his dissent. This point pertained to the doctrine of *in loco parentis* (in the place of parents). Emerging as part of English common law during the seventeenth century, *in loco parentis* referred to a parent's ability to voluntarily confer (parental) authority to a tutor or schoolmaster for the purposes of instructing, supervising, and/or disciplining his/her children (Imber & van Greel, 2010). Over time, American courts focused exclusively on the use of *in loco parentis* to justify disciplinary actions (Stuart, 2011). Just as parents could curtail their children's freedom of speech at home, teachers could do likewise with those same children at school. In *Mahanoy*, though, the majority determined that B. L.'s messages had *not* occurred under circumstances where the school stood *in loco parentis*. "There is no reason to believe," Breyer stated, "[that] B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the Coco Hut" (*Mahanoy* [Breyer], 2021, p. 10). The majority might have reached a different conclusion had it determined that the school had indeed stood *in loco parentis*.

4. Samuel Alito's Concurring Opinion

Alito's concurrence (which was also signed by Justice Neil Gorsuch) illustrates how he differed from (but ultimately agreed with) the majority, while also showing how he differed from (and disagreed with) Thomas. Alito focused on one central question: "Why should enrollment in a public school result in the diminution of a student's free-speech rights?" (*Mahanoy* [Alito], 2021, p. 5). For Alito, the answer had everything to do with *in loco parentis*. He argued that *in loco parentis* was "simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that *the parents* ask the school to perform" [emphasis added] (pp. 7-8). Parents, however, relinquished no more authority than is absolutely necessary. "In our society," Alito emphasized, "parents, not the State, have the primary authority and duty to raise, educate, and inform the character of their children" (p. 9). Thus, while the majority focused on the rights of students, Alito focused as much, if not more, on the rights of parents, seeing those rights as necessary bulwarks against the potentially illegitimate exercise of state power.

Nevertheless, Alito concurred with the majority's outcome, categorizing B. L.'s speech as "[simply] criticism (albeit in a crude manner) of the school and an extracurricular activity" (*Mahanoy* [Alito], 2021, p. 17). Because B. L. sent the messages on her own time while she was off campus; because she did not send the messages to any administrator, teacher, or coach; and because the messages did not cause any significant disruption at the school, Alito did not believe the school had a right to punish her speech. Echoing the majority's sentiments, he affirmed that "speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting" (p. 18). He concluded by noting that "school officials should proceed cautiously" before regulating "many types of off-premises student speech" (p. 18). His wariness of *in loco parentis* contrasted sharply with Thomas's veneration of it.

5. Clarence Thomas's Dissenting Opinion

Thomas's judicial philosophy is best described as originalism. This interpretative strategy emphasizes the need to determine what the Constitution's authors initially meant or intended by a given term or concept. Adherents to such an approach place a premium on what they believe is the unchanging, time-bound nature of the Constitution (Maggs, 2009; Whittington, 1999). Prior to *Mahanoy*, Thomas's espousal of originalism was evident in his (lone) concurring opinion in *Morse v. Frederick*, a 2007 student speech case involving a high school junior suspended for displaying a banner with the inscription "BONG HiTS [sic] 4 JESUS" at a school-sponsored event. Writing for the majority in that case, Chief Justice John Roberts concluded that the banner had communicated a message promoting drug use—and that schools, in pursuing their "compelling interest" to deter use of illicit substances—could restrict speech that advocated them (*Morse v. Frederick*, 2007, p. 407). Thomas reached the same outcome in *Morse*, but

with very different reasoning. He argued that "as *originally* understood, the Constitution does *not* afford students a right to free speech in public schools" [emphasis added] (pp. 418-419). Consistent with his originalism, he went even farther, stating that students had possessed virtually no rights in eighteenth- or early-nineteenth-century America, summarizing this historical circumstance with aphoristic concision: "In the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed" (p. 412). Therefore, absent constitutional or statutory changes, Thomas believes that students' legal rights continue to be almost entirely non-existent.

Thomas's lone concurrence in *Morse* prefigured his lone dissent in *Mahanoy*. He chastised the majority in *Mahanoy* for finding fault with the school's actions because in doing so they had, according to him, ignored "the 150 years of history" that actually supported the school's suspension of B. L. (*Mahanoy* [Thomas], 2021, p. 1). Moreover, to his dismay, the Court's student speech cases were—as he alleged was true here—increasingly "untethered from any textual or historical foundation" (p. 5).

Remaining true to his reliance on history, Thomas identified the school's legal power to regulate student speech that occurred off campus by citing a relatively unknown Vermont Supreme Court case. In *Lander v Seaver* (1859), the Vermont Supreme Court had ruled that punishing students for off-campus speech was permissible if the speech had "a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination" [interior quotation marks omitted] (*Mahanoy* [Thomas], 2021, p. 3). According to Thomas, *Lander* illustrated that the punishment of off-campus speech (under the conditions described above) had been "well settled" (p. 2) by the middle of the nineteenth century, and that the rule it propounded was "widespread" (p. 3), establishing what Thomas referred to as the "*Lander* test" (p. 7). For him, it was simply a matter of determining if B. L.'s Snapchat messages met the *Lander* test for regulating/punishing off-campus speech.

Thomas's dependence on *Lander* in his dissent did not go unnoticed or uncriticized by Alito in his concurrence. His critique is worth quoting at length: "This decision [*Lander*] is of negligible value for present purposes. It does not appear that any claim was raised under the state constitutional provision protecting freedom of speech. And even if flinty Vermont parents at the time in question could be understood to have implicitly delegated to the teacher the authority to whip their son for his off-premises speech, the same inference is wholly unrealistic today" (*Mahanoy* [Alito], 2021, p. 10). Alito's none-too-subtle jab at Thomas was thus twofold: he denied the substantive relevance of *Lander* (no free-speech issues were raised) and, perhaps more important, he described the use of nineteenth-century social norms as "wholly unrealistic" as a guide for contemporary jurisprudence.

Thomas also based his dissent on his belief that the Court had never rejected or even significantly modified *in loco parentis* over the course of more than a century and a half. Quoting from his concurrence in *Morse*, he noted that during the early to mid-nineteenth century, "[N]o one doubted the government's ability to educate and discipline … children as private schools did, including through strict discipline for behavior the school considered disrespectful or wrong" [interior quotation marks omitted] (*Morse v. Frederick*, 2007, pp. 411-412). Putting a fine point on it, he again quoted from his *Morse* concurrence: "The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way" [interior quotation marks omitted] (p. 416). As it was then, so it should be now, at least in Thomas's view.

While Thomas did not explain how his interpretation of *in loco parentis* could be applied to modern schools, he believed that the majority could and should have used the *Lander* test and other criteria to reach its decision in *Mahanoy*. Among the lines of inquiry that he believed the majority should have pursued was the extent that B. L.'s derogatory comments about the cheerleading squad were harmful because she herself was a squad member (Thomas implied that they were indeed harmful for that reason). He also believed that the majority failed to consider whether schools had more, not less, authority to discipline students when they transmit speech through social media (Thomas suggested that schools had *more* authority under those circumstances). Finally, he faulted the majority for not having adequately discussed the degree to which B. L.'s speech was "received on campus" (*Mahanoy* [Thomas], 2021, p. 8), despite the fact that Breyer had addressed this aspect of the case.

These issues notwithstanding, Thomas's primary concern throughout his dissent was that "the Court's foundation" was "untethered from anything stable," that the majority's arguments were "untethered from history," and that the majority's decision "depart[ed] from the historical rule" (*Mahanoy* [Thomas], 2021, p. 9), which was presumably the *Lander* test, in conjunction with acknowledgment of a school's plenary exercise of *in loco parentis*.

Consequently, even had the majority addressed Thomas's specific criticisms, he would have likely still dissented, affirming the school's right to punish B. L. as it saw fit (Bunker & Calvert, 2010).

6. Conclusion

What are scholars and school officials to make of Thomas's dissent? To begin with, Thomas based his judicial views on erroneous assumptions. As commentators have noted about some of his previous opinions, he seems to believe that parental rights have never changed and that "New England-style childhoods were the norm for all children" (Walsh, 2011, p. 21), neither of which is true. Blacker (2009) has provided perhaps the most cogent analysis of Thomas's thinking, an analysis that is entirely applicable to his dissent in *Mahanoy*. Blacker, borrowing from the work of Svetlana Boym (2001), calls Thomas an example of "restorative nostalgia" (Blacker, p. 140). For such a person, "The dissatisfactions of the all too ugly present (Unruly students! Behavior problems! Disrespectful youth!) are refracted through the retrospective looking glass into a happily inverted past containing all the desired and opposing qualities. In a phrase, this is the mentality of the good old days where the actual level of goodness is irrelevant" (p. 141). To wit, Thomas's sloppy and selective use of history provides the foundation and rationalization for his judicial decision making.

Another way of looking at Thomas's views concerning students, including their speech rights, is to place those views within the broader debate over whether schools should function primarily as sites of social *reproduction* (the maintenance of existing political and economic arrangements) or social *reconstruction* (a critique of existing political and economic arrangements). Among others (Dupre, 1996), Thomas firmly supports the former, believing that emphasis on the latter invites chaos within schools and classrooms. In briefest compass, educators should be free to enforce discipline and squelch dissent. In such a model, there is no room for teachers who encourage students to question authority or think for themselves. This flies in the face of long-held beliefs about the need for public education to promote democratic ideals. The Supreme Court itself in *Bethel School District v. Fraser* (1983), an important student speech case, noted: "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order (p. 683). These "shared values" include "tolerance of divergent political and religious views, even when the views expressed may be unpopular" (p. 681).

Snyder (2017), in his warnings about the erosion of democratic norms, has noted: "It is your ability to discern facts that makes you an individual and our collective trust and common knowledge that makes us a society. The individual who investigates is also the citizen who builds. The leader who dislikes the investigators is a potential tyrant" (p. 73). Suffice it to say, school administrators who mistakenly punish students should not be likened to actual tyrants. However, those who find such behavior by school administrators not only permissible, but also commendable—as Thomas does—support a vision of public schooling that, if it ever materialized, would be inimical to democratic governance.

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