

WALKING OUT: SCHOOLS, STUDENTS, AND CIVIL DISOBEDIENCE

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INTRODUCTION

On February 14, 2018, hundreds of high school students ran for their lives from the classrooms of Marjory Stoneman Douglas High School after seventeen students and staff were shot by Nikolas Cruz.¹ One month later, at 10 a.m. on Wednesday, March 14, 2018, high school students across the country walked out of their classrooms for seventeen minutes to memorialize the school shooting victims as well as all victims of gun violence.² In addition to remembering the victims, the walkout served as a political call to action—a protest against Congress's inaction towards gun control.³ The walkout was “unprecedented in recent American

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1. Katie Reilly, *Marjory Stoneman Douglas High School Was Targeted by a Shooter. What to Know About the School*, TIME, <http://time.com/5158804/marjory-stoneman-douglas-high-school-shooting/> (last updated Feb. 14, 2018, 8:34 PM); Lisa Marie Segarra et al., *Sheriff's Office Had Received About 20 Calls Regarding Suspect: The Latest on the Florida School Shooting*, TIME (Feb. 18, 2018, 1:51 PM), <http://time.com/5158678/what-to-know-about-the-active-shooter-situation-at-florida-high-school/?xid=homepage>.

2. Sarah Larimer, *What It Looks Like when Students Across the Country Walk out over Gun Violence*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/news/education/wp/2018/03/14/students-are-walking-out-of-school-after-the-parkland-shooting-heres-what-that-looks-like/?utm_term=.09cd9e3a98eb; Alan Taylor, *The Student Walkout Against Gun Violence, in Photos*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/photo/2018/03/school-walkout-in-photos/555605/>; see Meg Wagner & Brian Ries, *Student Walkouts Sweep the U.S.*, CNN (Apr. 20, 2018, 4:39 PM), <https://www.cnn.com/us/live-news/national-school-walkout/index.html>. Walkouts also occurred in elementary schools and on college campuses. Larimer, *supra*; Taylor, *supra*.

3. See *Our Mission*, NAT'L SCH. WALKOUT, <https://www.nationalschoolwalkout.net> (last visited Oct. 16, 2018). *Contra* Eric Levenson & David Williams, *Pro-Gun Students Walk*

history, not seen in size or scope since student protests of the Vietnam War in the late 1960s.”⁴

In many cities and towns, including Littleton, Colorado, and Newtown, Connecticut—places that had experienced mass school shootings in prior years⁵—students left school by the hundreds, sometimes in defiance of school authorities.⁶ School leaders appeared divided and confused about how to handle their emptying classrooms.⁷ In some communities, teachers and parents observed and participated in the walkout.⁸ In others, students received detentions or other forms of punishment for participating in the walkouts.⁹ While the March 2018 protests were the first major coordinated actions of the student-led movement for gun control, they are just the beginning.¹⁰ In an era of mass

out of School to ‘Stand for the Second’, CNN (May 2, 2018, 4:09 PM), <https://www.cnn.com/2018/05/02/us/school-walkout-pro-second-amendment/index.html> (stating that students have also staged walkouts from class in opposition to gun control).

4. Joe Heim et al., *Thousands of Students Walk out of School in Nationwide Gun Violence Protest*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/news/education/wp/2018/03/14/students-have-just-had-enough-walkouts-planned-across-the-nation-one-month-after-florida-shooting/?noredirect=on&utm_term=.60c51f0877f4.

5. Olivia Lank & Roger Susanin, *Newtown Students Rally on National School Walkout Day*, WFSB (Mar. 14, 2018), https://www.wfsb.com/news/newtown-students-rally-on-national-school-walkout-day/article_1e0c0f79-8394-5f7a-a094-03f867fa6fda.html; Jean Lotus, *Littleton Students Will Take Part in National School Walkout Day*, LITTLETON PATCH (Mar. 13, 2018, 8:35 PM), <https://patch.com/colorado/littleton/jeffco-school-walkouts-littleton-what-you-need-know>.

6. Lank & Susanin, *supra* note 5; Lotus, *supra* note 5; see Casey Quinlan, *Students Defy Many of Their Schools to ‘Walk out’ in Support of Gun Control*, THINK PROGRESS, <https://thinkprogress.org/student-protest-gun-violence-4a7f42670d32/> (last updated Mar. 14, 2018, 2:52 PM).

7. See David Gilbert, *LPS Student Walkouts Draw Crowds, Survivors*, LITTLETON INDEP. (Mar. 14, 2018, 2:02 PM), <http://littletonindependent.net/stories/lps-student-walkouts-draw-crowds-survivors,259268>; Rafael Guerrero, *U46 Students Planning Walkout Friday Despite Discipline Warnings*, COURIER NEWS (Apr. 17, 2018, 6:05 PM), www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-ecn-april-20-student-walkouts-st-0418-story.html.

8. *Students Walk Out of School to Protest Gun Violence*, ARLNOW, <https://www.arlnow.com/2018/03/14/students-walk-out-of-school-to-protest-gun-violence/> (last updated Mar. 14, 2018, 12:05 PM).

9. Dakin Andone & David Williams, *Yesterday, They Walked out of Class. Now, They’re Forced to Stay After School*, CNN, <https://www.cnn.com/2018/03/15/us/student-walkout-punishment-trnd/index.html> (last updated Mar. 16, 2018, 5:07 PM).

10. See *Walkout Planning Guide*, NAT’L SCH. WALKOUT, <https://www.nationalschoolwalkout.net/table-of-contents/> (last visited Oct. 16, 2018) (providing a guide for students to help them plan their own walkout to protest lack of gun control). There was an additional walkout on April 20, 2018, the anniversary of the Columbine High School shooting. See Jen Kirby, *National School Walkout on April 20 Kicks off the Next Wave of Gun Control Activism*, VOX, <https://www.vox.com/2018/4/19/17231618/national-school-walkout-april-20-gun-control> (last updated Apr. 20, 2018, 10:05 AM). There are now websites where students can find out where additional walkouts are planned and add their own walkouts to the list. See *Find A National School Walkout*, NAT’L SCH. WALKOUT,

shootings and hostile national politics, the youth of this country are showing their power and influence.

Courts have also long recognized that if schools are to be able to run properly, school administrators must have the authority to maintain an orderly and responsible learning environment.¹¹ Generally speaking, school officials stand *in loco parentis*¹² in the performance of the functions necessary to operate the school.¹³ To be sure, disruption of a school setting can have a deleterious effect on the quality of the educational program.¹⁴ Yet, the right of a student to speak freely “is not only an aspect of individual liberty . . . but also is essential to the common quest for truth and the vitality of society as a whole.”¹⁵ Being able to criticize authority is the core of political speech; it is necessary to expose and correct the abuse of official power.¹⁶ The protection of that dissent,

<https://act.indivisible.org/event/national-school-walkout/> (last visited Oct. 16, 2018).

11. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252–53 (3d Cir. 2002) (“[S]tudents are minors, and school administrators must have authority to provide and facilitate education and to maintain order.”); *Governor Wentworth Reg'l Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410, 420 (D.N.H. 2006) (“[T]he fundamental importance of the educational mission entrusted to the public school system, and the critical necessity of maintaining an orderly environment in which learning can take place.”), *vacated*, No. 06-1652, 2006 U.S. App. LEXIS 28104, at *1 (1st Cir. Nov. 13, 2006).

12. “[I]n loco parentis is Latin for ‘in the place of a parent’ or ‘instead of a parent’”—an official legal termination which establishes a responsibility for a minor. Jamie Landau, *From in Loco Parentis to Student-Citizens: The 1964 Berkeley Protests as Détournement*, 62 COMM. Q. 589, 594 (2014) (emphasis omitted).

13. *See* Landau, *supra* note 12; *see also* *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J. concurring) (emphasis omitted) (“Through the legal doctrine of *in loco parentis*, courts [have] upheld the right of schools to discipline students, to enforce rules, and to maintain order.”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–55 (1995) (explaining that parents delegate some of their authority to school officials when placing children in private school).

14. School shootings have been listed as one of the most critical issues facing public education today. *See* Peter DeWitt, 8 *Critical Issues Facing Education in 2018*, EDUC. WK. (Feb. 15, 2018, 6:10 AM), https://blogs.edweek.org/edweek/finding_common_ground/2018/02/8_critical_issues_facing_education_in_2018.html. In addition, schools are facing children who have suffered abuse, neglect, and dysfunction in the household. *Id.* “The National Resilience Institute reports that, “[seventy-two] percent of children and youth will experience at least one Adverse Childhood Experience (ACE) before the age of [eighteen].” *Id.* Other issues are inequitable funding of public education, insufficient leaders, the opioid crisis, and the current U.S. Secretary of Education. *Id.*

15. *See* *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503–04 (1984).

16. *See* *McCutcheon v. FEC*, 572 U.S. 185, 187–88 (2014) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 457 (2007)) (“The line between quid pro quo corruption and general influence must be respected in order to safeguard basic First Amendment rights, and the Court must ‘err on the side of protecting political speech rather than suppressing it.’”); *Id.* at 190 (citing *Texas v. Johnson*, 491 U.S. 397, 420 (1989)) (“If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (“[L]awful political speech [is] at the core of what the First

meaning the response towards and treatment of that speech, is a bellwether indicator that reveals whether the individual lives in a free society.¹⁷ Students' freedom of expression must be respected in the classroom. It is the place where they learn both the fundamentals of democracy as well as societal values. Student voices have always been important in furthering social issues within the United States.¹⁸ As Justice Abe Fortas famously declared in *Tinker v. Des Moines Independent Community School District*, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁹

The recent walkouts present a unique challenge within that difficult balance between a student's right to speech and a school's need to maintain order. While the Supreme Court has upheld speech rights for students wearing a political symbol²⁰ or abstaining from reciting the pledge of allegiance,²¹ a school walkout during school hours raises different concerns. Students are required to be at school except in the case of an excused absence.²² Most public schools have a policy in their code of conduct that prohibits students from cutting classes or leaving the

Amendment is designed to protect."); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)) ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"); *FCC v. League of Women Voters*, 468 U.S. 364, 375–76 (1984) (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983)) ("[Political speech] is entitled to the most exacting degree of First Amendment protection."); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("[The First Amendment reflects] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

17. Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U.L. REV. 253, 258 (2012).

18. See Mark Keierleber, *17 Minutes of History: Wednesday's Walkout Part of Long Tradition of Students Speaking Out, From Tinker v. Des Moines to Black Lives Matter*, the74 (Mar. 13, 2018), <https://www.the74million.org/article/17-minutes-of-history-wednesdays-walkout-part-of-long-tradition-of-students-speaking-out-from-tinker-v-des-moines-to-black-lives-matter/>.

19. 393 U.S. 503, 506 (1969).

20. See *id.* at 514–15; see also *Castorina v. Madison Cty. Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2001) (holding students' decision to wear T-shirts depicting the Confederate flag constituted protected speech); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 849, 856 (E.D. Mich. 2003) (holding the school was not justified in prohibiting a student from wearing a President George W. Bush politically oriented T-shirt).

21. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); see also *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992) (holding a statute requiring the recitation of Pledge of Allegiance failed strict scrutiny); *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 627 (E.D. Pa. 2003) (citing 24 PA. CONS. STAT. § 7-771(c)(1) (2002)) (same).

22. See, e.g., IOWA CODE § 299.1(1) (2014); N.M. STAT. ANN. § 22-12-2(B) (2015); N.Y. EDUC. LAW § 3205(1)(c) (McKinney 2017); N.C. GEN. STAT. § 115C-378(a)–(b) (2009); 24 PA. CONS. STAT. § 13-1327(a) (2018).

school building during class hours.²³ A walkout naturally involves students leaving the school building. How then should schools deal with these acts of civil disobedience?

As a long-time trustee on the Eastchester Union Free School District Board of Education of Eastchester, New York,²⁴ I was intimately involved in the discussions about how to approach this issue in 2018. In over twenty years of serving as a trustee, it is difficult to recollect a cause that was more sympathetic than the student walkouts. Considering the range of national responses, school districts seem to have taken one of three general approaches. Some school districts were outright supportive of the walkout and ignored their codes of conduct, exempting the students from any form of punishment.²⁵ Others warned students that they would face serious consequences if they left school for the walkout, such as a two-day suspension.²⁶ The third approach, and the one that my district

23. Ohio County schools in Hartford, Kentucky define an absence as “missing all or any part of the school day, including all scheduled activities” in the Student Code of Conduct. OHIO CTY. BD. OF EDUC., STUDENT CODE OF CONDUCT 27 (2013), <https://www.ohio.k12.ky.us/userfiles/1022/my%20files/2016-2017%20code%20of%20conduct.pdf?id=17943>. Orange County schools also prohibit being absent from school unless the student is excused and define “skipping school” as either not showing up to school or leaving once school is in session without permission. ORANGE CTY. BD. OF EDUC., STUDENT CODE OF CONDUCT AND ANNUAL NOTIFICATIONS 2018–2019, at 11 (2018), <http://www.orangecountyfirst.com/sites/default/files/Board%20Files/policy-4000/Student-Code-of-Conduct.pdf>. The policy states that “[s]tudents shall remain at school once they have arrived and be present in their designated homeroom and/or their assigned classroom unless they have been authorized to do otherwise by the principal or his/her designee.” *Id.* The Detroit Public School System defines a student’s right to free expression in their code of conduct, stating that “students have the right to disagree” with a caveat, that disagreement “must not infringe in any way upon the rights of others. The right to disagree does not include participation in student sit-ins, assemblies, . . . or the obstruction of halls and stairways, building entrances and exit pathways not authorized by the principal.” DETROIT PUB. SCHS. CMTY. DIST., RENAISSANCE HIGH SCHOOL PARENT/STUDENT HANDBOOK 2–3 (2016), <https://renaissance.schools.detroitk12.org/wp-content/uploads/2018/02/2016-2017-Student-Handbook.pdf>.

24. Mark Chapman, *Eastchester BOE Candidates Running Unopposed*, EASTCHESTER DAILY VOICE (May 11, 2012), <https://eastchester.dailyvoice.com/schools/eastchester-boe-candidates-running-unopposed/482468/>.

25. See, e.g., Lisa Childers, *Onteora Won’t Punish Students for Walkout Protesting Gun Violence*, HUDSON VALLEY ONE (Mar. 10, 2018), <https://hudsonvalleyone.com/2018/03/10/onteora-wont-punish-students-for-walkout-protesting-gun-violence/>; Meghan Grant, *Penalty Lifted in Student Walkouts*, REC., Mar. 20, 2018, at L6; T. Keung Hui, *Why Wake County Won’t Punish Students Who Protest School Gun Violence*, NEWS & OBSERVER, <https://www.newsobserver.com/news/local/education/article202394244.html> (last updated Feb. 27, 2018, 5:04 PM); Claudette Riley, *SPS: Students Who Join Walkouts Friday Will Not Be Punished*, SPRINGFIELD NEWS-LEADER (Mar. 20, 2018, 5:28 PM), <https://www.news-leader.com/story/news/education/2018/03/20/sps-students-who-join-walkouts-friday-not-punished/443293002/>.

26. See, e.g., Carly Baldwin, *Sayreville Threatens 2-Day Suspension for Students Who Walk out*, MATAWAN PATCH, <https://patch.com/new-jersey/matawan-aberdeen/sayreville->

ultimately took, was to apply the attendance policy in the code of conduct and accordingly punish the students.²⁷ No matter what the approach, the reactions of parents, teachers, and community members to the responses of school authorities were also varied and intense.²⁸

threatens-2-day-suspension-students-who-walk-out (last updated Mar. 14, 2018, 2:28 PM); Vanessa McCray, *Cobb Gives Students in Walkout in-School Suspension*, ATLANTA J. CONST. (Mar. 21, 2018, 5:46 PM), <https://www.myajc.com/news/local-education/cobb-gives-students-walkout-school-suspension/eKLVF0kzhIQEOjxFxjH1I/>; Nick Muscavage, *Sayreville High School Students Walk out After School Threatens to Suspend Protesters*, MY CENT. N.J., <https://www.mycentraljersey.com/story/news/education/in-our-schools/2018/03/14/one-sayreville-student-risks-suspension-walks-out/424965002/> (last updated Mar. 14, 2018, 5:06 PM); *Nyack Students Given Detention Following Gun Violence Walkout*, NEWS12 WESTCHESTER (Apr. 26, 2018, 6:13 PM), <http://westchester.news12.com/story/38053614/nyack-students-given-detention-following-gun-violence-walkout>; Chris Perez, *School to Suspend Students Who Walked out for Gun Protest*, N.Y. POST, <https://nypost.com/2018/03/14/school-to-suspend-students-who-walked-out-for-gun-protest/> (last updated Mar. 14, 2018, 8:47 PM); Christina Zdanowicz & Ralph Ellis, *Arkansas Student Says He Was Paddled for Gun Control Walkout*, CNN, <https://www.cnn.com/2018/03/17/us/paddling-for-student-protester/index.html> (last updated Mar. 17, 2018, 12:01 PM).

27. See, e.g., Alex Costello, *Nassau County Students Suspended For Not Following Walkout Rules*, FARMINGDALE PATCH, <https://patch.com/new-york/massapequa/nassau-county-students-suspended-participating-walkout> (last updated Mar. 20, 2018, 3:26 PM); Sydney Greene, *Texas Students Walk out of Classes, Continuing Momentum of Gun Violence Protests*, TEX. TRIBUNE (Apr. 20, 2018, 3:00 PM), <https://www.texastribune.org/2018/04/20/texas-students-walkout-classes-continuing-momentum-gun-violence-protes/>.

28. Below are a few examples from my own district. These were all portions of emails sent by parents and community members to the Superintendent and the Board of Education in Eastchester, New York. We have a general email where parents and community members can voice their concerns that are then responded to by either the Board or the Superintendent.

Example 1:

I am a parent of a 5th grader and a 7th grader. I would like to encourage the district to participate in the National School Walkout Day to demand Congress pass legislation to keep us safe from gun violence at our schools. It takes place on March 14 at 10:00 a.m. for [seventeen] minutes. This issue is very important to me and to many in the community. Please let me know if there is anything I can do to help make it happen.

Example 2:

I just read a post on Eastchester kids [Facebook] page that states our students are not allowed to stand up for their beliefs and support a cause without having to pay a consequence. I am in shock and disbelief that our district is punishing students for this. The school districts in our surrounding areas are not punishing their students. In fact[,] one nearby district is even allowing their MIDDLE school students to participate. Here is a direct line from a letter from a nearby district. As a district, we will be respecting the rights of our students who choose to walk out. It is my hope that you will withdrawal punishments on our students for wanting to have a voice on a serious issue and respect the students' rights.

Example 3:

Any reasoned decision about how a school should respond to a student walkout necessarily involves not only an understanding of the First Amendment rights of students, but also an examination of the extent to which a walkout may be part of the students' learning experience. And of course, while the memorial to those lost as a result of gun violence reflected a degree of national mourning, the underlying political issues had (and have) the potential to polarize and widen the gulf in politically divisive times.²⁹

This Article begins in Part I by reviewing the history and impact of youth civil disobedience and the special issues school walkouts raise. Part II then discusses the legal doctrines that guide school administrators and courts as they aim to strike a suitable balance between free expression and the day-to-day operations of a school. Part III analyzes the different approaches school districts have taken, and offers specific advice to school districts dealing with future walkouts. Part IV cautions that the only constitutionally permitted response by school districts is to subject students to the same consequences they would face for not attending class under ordinary circumstances. The Article concludes with reflections on the importance of ensuring that the long tradition of student engagement in progressive social movements is preserved and supported.

I am the mother of two children in the school district and it has come to my attention that contrary to what the majority of the neighboring school districts have done, with respect to the nationwide student walk-out in support of gun safety, [our district] has taken a reactionary approach to this event. While I know the District has not come out directly and said students can't participate, they have gone as close as they possibly can—even threatening detention the older students if they walk out. This is an appalling position to be taken by our school district. And as a parent and tax payer in this district I am ashamed. Our Country is in the midst of a nationwide crisis and our young people are doing what generations of young people before them have done in the face of such crisis, they are rising up peacefully to have their voices heard. Their school should commend them, not threaten them. Their school should support them, not chill their efforts to make a difference by threatening their school records. There are moments in time in our history than when they pass, they are gone forever. This is the moment for our children to stand up and say we want to be heard and seen by those in power and we won't be ignored anymore. As educator you should want to stand with them, not work against them.

As for security concerns. I don't take them lightly. However, since the school district is able to control large groups of students exiting for fire drills and gathering outside for sporting events[,] I don't see how this event poses any different security concerns than those other types events, other being used as a red herring to quash our children's voices. Do the right thing and openly permit our students to walk out, like their peers in nearly every neighboring town.

29. See Caroline Brooks & Matt Grossmann, *Gun Politics Polarizing America*, MSU TODAY (Feb. 16, 2018), <https://msutoday.msu.edu/news/2018/gun-politics-polarizing-america/>.

I. THE POWER OF YOUTH AND SOCIAL ACTIVISM

United States history is full of examples of youth social activism ranging from labor protests at the turn of the twentieth century to civil rights demonstrations and anti-war protests in the 1960s and 70s.³⁰ More recently, youth activism has arisen in the context of immigration reform, environmental reform, Black Lives Matter, and of course, gun control.³¹ Civil disobedience by any group of people is always passionate, sometimes effective, and frequently unruly. When the people participating in a walkout are minors, those feelings may be amplified.³² And while the protests can be controversial or disturbing, civic disobedience by our youth has an important place in history and needs to be respected, supported, and nurtured.³³ The law should be harnessed to inspire young people to advocate for change and to protect their right to do so.

30. THOMAS L. BYNUM, NAACP YOUTH AND THE FIGHT FOR BLACK FREEDOM, 1936–1965, at 16 (2013); Kathryn Lynn Weiland et al., *Politics, Identity, and College Protest: Then and Now*, 18 ABOUT CAMPUS 1, 8 (2013).

31. See Lawrence Erin Maggie Astor, *7 Times in History When Students Turned to Activism*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/us/student-protest-movements.html>; Erin Blakemore, *Youth in Revolt: Five Powerful Movements Fueled by Young Activists*, NAT'L GEOGRAPHIC (Mar. 23, 2018), <https://news.nationalgeographic.com/2018/03/youth-activism-young-protesters-historic-movements/>; Lawrence Downes, Opinion, *Questions for a Young Immigration-Rights Activist*, N.Y. TIMES (Apr. 10, 2013), <https://www.nytimes.com/2013/04/11/opinion/questions-for-a-young-immigration-rights-activist.html>; Erin B. Logan, *From Little Rock to Parkland: A Brief History of Youth Activism*, NPR (Feb. 28, 2018, 3:30 PM), <https://www.npr.org/sections/ed/2018/02/28/587933123/from-little-rock-to-parkland-a-brief-history-of-youth-activism>; Eugene Scott, *#NationalWalkoutDay Protesters Continued a Long History of Youth Activism*, WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/03/15/nationalwalkoutday-activists-continued-a-long-history-of-youth-activism/?utm_term=.72170320f5c7; Justin Worland, *The Planet's Plaintiff*, TIME (Oct. 6, 2016), <http://time.com/4518792/xiuhtezcatl-martinez-next-generation-leaders/>; YOUTH ACTIVISM PROJECT, <http://youthactivismproject.org> (last visited Oct. 20, 2018).

32. See Krystin Arneson, *11-Year-Old Naomi Wadler Gave One of the Most Powerful Speeches at the March for Our Lives*, GLAMOUR (Mar. 24, 2018, 4:13 PM), <https://www.glamour.com/story/naomi-wadler-gave-one-of-the-most-powerful-speeches-at-the-march-for-our-lives>.

33. See SASHA COSTANZA-CHOCK, YOUTH AND SOCIAL MOVEMENTS: KEY LESSONS FOR ALLIES 1 (2012), https://cyber.harvard.edu/sites/cyber.harvard.edu/files/KBWYouthandSocialMovements2012_0.pdf. The author points out that we have much to learn from the youth who are already engaged in mobilizing other youth towards social change. *Id.* Youth have been powerful agents of social change throughout the world, and their use of social media, ability to speak to other youth, ability to operate outside formal channels of political participation, all help to make them groups that we need to support. *Id.* at 2–3, 5; see also Sara Boboltz, *Florida Lawmaker on School Shooting Survivors: 'Adults Make the Laws'*, HUFFINGTON POST (Mar. 7, 2018), https://www.huffingtonpost.com/entry/elizabeth-porter-gun-control-parkland-survivors_us_5aa0801ae4b0e9381c152672.

Historically, childhood has been viewed as a formative period of development.³⁴ For example, a person must be eighteen before he or she can vote.³⁵ Not surprisingly, that is also the age at which most people will have completed their high school education.³⁶ As a result, there is a deep-seated belief that political beliefs cannot (or should not) be expressed until the age of majority.³⁷ Laws and actions tend to communicate to students that they have less impact authority and influence than they actually do.³⁸ History supports the view that students have had a tremendous impact on social and political reform in this country throughout its history.³⁹

“A walkout is defined as ‘the act of leaving or being absent from a meeting, especially as an expression of protest.’”⁴⁰ A student walkout

34. Julia M. Gossard, *Why We Doubt Capable Children: Constructing Childhood in the Revolutionary Era*, JUNTO (Apr. 17, 2018), <https://earlyamericanists.com/2018/04/17/why-we-doubt-capable-children>.

35. *Id.* See generally HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005) (providing an interesting discussion of the history of how children have been viewed throughout history and that, as a result, we have inherited the belief that a childhood is meant to forge a legal and political identity that cannot be expressed until the age of majority).

36. Gossard, *supra* note 34.

37. See CONSTANZA-CHOCK, *supra* note 33. Youth organizers often refer to the “War on Youth,” where youth of color “are targeted by laws, policies, and practices of heightened surveillance, repression, and criminalization.” *Id.*

38. Following the gun control rallies, “commentator Ben Shapiro argued that youth ‘are not fully rational actors.’” Keierleber, *supra* note 18; Ben Shapiro, *Students’ Anti-Gun Views*, NAT’L REV. (Feb. 20, 2018, 6:30 AM), <https://www.nationalreview.com/2018/02/students-anti-gun-views>. “Bill O’Riley . . . accused national news outlets of using children as a prop to attack President Donald Trump.” Keierleber, *supra* note 18. *But see* Giovanna Lucignano, *10 Ways Youth Can Make an Impact*, UNDP (Aug. 11, 2015), <http://www.undp.org/content/undp/en/home/blog/2015/8/11/10-ways-youth-can-make-an-impact.html> (describing ways that youth can participate in the political process by knowing their rights, learning about social issues, speaking out, networking, and joining youth organizations).

39. Youth activism is seen as early as 1903, with the March of the Mill children. Gail Friedman, *March of the Mill Children*, ENCYCLOPEDIA GREATER PHILA. (2014), <http://philadelphiaencyclopedia.org/archive/march-of-the-mill-children>. More than 200 child laborers marched from Philadelphia to New York to protest the horrific working conditions in the textile mills of Philadelphia. *Id.*; John Rosinbum, *Placing the National School Walkout in Historical Context: A Lesson Plan*, PERSP. ON HIST. (Mar. 13, 2018), <https://www.historians.org/publications-and-directories/perspectives-on-history/march-2018/placing-the-national-school-walkout-in-historical-context-a-lesson-plan>. The plaintiff in “*Tinker* was a [thirteen]-year-old eighth grader when she and other students wore black armbands to school to protest the Vietnam War.” Keierleber, *supra* note 18 (emphasis added). “[C]ommunity members criticized Tinker for her age, concluding she couldn’t possibly know enough about Vietnam to have an informed opinion.” *Id.*

40. REMS TECH. ASSISTANCE CTR., U.S. DEP’T OF EDUC., *LESSONS LEARNED FROM SCHOOL CRISES AND EMERGENCIES: RESPONDING TO SCHOOL WALKOUT DEMONSTRATIONS 1* (2008), https://rems.ed.gov/docs/ll_vol3issue1.pdf; *Walkout*, DICTIONARY.COM,

involves being absent from school.⁴¹ “[W]alkout demonstrations can occur in any school district and for a variety of reasons: in response to a local ordinance or school policy, the firing of a . . . teacher, [to support a labor strike,] or even to effect a change in school rules.”⁴² While some walkouts arguably involve childish or petty concerns,⁴³ many have resulted in serious and long-lasting social change.⁴⁴ Sometimes the students themselves organized the walkouts, and sometimes adults laid the groundwork or provided critical support.⁴⁵

For example, on April 23, 1951, sixteen-year-old civil rights activist Barbara Johns led a walkout in Farmville, Virginia, where students marched to the local courthouse to protest the “abysmal learning conditions at the all-black high school.”⁴⁶ While adults had approached

<https://www.dictionary.com/browse/walkout> (last visited Apr. 6, 2019).

41. See REMS TECH. ASSISTANCE CTR., *supra* note 40.

42. *Id.* Students advocate for change in other ways as well. In Burlington, Vermont, students petitioned the school board to fly the Black Lives Matter flag on its high school campus. See Nicole Higgins DeSmet, *Burlington Students Win Approval to Fly Black Lives Matter Flag*, BURLINGTON FREE PRESS, <https://www.burlingtonfreepress.com/story/news/local/vermont/2018/02/13/burlington-students-ask-school-board-permission-raise-black-lives-matter-flag-high-school/328510002> (last updated Feb. 14, 2018, 8:26 AM). The board passed the measure, with the support of the students, principal, and superintendent. *Id.* Students in Portland, Oregon and Evanston, Illinois, protested a school’s discriminatory dress code policy, which was unevenly enforced against women. Emily McCombs, *Sexist School Dress Codes Are A Problem, And Oregon May Have The Answer*, HUFFINGTON POST, https://www.huffingtonpost.com/entry/sexist-school-dress-codes-and-the-oregon-now-model_us_59a6cd7ee4b00795c2a318e5 (last updated Sept. 6, 2017).

43. Ben Chapman & Kerry Burke, *Students Revolt Against Summer Homework ‘Abuse’ at Success Academy*, DAILY NEWS (June 7, 2018, 4:00 AM), <http://www.nydailynews.com/new-york/education/ny-success-academy-homework-20180606-story.html> (reporting on a student protest in a charter school by an online petition against having to read five books and complete standardized test preparation assignments during summer break); Vivian Yee, *No Appetite for Good-for-You School Lunches*, N.Y. TIMES (Oct. 5, 2012), <https://www.nytimes.com/2012/10/06/nyregion/healthier-school-lunches-face-student-rejection.html> (describing how students threw out mandatory healthy lunches or started bringing lunch from home to protest new federal guidelines requiring more fruit and vegetables in school lunches).

44. See Olivia B. Waxman, *Student Walkouts Have Changed American History Before. Here’s How*, TIME (Mar. 14, 2018), <http://time.com/5185819/student-walkouts-history>.

45. *Id.* The author talked to people who participated in the Farmville walkout, the Birmingham, Alabama children’s Crusade, and the East Los Angeles school walkouts. *Id.* Each of those interviewed acknowledged that the walkouts were successful because there were supportive adults helping in different ways. *Id.*

46. *Id.* Four hundred fifty students were being taught on a campus that was built for 180 students. Emily Richmond, *The Forgotten School in Brown v. Board of Education*, ATLANTIC (May 16, 2014), <https://www.theatlantic.com/education/archive/2014/05/forgotten-school-in-brown-v-board/371026>. Three tar-paper shacks had been put up to accommodate the overflow. Waxman, *supra* note 44. “Students had to hold umbrellas when it rained because the roof leaked so badly.” Richmond, *supra*. The white student high school was only a couple of blocks away, so it was easy to compare the facilities at both schools. *Id.* “Moton had no

the school board about making the needed improvements, nothing was accomplished until after the students marched.⁴⁷ This student walkout was called the turning point of the civil rights movement.⁴⁸ On May 2, 1963, students walked out in Birmingham, Alabama to support integration.⁴⁹ Concerned about the economic impact of adults being sent to jail, civil rights leaders organized the students to protest the inequities of segregation.⁵⁰

In March 1968, over 100 students walked out of Garfield High School in East Los Angeles to protest the racial inequalities Mexican-Americans face in education.⁵¹ This led to a march of 22,000 students across the Los Angeles Unified School District and a series of related protests.⁵² Nearly forty years later, there was another walkout in 2006

cafeteria, no gym, no science lab, no lockers, . . . [and] no infirmary. . . [The] students weren't just marching for equal buildings, they were marching for an expanded curriculum to prepare them for the workforce and college." *Id.* "The subsequent lawsuit . . . became one of [the] five cases folded into *Brown v. Board of Education*." *Id.*

47. See Katy June-Friesen, *Massive Resistance in a Small Town*, HUMAN. (2013), <https://www.neh.gov/humanities/2013/septemberoctober/feature/massive-resistance-in-small-town>.

48. Amelia Brust, 'Left Out of History': 1951 Farmville Protest Led by High-Schoolers (Apr. 25, 2015), [http://www.rockingham.k12.va.us/uploads/3/1/8/9/31891485/farmville_tour_guides_\(dnr_article\).pdf](http://www.rockingham.k12.va.us/uploads/3/1/8/9/31891485/farmville_tour_guides_(dnr_article).pdf).

49. Waxman, *supra* note 44. "As black students attempted to march downtown, hundreds were arrested." Keierleber, *supra* note 18; see also *Birmingham Campaign*, KING ENCYCLOPEDIA, <https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign> (last visited Feb. 23, 2019) ("On 2 May more than 1,000 African American students attempted to march into downtown Birmingham, and hundreds were arrested."). "Then, at the direction of Commissioner of Public Safety Eugene "Bull" Connor[,] . . . the children were sprayed with high-pressure water hoses, beaten by police batons, and attacked by police dogs." Keierleber, *supra* note 18; see also *Birmingham Campaign*, *supra* ("When hundreds more gathered the following day, Commissioner Connor directed local police and fire departments to use force to halt the demonstrations. During the next few days images of children being blasted by high-pressure fire hoses, clubbed by police officers, and attacked by police dogs appeared on television and in newspapers, triggering international outrage.").

50. Waxman, *supra* note 44.

51. Louis Sahagun, *East L.A., 1968: 'Walkout!' The Day High School Students Helped Ignite the Chicano Power Movement*, L.A. TIMES (Mar. 1, 2018, 3:00 AM), <http://www.latimes.com/nation/la-na-1968-east-la-walkouts-20180301-htmstory.html>. Some have termed it as "the day a Mexican American revolution began." *Id.* "[H]undreds of students streamed out of classrooms" shouting, "Education, not eradication!" *Id.*

52. *Id.* High school students marched in Crystal City, Texas, in 1969. Greg Barrios, *Walkout in Crystal City*, TEACHING TOLERANCE (2009), www.tolerance.org/magazine/spring-2009/walkout-in-crystal-city. This led to the creation of the "Raza Unida Party." Teresa Palomo Acosta, *Crystal City Revolts*, TEX. ST. HIST. ASS'N, <https://tshaonline.org/handbook/online/articles/wmc01> (last modified Aug. 17, 2011). By the time the walkouts ended, "22,000 students had stormed out of class, delivered impassioned speeches and clashed with police." Sahagun, *supra* note 51. "School trustees held emergency meetings" and the mayor "suggested students had fallen under the influence of 'communist agitators.'" *Id.*

when 24,000 students walked out of fifty-two Los Angeles schools, joining thousands of students nationwide who walked out in protest of proposed federal immigration policy changes.⁵³

On November 14, 2016, over 400 students in Portland, Oregon, walked out of their schools as one student chanted over the loudspeaker: “Portland Public schools does not stand with racism, . . . sexism[, or] . . . Islamophobia.”⁵⁴ At one point the students sat silently in the middle of an intersection to commemorate the death of Michael Brown, who a police officer shot to death in Ferguson, Missouri, in 2014.⁵⁵ The previous spring, Latino students in Oregon organized a walkout to express their growing fear as current president of the United States Donald Trump became the Republican nominee.⁵⁶

In the weeks following the February 14, 2018 shooting in Parkland, Florida, waves of student protests formed across the country.⁵⁷ In addition to the three national protests on March 14, March 24, and April 20, 2018, student organizers continued to organize their own.⁵⁸ The American Civil

53. Sean Cavanagh & Laura Greifner, *Schools Respond to Student Walkouts With Mix of Discipline, Outreach*, EDUC. WK. (Mar. 30, 2006), https://www.edweek.org/ew/articles/2006/03/30/30rally_web.h25.html.

54. *PPS Students Stage Mass Walkout to Protest Trump Election*, KGW8 (Nov. 14, 2016, 7:21 PM), <https://www.kgw.com/article/news/pps-students-stage-mass-walkout-to-protest-trump-election/283-351794630>.

55. Lindsey Bever, *Police Killing Prompts Rioting, Looting Near St. Louis*, WASH. POST (Aug. 11, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/08/11/police-killing-prompts-rioting-looting-near-st-louis/?utm_term=.436a2dc27cbb; *Students Walk Out of School, March Through Portland (Live Updates)*, OREGONIAN (Nov. 14, 2016), https://www.oregonlive.com/portland/index.ssf/2016/11/students_walk_out_of_school_pr.html.

56. Casey Parks, *Fed up with Anti-Latino Sentiment, Hundreds of Portland High Schoolers Leave Class*, OREGONIAN (May 23, 2016), https://www.oregonlive.com/education/index.ssf/2016/05/portland_latino_students_prote.html.

57. See, e.g., Susannah Cullinane, *Marches, Walkouts and Sit-ins: Gun Control Battle Heads to the Street*, CNN, <https://www.cnn.com/2018/02/19/us/florida-parkland-shooting-marches/index.html> (last updated Feb. 19, 2018, 2:53 AM) (describing students’ plans to march against the National Rifle Association and to compel Congress to take action against gun violence in conjunction with the #Enough Walkout, the Women’s March, the March For Our Lives, and the National Day of Action Against Gun Violence in Schools); see also Denise Lavoie, *Schools Brace for Massive Student Walkouts over Gun Violence*, PBS (Mar. 11, 2018, 1:54 PM), <https://www.pbs.org/newshour/nation/schools-brace-for-massive-student-walkouts-over-gun-violence> (reporting that many schools prepared for coming protests by warning about suspensions, while other districts planned to work with protest participants).

58. See Cassandra Basler, *Meet the Students Who Dreamed Up Friday’s National School Walkout*, NPR (Apr. 19, 2018, 5:27 AM), <https://www.npr.org/2018/04/19/603418297/meet-the-students-who-dreamed-up-fridays-national-school-walkout> (telling the story of Lane Murdock and other Ridgefield, Connecticut, students who started a Change.org petition that grew into the national April 20 anti-gun-violence protest); Sarah Gray, *What to Know About March for Our Lives and Other Student-Led Gun Control Protests*, TIME, <http://time.com/5165794/student-protests-walkouts-florida-school-shooting/> (last updated

Liberties Union (ACLU) and professional organizers have published guides to help them, and in many cases the students are reinforced through the support they find on social media.⁵⁹

One can only expect additional student activism in this time of political uncertainty.⁶⁰ Youth activists are leaders of change. They are passionate and the issues that they support directly impact them. They speak with urgency and first-person accounts, creating an emotional response. They are comfortable with social media and their facility with

Mar. 12, 2018, 12:10 PM) (discussing the “[c]alls to action” by students on social media from the national walkouts held on March 14 and the march on Washington, D.C. on March 24); Adrienne St. Clair, *Students Walk Out to Protest Gun Violence 1 Month After Parkland Shooting*, NPR (Mar. 14, 2018, 10:20 AM), <https://www.npr.org/2018/03/14/593255026/students-to-walk-out-to-protest-gun-violence-1-month-after-parkland-shooting> (describing efforts by local student leaders under the national organization EMPOWER to organize a national protest against gun violence).

59. See Natasha Bach, *Some TV Networks Are Suspending Programming During Today’s Student Walkout*, FORTUNE (Mar. 14, 2018), <http://fortune.com/2018/03/14/school-walkout-march-14-mtv-bet-comedy-central-viacom-students/> (detailing Viacom’s support to student protestors through traditional media and social media); Doug Criss, *If You’re Planning to Take Part in the National School Walkout, Read This*, CNN (Mar. 14, 2018, 10:53 AM), <https://www.cnn.com/2018/03/12/health/student-walkout-questions-trnd/index.html> (providing answers from legal experts to frequently asked questions concerning student anti-gun-violence protests).

60. One commentator has noted how the Supreme Court’s decisions concerning free speech and school all reflect the “important issues and trends of [their] day.” Allen Rostron, *Intellectual Seriousness and the First Amendment’s Protection of Free Speech for Students*, 81 U.M.K.C. L. REV. 635, 636–37 (2013). “Fear of radical foreign influences during the Red Scare following the first World War led to *Meyer v. Nebraska*, where the Court struck down a Nebraska law prohibiting schools from teaching foreign languages to children until after eighth grade.” *Id.* at 637; 262 U.S. 390, 397, 403 (1923). Following the re-emergence of the Ku Klux Klan and anti-Catholic rhetoric, “the Court struck down an Oregon law requiring all parents to send their children to public rather than private schools” in *Pierce v. Society of Sisters*. Rostron, *supra*, at 637; 268 U.S. 510, 530, 535–36 (1925). As “patriotic fervor” rose because of the potential of fighting in another war, the Court decided *Minersville School District v. Gobitis*, and “allow[ed] schools to expel students with religious objections to saluting the American flag.” Rostron, *supra*, at 637; 310 U.S. 586, 600 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* was heard in the midst of the Vietnam anti-war movement, where the Court supported the right of students to “wear[] black armbands to express their opposition to the war.” Rostron, *supra*, at 637–38; 393 U.S. 503, 514 (1969). In the 1980s, when the Court decided *Bethel Sch. Dist. v. Fraser* and *Hazelwood Sch. Dist. v. Kuhlmeier*, the country was immersed in prurient thinking with Senate committee hearings about the censorship of “porn rock” and warning labels on music with explicit lyrics. Rostron, *supra*, at 638. The Court upheld the school’s authority to punish a student for delivering a lewd speech at a school assembly and found a principal could censor a student newspaper when it published stories on controversial topics like teen pregnancy. *Id.* Finally, in a time of anxiety about teens and drugs, the Court found that a school can prohibit speech promoting illegal drugs. *Id.* at 639; see *Morse v. Frederick*, 551 U.S. 393 (2007); see also Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions—For the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1407 (2011).

those platforms allows them to reach, pressure, and influence the democratic process.⁶¹ Adults, including school officials, need to facilitate this reform and protect the students' First Amendment rights.⁶²

II. THE FIRST AMENDMENT AND STUDENT SPEECH

The First Amendment provides that government entities may not abridge an individual's freedom of speech.⁶³ It "was adopted to curtail the power of Congress to interfere with individuals' freedom to believe, to worship, and to express [themselves] in accordance with . . . [their] own conscience."⁶⁴ In addition, it was designed to protect individuals from retaliation or their ideas from suppression, just because those ideas may be unpopular.⁶⁵ Thus, "the First Amendment is violated . . . if [an] individual engage[s] in conduct protected by the First Amendment and the government [takes] action against the person because of that protected conduct."⁶⁶ To determine whether there is a First Amendment violation, therefore, the first inquiry is to examine the government's restriction to see what kind of speech is covered.⁶⁷ There is no First Amendment violation if the restriction only relates to the government's own speech,⁶⁸

61. One example of the impact of social media is the Twitter account, "Student Walkout Against Gun Violence." Samantha Schuyler, *Students Aren't Waiting for March or April. They're Protesting Now*, NATION (Mar. 5, 2018), <https://www.thenation.com/article/students-arent-waiting-for-march-or-april-theyre-protesting-now/>; see Students Walkout Against Gun Violence (@studentswalkout), TWITTER, <https://twitter.com/studentswalkout>. The account is controlled by a nineteen-year-old college student who decided to help by giving students a platform where everyone can connect and organize so that the movement is even more powerful. Schuyler, *supra*. The student collects photos of each protest and offers the summary to the account's 25,000 followers. *Id.* "Each dispatch is liked or retweeted hundreds, sometimes thousands, of times." *Id.*

62. In an interesting article, *Time Magazine* reached out to three people who participated in three of the biggest walkouts in the twentieth century—Farmville, Birmingham, and East Los Angeles. Waxman, *supra* note 44. They all stressed that the walkouts only "happened when [all] other attempts to get attention had failed." *Id.* They also emphasized that although the walkouts were led by students, adults always helped to lay the groundwork or lend critical support, and that taking protests to the streets always means that there is a risk of harm. *Id.*

63. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

64. *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

65. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

66. *Kinney v. Weaver*, 367 F.3d 337, 358 (5th Cir. 2004).

67. See, e.g., *McIntyre*, 514 U.S. at 345.

68. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015) (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005)) (finding that specialty designed license plates are government speech, and therefore, the state is allowed to exercise viewpoint discrimination when it rejects an applicant's proposed license plate design).

or covers speech that the First Amendment does not protect.⁶⁹

In protecting speech, the First Amendment goes beyond written or spoken words—it also protects expressive conduct.⁷⁰ As the Supreme Court has stated, such protection is not “confined to expressions conveying a ‘particularized message,’ . . . [and includes the] painting of Jackson Pollock, [the] music of Arnold Schoenberg, . . . [and the] Jabberwocky verse of Lewis Carroll.”⁷¹ In *United States v. O’Brien*, the defendant burned his draft card on the courthouse steps in protest of the country’s involvement in the Vietnam War.⁷² He was subsequently arrested and convicted under a federal statute which prohibited people from knowingly mutilating or destroying draft cards.⁷³ The defendant appealed his conviction, arguing that the statute unconstitutionally infringed on his right to engage in political speech.⁷⁴ The Court held that the destruction of his draft card was not a constitutionally protected activity and “that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, . . . [an] important governmental interest in regulating the nonspeech element can justify . . . limitations on *First Amendment* freedoms.”⁷⁵ The defendant’s conviction was ultimately

69. See, e.g., *Virginia v. Black*, 538 U.S. 343, 363 (2003) (holding that the government could punish someone who burned a cross on someone else’s lawn because burning a cross as a threat is a “virulent form of intimidation”); *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984)) (holding that physical assault is not protected); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (holding that assault and violence are not protected); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (holding that defamation is not protected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that fighting words are not protected).

70. See *Texas v. Johnson*, 491 U.S. 397, 402–04 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)) (stating that Johnson’s right to participate in flag burning was expressive conduct because it was “imbued with elements of communication” and thus, was protected under the First Amendment); see also *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)) (citing *Cressman v. Thompson*, 719 F.3d 1139, 1148 (10th Cir. 2013)) (stating that the First Amendment extends “beyond written [and] spoken words”); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059–60 (9th Cir. 2010) (stating that images expressed in tattoos are expressions entitled to First Amendment protections). The Court first acknowledged that expressive conduct—the hanging of a flag—was a liberty guaranteed under the Fourteenth Amendment, and California’s legislature could not prohibit the hanging of such flag because it violated the appellant’s free speech liberties. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

71. *Hurley*, 515 U.S. at 569 (citing *Spence*, 418 U.S. at 411).

72. 391 U.S. 367, 369–70 (1968); see Brief for David Paul O’Brien at 14, *O’Brien*, 391 U.S. 367 (Nos. 232, 233).

73. *O’Brien*, 391 U.S. at 369–70 (citing 50 U.S.C. app. § 462(b) (1967)); see 50 U.S.C. § 3811 (2012).

74. See *O’Brien*, 391 U.S. at 370.

75. *Id.* at 376.

affirmed.⁷⁶

While it is often difficult to distinguish “pure speech”⁷⁷ from “expressive conduct,” the Supreme Court has held that in order for expressive conduct to have First Amendment protection, a court must look at whether there is “[a]n intent to convey a particularized message . . . , and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.”⁷⁸ In the non-school setting, communicating ideas through marching and picketing has usually been found to be expressive conduct that is closely related to pure speech.⁷⁹

Once there is a determination that there is protected speech, the next determination is whether the government’s restriction interferes with that speech at a public forum.⁸⁰ The restriction must be analyzed to establish whether it is content-based, and therefore subject to strict scrutiny,⁸¹ or whether it is content-neutral,⁸² and therefore subject to intermediate

76. *Id.* at 386.

77. Pure speech is actual verbal communication. *See* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 2 (2008). The term “pure speech” was used for the first time in *Cox v. Louisiana*, to distinguish the acts of protesting by picketing and marching and “those which communicate ideas by pure speech.” *See id.* at 2 n.8; 379 U.S. 536, 555 (1965).

78. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

79. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 448, 458 (2011) (holding that picketing outside a funeral home, although upsetting and hurtful, was still entitled to First Amendment protections); *United States v. Grace*, 461 U.S. 171, 175, 183–84 (1983) (striking down 40 U.S.C. § 13(k), which prohibited picketing outside of the Supreme Court building, and finding it to be unconstitutional as sidewalks and grounds outside the building were public forums); *Cox*, 379 U.S. at 538–39, 555, 558 (citing 40 U.S.C. § 13(k) (1983)) (holding that First Amendment protections were held to apply to marchers and picketers protesting racial discrimination who were picketing outside a court house in Louisiana).

80. The public forum doctrine is used in cases that challenge official policies that restrict “access to public places for expressive purposes.” Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 739 (1991). The origin of the public forum doctrine is usually traced to Justice John Roberts’ opinion in *Hague v. Comm. for Indus. Org.* *See id.* at 739 n.1; 307 U.S. 496, 515–16 (1939). The government can also designate a public forum by opening up property to the public for all speech purposes, or a limited public forum, where government property is opened up to the public for specific groups or specific topics. *See Saphire, supra*, at 739–40. “The most frequently invoked formulation of the doctrine can be found in *Perry Educ. Ass’n v. Perry Local Educators Ass’n . . .*” *Id.* at 739 n.4; 460 U.S. 37, 44–48 (1983).

81. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992).

82. *See, e.g., Turner Broad. Sys. v. FCC*, 520 U.S. 180, 225–26 (1997) (Stevens, J., concurring); *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1997). Content-neutral restrictions are also known as “time, place and manner” restrictions. *Ward*, 491 U.S. at 791 (1997) (citing *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)). Restrictions on content-neutral speech are permissible if the restriction (a) “advances important government interests [which are] unrelated to the suppression of free speech and [b] does not burden substantially more speech than necessary to further those interests.”

scrutiny.⁸³

First Amendment rights within the school setting have raised additional twists and turns in the law. First, while public schools are government entities, they were locally controlled and considered to be an extension of the home under the doctrine of *in loco parentis*.⁸⁴ Thus, for many years

the First Amendment was not implicated in student speech . . . since there was no state action. As states began to assert more control over the public schools, . . . many began to question the local, *in loco parentis*, view. . . . It became increasingly clear that the public school system was an arm of the state.⁸⁵

Turner, 520 U.S. at 189 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Restrictions must be narrowly tailored. *Ward*, 491 U.S. at 789 (citing *Rock Against Racism v. Ward*, 848 F.2d 367, 370 (2d Cir. 1988)).

83. See, e.g., *Turner*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377) (applying intermediate scrutiny); *Ward*, 491 U.S. at 798 n.6, 803 (holding that strict scrutiny should not be applied for time, place, and manner restrictions, and applying intermediate scrutiny); *R.A.V. v. St. Paul*, 505 U.S. 377, 403–04, 406 (1992) (White, J., concurring) (finding strict scrutiny analysis irrelevant to the constitutionality of legislation restricting graffiti known to cause anger or resentment in others on the basis of race, gender, and religion).

84. *In Loco Parentis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (translating the Latin term "*in loco parentis*" to "in the place of a parent"). For an examination of the traditional view, see generally *Morse v. Frederick*, 551 U.S. 393 (2007) (Thomas, J., concurring) (discussing the doctrine within American history); Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO L.J. 663 (1987) (discussing the traditional view of public school); DAVID J. BLACKER, *DEMOCRATIC EDUCATION STRETCHED THIN: HOW COMPLEXITY CHANGES A LIBERAL IDEA* (2007) (discussing the rights of students and the so-called "demise" of the doctrine of *in loco parentis*). State courts began enforcing the doctrine of *in loco parentis* in public school settings as early as 1837, stating that "[t]he teacher [was] the substitute of the parent." *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837); see *Morse*, 551 U.S. at 413.

85. Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU EDUC. & L.J. 1, 5–6; see Hafen, *supra* note 84, at 671, 673–74; see also Mark Fidanza, Note, *Aging Out of In Loco Parentis: Towards Reclaiming Constitutional Rights For Adult Students in Public Schools*, 67 RUTGERS U.L. REV. 805, 821–22 (2015) (stating that since "the doctrine is outdated, ineffective, and irrelevant," schools have overbroad control over students, when parents disagree with actions of schools, parents bring suits against schools and in turn these suits are entertained by the court). The idea of public schools as agents of the federal government began as a result of the desegregation of schools. Hafen, *supra* note 84, at 671, 673–74. Historically, public schools in the United States were controlled by local school boards. Rebecca Jacobsen & Andrew Saultz, *Trends—Who Should Control Education?*, 76 PUB. OPINION Q. 379, 379 (2012). States first began to assert their control in the public-school system in 1980 when there was a push for state subsidized and controlled funding of education, state curriculum standards, and required teacher certification. *Id.* at 381. This trend of increased state control did not cease. See Nick Anderson, *Governors, State Superintendents Propose Common Academic Standards*, WASH. POST (Mar. 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/10/AR2010031000024.html>. In 2010, many states yet again made a strong push for new academic achievement

The Supreme Court first outlined the First Amendment rights of students in *West Virginia State Board of Education v. Barnette*.⁸⁶ In a six-three decision, the Court held that the school board could not require students to salute the American flag and recite the Pledge of Allegiance at school.⁸⁷ The Court struck down the resolution as an unconstitutional violation of students' rights to express themselves, emphasizing that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁸⁸ While boards of education have "important, delicate, and highly discretionary functions," those functions must be performed "within the limits of the Bill of Rights."⁸⁹

The Court's holding in *Tinker v. Des Moines Independent School District*⁹⁰ continues to be at the heart of any discussion of student speech.⁹¹ In *Tinker*, high school students planned to wear black armbands to school in protest of the country's involvement in Vietnam.⁹² School officials passed a policy forbidding the students from wearing the armbands after becoming aware of the students' plan.⁹³ The students ignored the school officials' policy and wore the armbands anyway, and were subsequently suspended for violating the rule.⁹⁴ "The students then challenged the suspensions as violating their First Amendment rights."⁹⁵

The U.S. Supreme Court found for the students, holding "that suspending them for protesting . . . in a non-disruptive fashion violated their First Amendment rights."⁹⁶ The Court found that the act of wearing a black armband expressed a particular viewpoint and was therefore "closely akin to 'pure speech' . . . [and] entitled to comprehensive protection."⁹⁷ While teachers and students do not "shed their

standards, especially in math and English, for students following the implementation of "No Child Left Behind" and the proposal of the "Common Standards Project." *Id.*

86. See 319 U.S. 624, 631 (1943).

87. See *id.* at 628–29.

88. *Id.* at 637, 642.

89. *Id.* at 637.

90. 393 U.S. 503 (1969).

91. See, e.g., Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL RTS. J. 657, 657 (2009).

92. *Tinker*, 393 U.S. at 504; Cordes, *supra* note 91, at 661.

93. *Tinker*, 393 U.S. at 504; Cordes, *supra* note 91, at 661.

94. *Tinker*, 393 U.S. at 504; Cordes, *supra* note 91, at 661.

95. Cordes, *supra* note 91, at 661; see *Tinker*, 393 U.S. at 504.

96. Cordes, *supra* note 91, at 661; *Tinker*, 393 U.S. at 505–06 (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

97. *Tinker*, 393 U.S. at 505–06 (first citing *West Virginia v. Barnette*, 319 U.S. 624 (1943); and then citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

constitutional rights to freedom of speech or expression at the schoolhouse gate,”⁹⁸ the Court recognized “that those rights must be analyzed ‘in light of the special characteristics of the school environment.’ In particular, . . . the necessary authority of school officials to control conduct and avoid the disruption of the school’s education mission.”⁹⁹ Justice Abe Fortas, writing for a seven-two majority, held “that students may express [their] opinions, even on controversial subjects, if they express those opinions without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”¹⁰⁰ While recognizing the need for schools to control conduct within the school, the Court specified that school boards are creatures of government and “do not possess absolute authority over [the] students.”¹⁰¹ Thus, when regulating student expression, school officials must be able to demonstrate that there are facts that could establish “substantial disruption of or material interference with school activities.”¹⁰²

The Court resolved the balance in the students’ favor, noting that the school officials had not put forward any facts that indicated that the wearing of black armbands would disrupt the normal activities of a school.¹⁰³ There was no “disruptive action or . . . group demonstrations.”¹⁰⁴ The interference involved only “a silent, passive expression of opinion.”¹⁰⁵ In addition, the Court pointed out that the restriction prohibited only one viewpoint—opposing the Vietnam War.¹⁰⁶ Because that particular message was singled out, the actions of the school district were “[c]learly unconstitutional.”¹⁰⁷ Thus, the Court intertwined its analysis with the concept that “viewpoint restrictions on student speech are constitutionally permissible only when necessary to avoid a substantial interference with the operation of a school”¹⁰⁸ If the student speech does not significantly and materially interfere with the operation of the school, school administrators have no basis to discipline

98. *Id.* at 506.

99. Cordes, *supra* note 91, at 661–62; *Tinker*, 393 U.S. at 506.

100. Cordes, *supra* note 91, at 662; *Tinker*, 393 U.S. at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

101. *See Tinker*, 393 U.S. at 511.

102. *Id.* at 513–14 (citing *Hammond v. S.C. State Coll.*, 272 F. Supp. 947, 948 (D.C.S.C. 1967)).

103. *Id.* at 514.

104. *Id.* at 508.

105. *Id.*

106. *See Tinker*, 393 U.S. at 510.

107. *Id.* at 511; Cordes, *supra* note 91, at 663.

108. Cordes, *supra* note 91, at 663; *see Tinker*, 393 U.S. at 511.

the students, especially if the restriction involves a particular political viewpoint.¹⁰⁹ Conversely, student conduct that “materially disrupts classwork or involve[s] substantial disorder or [the] invasion of rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.”¹¹⁰

It has been generally accepted since the Court’s *Tinker* decision that students retain First Amendment rights while they are in school.¹¹¹ The issue that has continued to arise, however, has to do with an understanding of the extent and nature of those rights.¹¹² While “[m]any [courts have] viewed the language used by the *Tinker* Court as establishing a broad presumption in favor of student speech that was only overcome when the speech was disruptive to the teaching going on in the classroom,”¹¹³ the facts in *Tinker* also support a more narrow reading of the decision.¹¹⁴ “Because *Tinker* involved speech that advocated a

109. See *Tinker*, 393 U.S. at 511; Cordes, *supra* note 91, at 663.

110. Cordes, *supra* note 91, at 662; see *Tinker*, 393 U.S. at 511.

111. See Cordes, *supra* note 91, at 664; see also 3 JAMES A. RAPP, EDUCATION LAW § 9.04 (67th ed. 2018). See generally Grayned v. City of Rockford, 408 U.S. 104 (1972) (holding that a school cannot bar free expression on its campus); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that students’ right to free speech also extends to public universities); Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (holding that First Amendment rights extend to elementary school students).

112. See generally Lindsay J. Gower, *Blue Mountain School District v. J.S. ex rel. Snyder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709 (2013) (arguing that the Supreme Court should articulate a clear standard for public school students’ right to free speech); Heather K. Lloyd, Note & Comment, *Injustice in Our Schools: Students’ Free Speech Rights Are Not Being Vigilantly Protected*, 21 N. ILL. U.L. REV. 265 (2001) (arguing that the balance between protecting students while allowing school officials to operate school efficiently has recently been struck in favor of schools and restricted students’ rights); Rebecca L. Ziedel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C.L. REV. 303 (2012) (discussing the student free speech standards applied in various extracurricular settings).

113. Bentley, *supra* note 85, at 7. Numerous courts have taken different positions on whether content-neutral speech restrictions are governed under *Tinker*. Compare *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp. 965, 973–74 (C.D. Ill. 1989) (using another analysis for time, place, and manner restrictions on the distribution of non-school related materials by students rather than using *Tinker*), with *Raker v. Frederick Cty. Pub. Schs.*, 470 F. Supp. 2d 634, 640 (W.D. Va. 2007) (using the *Tinker* analysis to a similar time, place, and manner restriction as in *Nelson*). Courts seem to be more consistent in refusing to extend the application of *Tinker* to situations involving incidental speech regulations. See, e.g., *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005) (first quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968); and then quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)) (assessing student free speech challenge to school’s uniform policy under *O’Brien* rather than *Tinker*); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001) (same).

114. Bentley, *supra* note 85, at 7; see *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 273 (2d Cir. 2011) (citing N.Y. SOC. SERV. LAW § 413 (McKinney 2011)) (paying special attention to characteristics of school); *Doninger v. Niehoff*, 642 F.3d 334, 354 (2d Cir. 2011)

specific viewpoint on a current and salient political issue, it involved political speech—the type of speech that the Court has always viewed as the central reason for the First Amendment”¹¹⁵ In addition, because the armbands students wore “support[ed] the anti-Vietnam War movement, the [school] district’s response [suggested] viewpoint discrimination, a type of discrimination that the Court had recognized as extremely suspect in its other First Amendment jurisprudence.”¹¹⁶

While *Tinker* has been cited in all the Supreme Court’s rulings regarding student speech since 1969, each of those Courts has used a different analytical framework to uphold a school’s restriction.¹¹⁷ In *Bethel School District No. 403 v. Fraser*, a high school student gave a speech that included sexual innuendos at a school assembly.¹¹⁸ Before the assembly, he had shown the speech to two teachers who warned him that the content was inappropriate and that he could be subject to disciplinary consequences.¹¹⁹ The school disciplinary code stated that “[c]onduct

(quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (closely applying the rule from *Tinker*); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) (holding that *Tinker* cannot be “gospel [to] cases involving public universities”).

115. Bentley, *supra* note 85, at 7; see *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (citing *Healy v. James*, 408 U.S. 169, 180–81 (1972)); *Tinker*, 393 U.S. at 505 (citing *W. Va. State of Educ. v. Barnette*, 319 U.S. 624 (1943)); see also Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 701.

116. Bentley, *supra* note 85, at 7; see *Tinker*, 393 U.S. at 509–10. Under the First Amendment, expression cannot be prohibited just because the regulating body disapproves or disagrees with the message. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). “[T]he Court defines viewpoint discrimination as a regulation of speech, the rationale for which is the ‘specific motivating ideology or the opinion or perspective of the speaker.’” Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U PA. J. CONST. L. 727, 730 (2018); *Rosenberger*, 515 U.S. at 829 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)). Simply, view-point discrimination is a form of content-based discrimination, where the prohibition is of a single view or belief. *Rosenberger*, 515 U.S. at 829; *Perry Educ. Ass’n*, 460 U.S. at 55. View-point discrimination is the most egregious or impermissible type of content-based regulation of speech. Douglas, *supra*, at 728; see *Reed*, 135 S. Ct. at 2229–30 (quoting *Rosenberger*, 518 U.S. at 829); *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992).

117. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (quoting *Tinker*, 393 U.S. at 506) (upholding the school’s restriction where students had a “BONG HiTS 4 JESUS” banner on the sidewalk while watching the Olympic torch pass their school); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506) (upholding the school’s restriction where a student wrote articles for a class in the school district-funded newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 679 (1986) (citing *Tinker*, 393 U.S. at 504) (upholding the school’s restriction where a student made lewd speech at school assembly).

118. 478 U.S. at 677–78.

119. *Id.* at 678.

which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language[,] or gestures.”¹²⁰ As punishment, the student was suspended for two days and prohibited from giving a commencement speech.¹²¹

The student brought an action against the school district, alleging that the school district violated his right to freedom of speech under the First Amendment.¹²² The U.S. Court of Appeals for the Ninth Circuit agreed with the district court’s determination, holding that the student’s speech was similar to the armbands worn in protest in *Tinker*, and that the school failed to show that the speech resulted in a substantial interference with the school’s activities.¹²³ The Supreme Court reversed, stressing that this situation was very different from the “nondisruptive, passive expression of a political viewpoint in *Tinker*.”¹²⁴ It held that the sanctions “in this case were unrelated to any political viewpoint,” and therefore, “it was perfectly appropriate for the school” to punish the student.¹²⁵ While the Court did not explicitly reject the test enunciated in *Tinker*, it seemed to uphold the authority of a school’s officials to control how students express these viewpoints by imposing punishments, even when these viewpoints involve pure speech.¹²⁶

Following this decision, the Supreme Court decided *Hazelwood School District v. Kuhlmeier* two years later.¹²⁷ In *Hazelwood*, the high school principal removed two articles from the school’s newspaper.¹²⁸ One article examined the pregnancies of three girls who attended the school, and the second article discussed how divorce impacted students in the school.¹²⁹ The newspaper was made with funds from the school district and was prepared in a journalism class at the school.¹³⁰ It was both distributed within the school and throughout the local community.¹³¹ The students brought an action alleging a violation of their First Amendment

120. *Id.*

121. *Id.* at 678–79.

122. *Id.* at 679.

123. *Fraser v. Bethel School Dist.*, 755 F.2d 1356, 1359 (9th Cir. 1985) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969)), *rev’d*, 478 U.S. 675 (1986).

124. *Fraser*, 478 U.S. at 680, 685, 687.

125. *Id.* at 685–86.

126. *See id.* See generally Cheryl Bratt, *Top-Down or From the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 *YALE L.J.F.* 917 (2018) (illustrating the belief that the Court permits the restriction of student speech).

127. 484 U.S. 260 (1988).

128. *Id.* at 262.

129. *Id.* at 263.

130. *Id.* at 262.

131. *Id.*

rights.¹³² While the students lost in district court,¹³³ the U.S. Court of Appeals for the Eighth Circuit held that the newspaper functioned as a public forum and that under *Tinker*, the school was unable to demonstrate that the restriction was necessary to avoid material interference with the school.¹³⁴ The Supreme Court rejected the Eighth Circuit's determination that the newspaper was "public," holding that it was a supervised learning experience that was part of the school's educational curriculum, and therefore, the school was within its authority to regulate the newspaper.¹³⁵ The Court concluded that the standard from their *Tinker* decision did not apply in the situation where a school exercised control over its students participating in expressive activities sponsored by the school.¹³⁶ Because the speech involved the "imprimatur of the school," the speech could be regulated as long as the regulations were "reasonably related to legitimate pedagogical concerns."¹³⁷

In their most recent decision, *Morse v. Frederick*, the Court characterized the test in *Tinker* as balancing facts that involved viewpoint political speech with an insufficient school interest.¹³⁸ In *Morse*, a principal suspended a high school student who held up a fourteen-foot banner that stated "BONG HiTS 4 JESUS" as the Olympic Torch Relay went by the school.¹³⁹ The student brought the banner from home, and unfolded it up in hopes of attracting the television cameras covering the event as the torch bearers passed.¹⁴⁰ The Court distinguished between the student's political message with the armbands in *Tinker* and the sexual

132. *Hazelwood Sch. Dist.*, 484 U.S. at 264.

133. *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1466 (E.D. Mo. 1985).

134. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372–74 (8th Cir. 1986).

135. *Hazelwood Sch. Dist.*, 484 U.S. at 270 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

136. *Id.* at 272–73.

137. *See id.* at 271–73. The Court upheld the censorship even though the articles were neither lewd nor vulgar as in *Fraser*, or "likely to cause a substantial disruption" as in *Tinker*. Bentley, *supra* note 85, at 10; *Hazelwood Sch. Dist.*, 484 U.S. at 271 n.4 (first citing 478 U.S. at 685; and then citing 393 U.S. at 514). Instead, the Court used a "public forum" analysis "that it had used in its adult free speech cases," concluding that school facilities are not public forums and that "the speech at issue was not purely student expression but a combination of student and government speech." Bentley, *supra* note 85, at 10–11; *Hazelwood Sch. Dist.*, 484 U.S. at 267, 269 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)); *see also* Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 346 n.31 (2016) (discussing the continuing difficulty defining the school's status in the public forum); Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 90 (2008) (discussing the different boundaries that the various circuits are using when applying *Hazelwood* to student-speech issues).

138. *See* 551 U.S. 393, 408 (2007) (quoting *Tinker*, 393 U.S. at 506, 508–09).

139. *Id.* at 397–98.

140. *See id.* at 396, 398–99.

innuendos of the school assembly speech in *Fraser*, noting that the punishment in *Fraser* had nothing to do with an agreement or disagreement with the student's views.¹⁴¹ Finding the analysis in *Fraser* unclear, Chief Justice Roberts noted that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"¹⁴² and the "substantial disruption" analysis "of *Tinker* is not the only basis for restricting student speech" since that was not the standard that was used in *Fraser*.¹⁴³ The Court concluded that speech can be restricted for reasons other than "particular disruption in the educational process, [and] '[t]he special characteristics of the school environment . . . and the [state] interest in stopping student drug abuse' justified the [school district's] actions . . ."¹⁴⁴ The Court ultimately upheld the suspension, finding that combating student drug use was a compelling state interest.¹⁴⁵

The question of where the *Tinker* "substantial interference analysis" applies has continued to be the subject of many courts and commentators.¹⁴⁶ While the school policy at issue in *Tinker* was clearly a

141. *See id.* at 416–18 (Thomas, J., concurring) (quoting *Fraser*, 478 U.S. at 686) (citing *Tinker*, 393 U.S. at 504).

142. *Id.* at 396–97 (quoting 478 U.S. at 682).

143. *See Morse*, 551 U.S. at 405–06 (citing *Tinker*, 393 U.S. at 514).

144. Bentley, *supra* note 85, at 13; *Morse*, 551 U.S. at 408.

145. *See Morse*, 551 U.S. at 407, 410 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)); Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 468–69 (2008) (internal footnote omitted) ("I argue that student speech that is hurtful to other students (whether religiously-motivated or not) should first be divided into two categories: (1) speech that identifies particular students for attack; and (2) speech . . . that expresses a general opinion without being directed at particularly named (or otherwise identified) students. Schools should receive great latitude to restrict the first category of speech, which essentially amounts to verbal bullying.").

146. *See, e.g.,* Cordes, *supra* note 91, at 707. One "approach taken by lower courts [is] to view *Tinker* as establishing the general rule for student speech, and *Fraser*[.] . . . *Hazelwood*[, and *Morse*] as creating exceptions to [the] rule." *Id.* at 667. Thus, *Tinker* applies "unless the speech in question was vulgar and lewd, . . . school sponsored," or involved a dangerous area that needs to be regulated. *Id.* at 668. As the Ninth Circuit stated in *Chandler v. McMinnville School District*, "We have discerned three distinct areas of student speech from the Supreme Court's school precedents . . ." 978 F.2d 524, 529 (1992); Cordes, *supra* note 91, at 668; *see Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 (3d Cir. 2001); *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (citing *Fraser*, 478 U.S. at 686); *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988); *Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 737 (N.D. Ind. 2005). "[T]he Seventh Circuit [however,] has interpreted *Hazelwood* as modifying . . . *Tinker*, and that, absent a school-created speech forum, restrictions [must] be judged [to be] 'reasonably related to legitimate pedagogical concerns.'" Cordes, *supra* note 91, at 668; *Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1997) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); *see Bentley, supra* note 85, at 1–2; Bruce C. Hafen & Jonathan O. Hafan, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379, 386 (1995); Lisa Shaw Roy,

viewpoint-hostile regulation of political speech, it remains unclear whether that standard should be applied to all regulations of student speech or whether it should only be limited to viewpoint restrictions of student speech.¹⁴⁷ As discussed above, the Supreme Court discussion of *Tinker*'s scope has been inconsistent.¹⁴⁸ In *Fraser*, the Court distinguished *Tinker* by pointing out that the *Fraser* punishment was “unrelated to any political viewpoint.”¹⁴⁹ While it upheld the punishment, it did not explicitly reject the *Tinker* standard.¹⁵⁰ In *Hazelwood*, the Court depicted the standard in *Tinker* as one that broadly applies to a school's regulation of its students “expressing their personal views on the school premises.”¹⁵¹ Yet, the Court decided that “the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”¹⁵² Finally, while the Court again depicted the *Tinker* decision as broadly conveying the suppression standard for “student expression” in *Morse*,¹⁵³ it distinguished the facts in *Morse* by depicting *Tinker* as only applying to a particular viewpoint's suppression.¹⁵⁴ While *Tinker* established a protective standard of student speech rights, it continues to be limited by its apparent focus on viewpoint restrictions on core political speech.¹⁵⁵

While all government entities can restrict speech that is not protected by the First Amendment,¹⁵⁶ schools can clearly restrict speech that the government could not ordinarily restrict.¹⁵⁷ Once there is a determination

Inculcation, Bias, and Viewpoint Discrimination in Public Schools, 32 PEPP. L. REV. 647, 648 (2005).

147. See Cordes, *supra* note 91, at 663.

148. See Bentley, *supra* note 85, at 1–2.

149. 478 U.S. at 685.

150. See *id.*

151. 484 U.S. at 266 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 512–13 (1969)).

152. See *id.* at 272–73.

153. See 551 U.S. at 396 (quoting 393 U.S. at 506).

154. See *id.* at 408–09 (quoting 393 U.S. at 508–09).

155. Cordes, *supra* note 91, at 663.

156. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“[T]he right of free speech is not absolute at all times and under all circumstances. . . . [This does not] include lewd and obscene, the profane, the libelous . . . [or other words] which . . . incite an immediate breach of the peace.”).

157. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988). “Free speech case law [involving] First Amendment claims in public schools does not follow free speech doctrine as it is applied in other contexts.” Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 729 (2009). While the First Amendment protects students from unreasonable restrictions of speech by the government,

that the regulated activity is protected speech, the level of protection to be applied to that speech in the school setting is less clear. As the U.S. Court of Appeals for the Second Circuit stated, “It is not entirely clear whether *Tinker*’s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination.”¹⁵⁸ If a school district implements content- or viewpoint-based political regulation of student expression, courts continue to apply the heightened standard espoused in *Tinker*.¹⁵⁹ But what happens if the school’s restriction is content-neutral, but still impacts protected student speech? Content-neutral regulations “are justified [speech limitations] without reference to the content of the regulated speech.”¹⁶⁰ For example, a school may create a school uniform policy to increase student achievement or promote safety. Students could argue that the regulation violates their First Amendment right by preventing them from wearing clothing that communicates a particular message.¹⁶¹ Or in the context of walkouts, a school could have a policy that students may not leave the school

including public schools, students do not have the full protections that other citizens have when they are protesting on street corners or other public settings. *See id.* at 721. Because of the age of students and the fact that school is a quasi-public setting, there are limits placed on both content and manner of speech that can be imposed by school officials. *See id.* at 810–11. First, it is unclear whether a school is a public forum. *Id.* at 721. While it is a governmental entity, schools are generally closed to the public. *Id.* at 731. In the non-school setting, “speech regulations in a non-public forum constitutes a much less demanding review than *Tinker*.” Brownstein, *supra*, at 732; *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 808–09 (1985). Thus, in this situation, *Tinker* provides greater protection to students than individuals in the non-school area. Brownstein, *supra*, at 732–33; *Cornelius*, 473 U.S. at 823 n.3 (Blackmun, J., dissenting).

158. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006).

159. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) (quoting *Burnside v. Byars*, 363 F.2d 744, (5th Cir. 1966)) (holding that students’ buttons displaying the political message “scab,” which was in support of a teacher’s union strike, were given greater protection); *see also Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1190 (C.D. Cal. 2007) (quoting *Hazelwood Sch. Dist.*, 484 U.S. at 266–67) (holding it was not a violation of a student’s right to free expression to punish that student for inappropriate public displays of affection and that such an expression was inconsistent with a school’s educational mission).

160. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

161. *See generally* Alison M. Barbarosh, Comment, *Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students’ First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415 (1995) (discussing the constitutionality of school uniforms). Courts have held that personal appearance is a form of symbolic speech. *See, e.g., Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972); *Richards v. Thurston*, 424 F.2d 1281, 1283 (1st Cir. 1970); *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (citing *Griffin v. Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969)). *But see Karr v. Schmidt*, 460 F.2d 609, 613–14 (5th Cir. 1972) (en banc); *Bishop v. Colaw*, 450 F.2d 1069, 1074 (8th Cir. 1971); *Freeman v. Flake*, 448 F.2d 258, 260–61 (10th Cir. 1971); *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 937 (9th Cir. 1971); *Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir. 1970).

grounds, again with the purpose of increasing student achievement or promoting safety. Students could argue that the regulation violates their First Amendment rights by preventing them from participating in a protest.¹⁶² There is a split among the circuit courts that have considered this issue.¹⁶³

“Outside of the school setting, First Amendment doctrine has long held that content-neutral regulations of speech must be evaluated differently from the way in which content-based restrictions are evaluated.” Courts have held that content-neutral regulations of speech outside of the school setting must be evaluated in a different way than viewpoint-based restrictions.¹⁶⁴ The courts have created exceptions for non-political speech or conduct regulation that incidentally infringes on expression.¹⁶⁵ The *O’Brien* Court held that “when ‘speech’ and

162. See, e.g., *Dodd v. Rambis*, 535 F. Supp. 23, 25–27 (S.D. Ind. 1981).

163. See *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 765 (9th Cir. 2006) (quoting *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992)) (“[T]he First Amendment protects all student speech that is neither school sponsored, a true threat nor vulgar, lewd, obscene or plainly offensive.”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (citing *Chandler*, 978 F.2d at 529) (holding that *Tinker* applies to all regulation of student speech that does not fall under *Hazelwood* or *Frazer*); c.f. *Blau v. Forth Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969)) (holding that *Tinker* did not apply to expressive conduct); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)) (“Applying the *Tinker* analysis to all other restrictions on student speech does not account for regulations that are completely viewpoint-neutral. The Supreme Court clearly thought it necessary to apply a higher standard of scrutiny to ‘personal expression that happens to occur on the school premises,’ as opposed to First Amendment activity sponsored by the school.”); *Bar-Navon v. Sch. Bd. Brevard Cty. Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 U.S. Dist. LEXIS 2365, *15 (M.D. Fla. Jan. 11, 2007) (citing *Blau*, 401 F.3d at 388–89) (holding that the regulation of a student’s expressive conduct was permissible under the First Amendment).

164. Geoffrey A. Starks, *Tinker’s Tenure in the School Setting: The Case for Applying O’Brien to Content-Neutral Regulations*, 120 YALE L.J. ONLINE 65 (2010), <https://www.yalelawjournal.org/forum/tinkers-tenure-in-the-school-setting-the-case-for-applying-obrien-to-content-neutral-regulations>. Content-neutral restrictions restrict speech regardless of the message being conveyed; however, content-based restrictions restrict the speech because of the message itself. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983); see also *Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)) (“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”); *Clark*, 468 U.S. at 294 (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984)) (holding that symbolic conduct, such as camping, can be banned, and such ban is Constitutional, when such ban is a reasonable time, place, or manner restriction).

165. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291–93 (2000) (holding that a state law prohibiting public nudity stifles the expressive speech of nude dancers, but passes *O’Brien* scrutiny because it is a content-neutral regulation); *R.A.V. v. St. Paul*, 505 U.S. 377, 385, 396 (1992) (reversing and remanding a Minnesota Supreme Court ruling supporting a city

‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”¹⁶⁶ Thus, if the restriction on the conduct serves an important government purpose unrelated to the suppression of free expression, then there is no First Amendment protection.¹⁶⁷ Similarly, in *Clark v. Community for Creative Non-Violence*, the Court held that “[r]easonable time, place, or manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech.”¹⁶⁸

In the school setting, it is arguable that the Supreme Court is following a similar pattern. Under that scenario, the *Tinker* test would only be applied to political, viewpoint-based regulations.¹⁶⁹ Content-neutral regulation of student expressive conduct would be regulated by the “time, place, and manner” test articulated in *O’Brien*.¹⁷⁰ “Lower courts applying the *O’Brien* test in the school setting have found that a regulation is constitutional when . . . the regulation ‘furthers an important or substantial governmental interest’; the asserted governmental interest ‘is unrelated to the suppression of student expression’; and ‘the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.’”¹⁷¹ Thus, unlike the test in *Tinker*, which

ordinance prohibiting bias-motivated disorderly conduct, here burning a cross on a black family’s lawn, and holding “that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses”).

166. 391 U.S. 367, 376 (1968).

167. *See id.* at 377.

168. 468 U.S. 288, 298 n.8 (1984). This is a test balancing the soundness of the school’s interest in its regulation and the amount of interference on the student’s speech. *See id.* at 307–08 (Marshall, J., dissent). The speaker side of the balance is frequently described as asking “whether [the regulation] leaves open ample channels for alternative expression.” *DA Mortg., Inc. v. Miami Beach*, 486 F.3d 1254, 1267–68 (11th Cir. 2007).

169. *See* discussion *supra* Section II; *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969)).

170. *See United States v. O’Brien*, 391 U.S. 367, 375, 377 (1968); *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005) (first quoting *O’Brien*, 391 U.S. at 377; and then quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997)); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442–43 (5th Cir. 2001).

171. *Starks*, *supra* note 164; *Blau*, 401 F.3d at 391 (first citing *O’Brien*, 391 U.S. at 377; and then citing *Turner*, 520 U.S. at 189). Applying the *O’Brien* test, the Supreme Court has held that school uniforms are a permissible restriction on the freedom of expression. *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 422 (9th Cir. 2008). The goal of school uniforms is not to intend to suppress free speech—implementation of uniforms is narrowly tailored to achieve the goal of a “distraction-free educational environment” for students and students’ rights were not infringed on, more than necessary, to achieve this distraction free environment. *Jacobs*, 526 F.3d at 436–37 (citing *Turner*, 512 U.S. at 662); *see N.Y. State Ass’n of Career Sch. v.*

applies a more heightened standard requiring the school district to show a “substantial disruption” to justify restricting student expression, the test in *O’Brien* is an “intermediate” level of scrutiny, and gives more deference to school authorities in overseeing student conduct.¹⁷² Yet, the *Tinker* Court mentioned the students wearing their black armbands as “closely akin to ‘pure speech,’”¹⁷³ thus giving support to the argument that the heightened standard should be applied to both expressive conduct and pure speech.

So, how should regulations in the school setting be analyzed to assess whether the restriction violates a student’s first amendment rights? The first inquiry is to determine whether the speech is prohibited by the school regulation.¹⁷⁴ If the school can argue that it is regulating its own speech,¹⁷⁵ then there is probably no viable free speech challenge.¹⁷⁶ If the school can argue that the restriction does not involve speech that is protected by the First Amendment, then there is no viable free speech challenge.¹⁷⁷

Once there is a determination that the regulated conduct is protected speech, the next step is determining which level of scrutiny applies.¹⁷⁸ If the regulation involves a content-based restriction on a political viewpoint, the test enunciated in *Tinker* will apply¹⁷⁹ and the regulation

State Educ. Dep’t., 823 F. Supp. 1096, 1106 (S.D.N.Y. 1993) (holding that a New York State statute passes the *O’Brien* test and does not violate the First Amendment or other civil rights); *c.f.* *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666, 671 (S.D. Tex. 1997) (holding that a school restriction on wearing rosary beads was considered a restriction on pure speech and was overturned, and held that the *O’Brien* test did not apply).

172. *Compare O’Brien*, 391 U.S. at 376, with *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). *See also Jacobs*, 526 F.3d at 428 n.23, 429.

173. *Tinker*, 393 U.S. at 505.

174. *Canady*, 240 F.3d at 439; *see also Blau*, 401 F.3d at 391.

175. *Hazelwood*, 484 U.S. at 266–67 (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 685–86 (1986)).

176. *Id.* at 273, 276 (noting that a school only has to demonstrate that the restriction is “reasonably related to pedagogical concerns”).

177. *See* Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 434 (2009). There are many areas where free speech rights are not constitutionally protected. *Id.* Just the way threats and fighting words are not protected, in the school setting, where it is important to teach civility, name calling, and other fighting words should also not be protected. *Id.* at 440 (discussing the importance of protecting students from bullying).

178. *See Canady*, 240 F.3d at 439, 441.

179. *See Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 431 (9th Cir. 2008). Justice Clarence Thomas believes that free speech rights should not apply to students at all, “arguing that *Tinker* [is] a mistake that should be overruled.” Rostron, *supra* note 60, at 647; Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring). In *Morse*, he reaches that conclusion based “on historical analysis, contending that evidence about discipline in public schools in the nineteenth century indicates that the original understanding of the First Amendment did not include speech rights for students.” Rostron, *supra* note 60, at 647; 551

will probably be struck down.¹⁸⁰ If the school district can demonstrate that the restriction is content-neutral but impacts symbolic or expressive conduct, then the level of scrutiny is not as clear.¹⁸¹ While some courts still apply *Tinker*, many apply intermediate scrutiny, holding that the school can still regulate the conduct as long as the regulation is one that furthers an important school interest and is unrelated to the suppression of the students' free speech.¹⁸²

III. ANALYZING SCHOOLS' RESPONSES TO WALKOUTS UNDER THE FIRST AMENDMENT

When school districts became aware that there was going to be a national student walkout on March 14, 2018, districts and school administrators began conversations about how to respond.¹⁸³ Many

U.S. at 411 (Thomas, J., concurring). He also claims that *Tinker* has had "adverse effects" on schools, and that it "contributed significantly to student defiance of teachers and . . . [lack] of respect for school authority." Rostron, *supra* note 60, at 647; *Morse*, 551 U.S. at 421 (Thomas, J., concurring) (citing Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 50 (1996)). See generally RICHARD ARUM, *JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY* (2003) (discussing how litigation has eroded the moral authority of teachers and principals, which has led to a degradation in the quality of American education); ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* (2009) (examining the way courts have wrestled with student expression in school).

180. See Bentley, *supra* note 85, at 1–2. Curtis Bentley has proposed that the test should be "that students possess a judicially enforceable right to speak only when it is clear that repression of [that] speech could not reasonably serve the goals of democratic education." *Id.* at 35. "[T]he basic premise of democratic education [is] that it is necessary and acceptable to teach students certain essential values in the interest of perpetuating and improving democratic self-government." *Id.* at 29.

181. See *id.* at 14–15.

182. See, e.g., *Blau v. Forth Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969)) (holding that *Tinker* did not apply to expressive conduct); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)) ("Applying the *Tinker* analysis to all other restrictions on student speech does not account for regulations that are completely viewpoint-neutral. The Supreme Court clearly thought it necessary to apply a higher standard of scrutiny to 'personal expression that happens to occur on the school premises,' as opposed to First Amendment activity sponsored by the school."); *Bar-Navon v. Sch. Bd. Brevard Cty. Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 U.S. Dist. LEXIS 2365, *15 (M.D. Fla. Jan. 11, 2007) (citing *Blau*, 401 F.3d at 388–89) (holding that the regulation of a student's expressive conduct was permissible under the First Amendment).

183. See, e.g., NICOLAS RIVEROS & NICK FERNALD, HARV., *GRADUATE SCH. EDUC., SCHOOL WALKOUTS AS CIVIL DISOBEDIENCE: HOW SHOULD DISTRICTS RESPOND?* 1, 3–4 (2016), https://www.justiceinschools.org/files/playpen/files/school_walkouts.pdf (responding to the 2016 school walkouts in Portland, Oregon to protest the 2016 presidential election); *Student Walkouts*, N.Y. STATE SCH. BDS. ASS'N., www.nyssba.org/news/2018/02/23/legal-alert/student-walkouts/ (last visited Mar. 9, 2019) (showing an example of how districts began to plan); see also REMS TECH. ASSISTANCE CTR.,

worried about danger to students who were protesting in public spaces.¹⁸⁴ There were discussions about the impact of the walkouts on a student's learning experience.¹⁸⁵ While some school leaders supported the walkout as strengthening civic skills,¹⁸⁶ others believed that the walkout would cause students to lose valuable instructional time.¹⁸⁷ There were concerns about whether the walkout would only involve high school students, or whether it would trickle down into the middle and elementary schools.¹⁸⁸ There was also unease about the impact of the demonstration on the climate within the school.¹⁸⁹ While the seventeen-minute walkout was meant to honor the seventeen victims of Marjory Stoneman Douglas High School, the underlying support for stronger gun control laws created political overtones in an already divisive political climate, potentially

supra note 40, at 2–4 (responding to the recent immigration walkouts).

184. See, e.g., Jaclyn Allen & Blair Miller, *Safety, Effects of Student Protests Discussed Ahead of Planned Walkouts in Colorado*, DENVER ABC, <https://www.thedenverchannel.com/news/360/safety-effects-of-student-protests-discussed-ahead-of-planned-walkouts-in-colorado> (last updated Mar. 13, 2018, 10:30 PM) (stating that John Adsit, a former Denver police officer, was injured during a 2014 student protest and expressed safety concerns about the upcoming walkout); Amanda Oglesby, *Safety Concerns Keep Many School Walkouts Indoors*, ASBURY PARK PRESS, <https://www.app.com/story/news/education/2018/03/13/safety-concerns-keep-many-school-walkouts-indoors/415944002/> (last updated Mar. 13, 2018, 11:40 AM) (showing that in response to safety concerns and copycat shooter threats, New Jersey schools are having students stay within school grounds or the building during a walkout protest, making it a “walk up”).

185. See Allen & Miller, *supra* note 184.

186. See, e.g., Amy Bernstein, *Student Protests Offer Real-Time Civics Lesson*, BALT. SUN (Apr. 18, 2018, 10:50 AM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0419-civics-lessons-20180418-story.html> (saying that these protests are a real-time historical movement that can help students meet state civics studies requirements which are part of the current curriculum).

187. See Allen & Miller, *supra* note 184 (stating that a parent is worried the walkout will disrupt school and would rather the protest be done outside of school instructional time). See generally *Considerations for Principals when Students are Planning an Organized Protest or Walkout*, NAT'L ASS'N SECONDARY SCH. PRINCIPALS (Feb. 23, 2018), <http://blog.nassp.org/2018/02/23/considerations-for-principals-when-students-are-planning-an-organized-protest-or-walkout/> (giving guidance on how to lessen the academic impact of student walkouts and other potentially negative effects of the protest).

188. See, e.g., Stephanie Saul & Anemona Hartocollis, *How Young Is Too Young for Protest? A National Gun-Violence Walkout Tests Schools*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/national-school-walkout-guns.html> (showing that many schools are encouraging middle school and sometimes grade school students to participate in the national protests, but are calibrating participation to be age and grade level appropriate); Nina Schutzman & John W. Barry, *Students Rally to Raise Awareness of Gun Violence, Safety Concerns*, POUGHKEEPSIE J., <https://www.poughkeepsiejournal.com/story/news/education/2018/03/14/students-rally-raise-awareness-gun-violence-safety-concerns/420070002/> (last updated Mar. 15, 2018, 9:40 AM) (giving an example where middle school and junior high school students join in anti-gun-violence protests).

189. See Schutzman & Barry, *supra* note 188 (showing parents expressing concern over the walkout).

polarizing and increasing the divide between students.¹⁹⁰

As history has illustrated, actions to either diffuse or enable protests can signal how a school district views the value of students as members of a community. It can either empower students or reinforce a student's experience of marginalization.¹⁹¹ Students who do not want to participate in the walkout may feel excluded or judged by their peers or teachers.¹⁹² The planned walkout also provoked parental and community reactions that were varied and strong. Some parents felt strongly that students had the right to speak out without repercussions and expressed pride in their children's political activism.¹⁹³ Others questioned the capacity of students to understand the political context and doubted the motivation for participating.¹⁹⁴

190. *See id.* (detailing how the organizers, Women's March Youth EMPOWER, stated that the walkouts were intended to be a political call to action). It is about protesting Congress's inaction when it comes to gun violence. *See id.*; *see also* Frank Miniter, *High Schoolers the Media Won't Tell You About*, AM'S. FIRST FREEDOM (May 31, 2018), <https://www.americas1stfreedom.org/articles/2018/5/31/high-schoolers-the-media-won-t-tell-you-about/> (arguing that even though the walkout was plugged as a tribute to the victims in Parkland, it became a political event, including speeches calling for an increase in gun control).

191. *See* Michelle Dean, *Extra Strength*, N.Y. TIMES, Apr. 1, 2018, at MM9 (discussing how students' dissent was set off to the side and marginalized by public officials). The author also acknowledged that power plays into student demonstrations because students do not have the power to make rules or laws that might curtail gun shooting, but demonstrating through a walkout creates that power. *See id.*

192. *See, e.g.,* *Ohio Student Suspended for Staying in Class During Walkouts*, CINCINNATI ENQUIRER (Mar. 16, 2018, 9:06 AM), <https://www.cincinnati.com/story/news/2018/03/16/ohio-student-suspended-staying-class-during-walkouts/431268002/>. One Ohio high school student was suspended for a day because he stayed in a classroom instead of joining protests or going to a study hall. *Id.* This student felt that politics were not meant for school and did not want to take sides. *Id.*

193. *See* Heidi Stevens, *My Daughter's Walking Out of School Today, and I Couldn't Be More Proud*, CHI. TRIB. (Apr. 20, 2018, 9:15 AM), <http://www.chicagotribune.com/lifestyles/stevens/ct-life-stevens-friday-national-school-walkout-0420-story.html>; Bob Wilson, *Parent Beams with Pride Over Student's Participation in Walkout Protest*, NEWS 8, https://www.wtnh.com/news/politics/parent-beams-with-pride-over-students-participation-in-walkout-protest_2018040310405898/1097772363 (last updated Mar. 14, 2018, 10:58 PM). Parent, Rob Sanville, expressed pride in his daughter's participation in political protest, who spoke at her school about a walkout protest. Wilson, *supra*.

194. Students have brought many lawsuits challenging their freedom of expression since the decision in *Tinker*. *See* B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 297–98 (3d Cir. 2013) (involving students' right to wear "I love Boobies" bracelets as part of an awareness campaign for a breast cancer); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1064–65 (9th Cir. 2013) (involving the expulsion of a student who sent threats of violence against classmates); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 466 (6th Cir. 2000) (involving students' right to wear Marilyn Manson shirts). Students have protested against too much homework, unsatisfactory school lunches, the ability to use cell phones in class, and other things that could be seen as trivial. *See* George Brown & Caitlin Alexander, *Students Protest Cellphone Policy at Oakhaven High School*, WREG MEMPHIS,

Ultimately, school districts had three general responses. Despite codes of conduct that only called for detention for not being in class, some school districts opted to punish students who participated in the walkout with suspensions.¹⁹⁵ Other districts decided not to impose any sanction on students who chose to participate in the walkout, even if the school district had general attendance policies.¹⁹⁶ Some schools tried to turn the walkout into an assembly.¹⁹⁷ Finally, some districts followed their codes of conduct and punished students in the same manner as if they had missed a class for any other reason—usually a detention or an unexcused absence on their records.¹⁹⁸

The first step in evaluating how courts may analyze a school district's response is deciding whether the student speech is protected by the First Amendment.¹⁹⁹ Outside of the school setting, the courts have

<https://wreg.com/2014/09/23/students-protest-cell-phone-policy-at-oakhaven-high-school/> (last updated Sept. 23, 2014, 4:34 PM); Chapman & Burke, *supra* note 43; Yee, *supra* note 43. In his dissent in *Tinker*, Justice Hugo Black lamented that allowing students to have freedom of speech would leave public schools at the mercy of “the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 525 (1969) (Black, J., dissenting).

195. See, e.g., *Needville ISD Not Allowing Student Demonstrations Amid National Call for Walk Outs*, ABC13 (Feb. 21, 2018), <https://abc13.com/education/needville-isd-not-allowing-school-walk-outs-amid-gun-violence-protests/3118299/> (describing a Facebook post from Needville ISD Superintendent Curtis Rhodes threatening students with out-of-school suspension for three days if they joined in the national protest). The Sayreville Board of Education confirmed that suspensions would be issued for students who choose to participate in the walkout. *NJ School District Threatens Punishment Against Students Who Participate in National Walkout*, CBS N.Y. (Mar. 13, 2018, 7:08 PM), <https://newyork.cbslocal.com/2018/03/13/sayreville-school-district-walkout-threat/>.

196. See, e.g., *Palo Alto Schools to Accommodate Students in National Walkout For Gun Laws*, CBS S.F. (Mar. 12, 2018, 10:35 AM), <https://sanfrancisco.cbslocal.com/2018/03/12/palo-alto-unified-national-school-walkout-gun-control/>. Interim Superintendent Karen Hendricks stated that “while neither the district nor the schools themselves sanction the demonstrations, the students are permitted to exercise their right to participate [in the protests].” *Id.*

197. See, e.g., Claire Lowe, *South Jersey Schools Participate in National #Enough Walkouts*, PRESS ATLANTIC CITY (Mar. 14, 2018), https://www.pressofatlanticcity.com/news/south-jersey-schools-participate-in-national-enough-walkouts/article_4a473a1f-d337-5631-90b7-4e74d06beee3.html. Student walkouts turned into an assembly at many Southern New Jersey schools, where students participated in moments of silence, school safety education, and other actions to memorialize Parkland victims. *Id.*

198. The New York City Department of Education (DOE) forgave absences for participating in a March protest, but stated concerning an up-coming event, “‘We are aware of the planned full-day walkout and schools will follow standard attendance policies.’ . . . DOE spokesperson Miranda Barbot said . . . that kids who take part in [the] walkout . . . will not get any special pardon. . . . Students who leave school grounds will be cited for an unexcused absence.” Selim Algar, *DOE: Students Will Be Penalized for Taking Part in Half-Day Gun Protest*, N.Y. POST, <https://nypost.com/2018/04/19/doe-students-will-be-penalized-for-taking-part-in-half-day-gun-protest/> (last updated Apr. 19, 2018, 10:14 PM).

199. See, e.g., Hawk, 725 F.3d 293, 303 (3d Cir. 2013) (quoting *Saxe v. State Coll. Area*

consistently held that marching in an organized demonstration is a traditional form of expressive conduct, and is therefore protected.²⁰⁰ In *Corales v. Bennett*, four middle school students intended to show their opposition to the proposed immigration reform by participating in a walkout.²⁰¹ While up to 150 students walked out of neighboring middle schools, only four students were absent from that particular school.²⁰² Nevertheless, because of warnings from school administrators that there were potential walkouts that day, the court held that the students were engaged in expressive conduct.²⁰³ Similarly, in the #NeverAgain walkouts, there was a clear intent to convey a particularized message of gun control reform.²⁰⁴ Thousands of events were planned for both the March and April walkouts, and the events were covered by the national news both before and after the marches.²⁰⁵ Under these particular conditions, “the likelihood was great that the message would be understood by those who viewed it.”²⁰⁶ Therefore, it is clear that the walkout would be considered expressive conduct.

The next step is to examine the restriction to determine whether it is content-based or content-neutral.²⁰⁷ Schools that impose a harsher punishment for students who engage in a protest than students who miss class for other reasons may run afoul of the First Amendment.²⁰⁸ While

Sch. Dist., 240 F.3d 200, 211, 214 (3d Cir. 2001)).

200. See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966) (finding that a silent sit-in at a segregated library was expressive conduct); *Coal. to March on the RNC & Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1022, 1024 (D. Minn. 2008) (rescinding a permit was not a denial of first amendment rights despite marching being expressive conduct, because government regulation of expressive activity is allowed so long as it is content-neutral). Justice Arthur Goldberg cautioned, “We emphatically reject the notion urged by appellant that the *First* and *Fourteenth Amendments* afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.” *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

201. 567 F.3d 554, 559 (9th Cir. 2009).

202. *Id.* at 559–60.

203. *Id.* at 563.

204. See Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 *YALE L.J.F.* 917, 937 (2018).

205. See Holly Yan, *What to Expect from Friday’s Massive National School Walkout*, CNN, <https://www.cnn.com/2018/04/19/us/national-school-walkout-explainer/index.html> (last updated Apr. 19, 2018, 1:04 PM).

206. *Spence v. Washington*, 418 U.S. 405, 411 (1974); see Bratt, *supra* note 204, at 937–39.

207. See *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)); *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

208. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (asserting that the punishment of expression based on its “particular opinion” is

marching is expressive conduct, a regulation that creates a more severe punishment for participating in the walkout smacks of a content-based restriction of a political viewpoint.²⁰⁹ Like the situation in *Tinker*, the school district is creating a rule that is specifically punishing the students for their conduct of participating in the walkout.²¹⁰ Therefore, the punishment is more likely about the substantive message rather than the conduct.²¹¹ As a result, the test in *Tinker* would apply, and school officials would be required to justify their disciplinary action by demonstrating “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”²¹² The school district will have a difficult time demonstrating that a student should be punished more vigorously for leaving school to participate in a protest than to go out to lunch with friends, for example. The March 14th walkout was a planned walkout, with participants in schools across the country.²¹³ Students will be able to successfully argue that the school district is punishing the students for their political speech.

Similarly, if schools choose to ignore the code of conduct or decide to create an assembly to discuss the issues, they also may run afoul of the First Amendment.²¹⁴ The outpouring by students across the country to express their grief and solidarity with school and families who have experienced shooting deaths is as sympathetic a cause as can be imagined. It is understandable that school officials might want to support those students, and that families and community members would approve and help coordinate those efforts. But what happens when a group of students wants to participate in a rally or walkout for a cause that is not so agreeable? If the school district imposes discipline on those students, then those students have a viable First Amendment claim where they can demonstrate that the current punishment must be content-based.²¹⁵ Once a school creates a forum, such as an assembly, there is also the possibility that the parties who are excluded can claim the school is discriminating on the basis of viewpoint.²¹⁶ It is not enough to argue that the walkout or assembly is apolitical because both students and organizers have been

unconstitutional under the First Amendment).

209. See *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

210. See *Tinker*, 393 U.S. at 504.

211. See *id.* at 505–06 (citing *Cox*, 379 U.S. at 555).

212. *Id.* at 509, 514.

213. See *Larimer*, *supra* note 2.

214. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

215. See *Tinker*, 393 U.S. at 511.

216. See *Brownstein*, *supra* note 157, at 772–73 (discussing the restriction of student speech during school-sponsored activities, such as assemblies).

clear that they consider the walkout a political protest.²¹⁷

In *Garcia v. Yonkers School District*, students walked out of their high school and protested budget cuts in front of city hall.²¹⁸ There had been a similar demonstration the previous year that had been “effective at staunching the previous year’s cuts.”²¹⁹ None of the students who had walked out at the previous “demonstration were penalized for their act of protest, although they had violated the [school’s disciplinary code] against leaving school grounds during school hours.”²²⁰ However, these students were given a five-day suspension and were classified as students “who engage in ‘violent’ or ‘dangerous’” behavior under the disciplinary code.²²¹

The students brought an action against the school district arguing that their First Amendment rights were violated and requesting an injunction from the suspensions.²²² At the hearing, “the District Court found that the Students had shown a likelihood of success on their First Amendment claim,” especially because the imposition of the disciplinary action only applied to this particular walkout, and not all walkouts.²²³ School districts face the same result if they decide not to punish this group of students and later on face another walkout where they determine punishment is necessary.²²⁴

The only approach that is constitutionally permissible is for school districts to apply their current school disciplinary code to the situation.²²⁵ Most schools have codes of conduct that give a range of punishments to students who leave school grounds without permission.²²⁶ Those

217. See, e.g., Larimer, *supra* note 2; Schutzman & Barry, *supra* note 188.

218. 561 F.3d 97, 99 (2d Cir. 2009).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 99–100.

223. *Garcia*, 561 F.3d at 100; see *Garcia v. Yonkers Sch. Dist.*, 499 F. Supp. 2d 421, 425 (S.D.N.Y. 2007), *rev’d*, 561 F.3d 97, 100 (2d Cir. 2009). The district court did not make any written findings, did not sign the preliminary injunction, and provided an opportunity to the school to present evidence at another hearing if the school district requested. *Garcia*, 499 F. Supp. 2d at 425. The school district did not request another hearing and “filed a memorandum in opposition to the Students’ request for a temporary restraining order.” *Garcia*, 561 F.3d at 101. The students filed a reply memorandum in opposition and no decision was made until 2007. *Id.* (citing *Garcia*, 499 F. Supp. 2d at 426).

224. See *Garcia*, 561 F.3d at 104.

225. See Cory Turner & Clare Lombardo, *How School Walkouts Test Student Rights And School Responsibilities*, NPR (Mar. 13, 2018, 6:00 AM), <https://www.npr.org/sections/ed/2018/03/13/591858922/how-school-walkouts-test-student-rights-and-school-responsibilities>.

226. See, e.g., BROWARD CTY. PUB. SCHS., THE CODE BOOK FOR STUDENT CONDUCT 56 (2017), https://www.browardschools.com/cms/lib/FL01803656/Centricity/Domain/13726/SY%202018-19%20COSC%20rev.%208_2_18.pdf; L.A. UNIFIED SCH. DIST., 2017–2018

regulations are content-neutral.²²⁷ Whether the court applies the *Tinker* standard or a more intermediate level of scrutiny, the school district's actions are likely to be upheld.²²⁸

In *Corales v. Bennett*, four middle school students left school to participate in immigration reform protests.²²⁹ They were subsequently disciplined in accordance with the school disciplinary code for truancy, which included the taking away of end-of-school activities.²³⁰ The Vice Principal also lectured them harshly about the legal consequences of truancy, telling them that they faced police involvement and juvenile hall.²³¹ One of the students subsequently committed suicide, and his family brought an action against the school district arguing, among other things, that the school district had violated the student's First Amendment rights.²³²

After determining that the students were engaging in protected conduct, the district court determined the punishment to be content-based because of the severe lecture, and analyzed the case using the *Tinker* framework.²³³ The Ninth Circuit disagreed, finding that it was the incorrect analysis.²³⁴ It held that the *Tinker* framework applies "to decisions by a school to punish a student's speech or expressive conduct . . . because of [that speech or conduct's] potentially disruptive [effect] on . . . the operation of the school."²³⁵ During the walkout, "the expressive conduct . . . occurred entirely off-campus and was not school sponsored. The students were punished not for any disruptive aspect of their expressive conduct, . . . but for the disruption caused by the act of leaving campus without permission."²³⁶ Therefore, the question of whether the students could be disciplined under the content-neutral rule that they could not leave the campus without permission, when their purpose was to engage in expressive conduct, was whether the regulation was narrowly drawn to further a substantial government interest unrelated

PARENT STUDENT HANDBOOK 13–14 (2017), https://achieve.lausd.net/cms/lib/CA01000043/Centricity/domain/577/schoolformsandresources/PrntStdntHnbk_1718_eng.pdf.

227. *See supra* note 82.

228. *See supra* note 83.

229. 567 F.3d 554, 559 (9th Cir. 2009).

230. *Id.*

231. *Id.*

232. *Id.* at 561.

233. *Id.* at 561–62 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)); *see also* *Corales v. Bennett*, 488 F. Supp. 2d 975, 982 (C.D. Cal. 2007) (citing *Tinker*, 393 U.S. at 514).

234. *Corales*, 567 F.3d at 565–66 (citing *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 430–31 (9th Cir. 2008)).

235. *Id.* at 565 (citing *Tinker*, 393 U.S. at 509).

236. *Id.*

to the suppression of free speech.²³⁷

Ultimately, the court found that the school's regulation furthered substantial governmental interests such as enforcing compulsory education and maximizing school funding.²³⁸ As it was also narrowly drawn, the school was entitled to enforce the regulation even when the students left school for expressive purposes.²³⁹ The court further found that there was no evidence that the school had any kind of retaliatory motive, holding that the district court had properly granted summary judgment for the school district.²⁴⁰

Even under a *Tinker* analysis, the school district's actions would survive a first amendment challenge.²⁴¹ The district would be able to demonstrate that the students were disciplined because of facts that "reasonably . . . forecast substantial disruption of or material interference with school activities." A walkout would make it difficult for school staff to do their jobs or teachers to continue their classes with the students who stayed in class. As the district court found in *Corales*, "school officials may take action[s] to protect the safety of individual students even if [the] action interferes with the student's ability to express him or herself," which included severe warnings in this case.²⁴² In the situation where the content-neutral regulation is being applied in a content-neutral way, the *Tinker* standard is satisfied.²⁴³

IV. WHAT IS A SCHOOL TO DO?

The law is incoherent and complicated. The courts continue to be split on what legal standard should be used to evaluate student speech.²⁴⁴

237. *Id.* at 566 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)) (citing *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 430–31 (9th Cir. 2008)). This is also known as the intermediate scrutiny test. *See id.* at 568.

238. *Corales*, 567 F.3d at 566 (citing *Hoyem v. Manhattan Beach City Sch. Dist.*, 585 P.2d 851, 860 (Cal. 1978)).

239. *Id.* at 568.

240. *Id.* (quoting *Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994)).

241. *Id.* (citing *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 759 (9th Cir. 2006)).

242. *Id.* at 561–62 (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001)).

243. *See Brownstein*, *supra* note 157, at 732–34.

244. *Id.* at 721; *see, e.g., DeFabio v. E. Hampton Union Free Sch. Dist.*, 623 F.3d 71, 77–78 (2d Cir. 2010) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)); *Defoe v. Spiva*, 625 F.3d 324, 330–31 (6th Cir. 2010) (quoting *Tinker*, 393 U.S. at 506–07); *A.M. v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009) (quoting *Tinker*, 393 U.S. at 504, 514); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 738–39 (8th Cir. 2009) (quoting *Tinker*, 393 U.S. at 509, 514) (citing *Tinker*, 393 U.S. at 504–06, 509); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 673 (7th Cir. 2008); *Scott v. Sch. Bd.*, 324 F.3d 1246, 1248 (11th Cir. 2003) (quoting *Denno ex rel. Denno v. Sch. Bd.*, 218 F.3d 1267, 1271 (11th Cir. 2000)); *Walker-Serrano v. Leonard*, 325 F.3d 412, 415–16 (3d Cir. 2003) (citing *Tinker*, 393 U.S. at 506); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358,

The factual scenarios are unclear and complicated. There are cases about students' speech on the internet and social media,²⁴⁵ cases about dress codes and message-bearing T-shirts,²⁴⁶ cases involving out-of-school organizations distributing flyers to students for out-of-school events,²⁴⁷ and cases about religious student groups seeking school recognition.²⁴⁸ Some involve pure speech,²⁴⁹ some involve mixed speech,²⁵⁰ and some involve expressive speech.²⁵¹ School officials are concerned about what law to apply and whether they will be entitled to qualified immunity if they are incorrect.²⁵² And yet, there is more and more litigation initiated by students and their parents challenging whether a school's speech restriction is constitutional.²⁵³

Schools must make sure that the restrictions they apply to walkouts are not content-based. When students participate in a walkout, the speech in question is student expression.²⁵⁴ If a school district punishes students participating in a walkout more severely than other students who miss class, that policy smacks of a content-based restriction.²⁵⁵ If the student speech is a walkout that has political overtones, the court will apply the

1365–66 (10th Cir. 2000) (first quoting *Tinker*, 393 U.S. at 506; and then quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 260, 266 (1988)); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988) (first citing *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982); then citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); and then citing *Hazelwood Sch. Dist.*, 484 U.S. 260).

245. See Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 591 (2011).

246. See Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 188–89 (2007).

247. See, e.g., *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 519 (3d Cir. 2004); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1046 (9th Cir. 2003).

248. See, e.g., *Prince v. Jacoby*, 303 F.3d 1074, 1082 (9th Cir. 2002) (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 232 (1990)).

249. See, e.g., *Tinker*, 393 U.S. at 505–06 (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

250. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

251. See, e.g., *Corales v. Bennett*, 567 F.3d 554, 565 (9th Cir. 2009).

252. See *Doninger v. Niehoff*, 642 F.3d 334, 355–56 (2d Cir. 2011); see also Francisco M. Negron, Jr., *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U.L. REV. 1221, 1222–23 (2009); Kenneth W. Starr, *From Fraser to Frederick: Bong Hits and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 676 (2009); Jordan Blair Woods, *Morse v. Frederick's New Perspective on Schools' Basic Educational Missions and the Implications of Gay-Straight Alliance First Amendment Jurisprudence*, 18 COLUM. J. GENDER & L. 281, 300 (2008); c.f. *Pearson v. Callahan*, 555 U.S. 223, 245 (2009).

253. See Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 211–12 (2013).

254. See *Corales*, 567 F.3d at 563.

255. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

standard in *Tinker*, and the restriction will be struck down.²⁵⁶ If a school district decides to hold an assembly to discuss the issue²⁵⁷ or decides not to punish students at all for this particular walkout, those decisions can be used to demonstrate that a future restriction on a walkout or assembly is content-based.

In order to ensure that the restriction is content-neutral, the school district must be consistent in its application of the disciplinary action. If the code of conduct imposes detention for missing a class, that is the restriction that should apply to students who participate in the walkout. Even if the current cause is sympathetic, and even if the community and parents are supportive, the only appropriate response is to apply the content-neutral regulation in a content-neutral way. Courting danger is a part of youth activism. “If history means anything, [the] risk of school discipline [will] make their voices even stronger.”²⁵⁸

There are ultimately two ways of ensuring that students’ speech rights are being upheld. One way is through judicial review.²⁵⁹ The other is through the political process, where the public elects the members of the school board who create the policies in a district.²⁶⁰ The school boards also hire the superintendents and principals, and hear appeals from students who have been suspended or expelled.²⁶¹ Thus, they provide a

256. See, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530–31 (9th Cir. 1992) (citing *Tinker*, 393 U.S. at 514).

257. The event itself could be considered to be a mixed-speech case, where the school has control over the event, but its control is limited to the approval or disapproval of speakers. See Bowman, *supra* note 253, at 235.

258. Keierleber, *supra* note 18; see also Andrew J. Rotherham, Opinion, *Rotherham: Students Walking Out of Class in Protest Have the Right Idea. It’s the Adults Who Are Messing It Up*, THE74 (Mar. 13, 2018), <https://www.the74million.org/article/rotherham-students-walking-out-of-class-in-protest-have-the-right-idea-its-the-adults-who-are-messing-it-up/> (“Looking for schools to lead the way on a student protest by making it consequence-free . . . is exactly backward. . . . [W]e should applaud treating this as a real protest rather than a school activity and planning consequences accordingly.”).

259. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasizing the need for close judicial scrutiny of laws affecting a right under the Bill of Rights); Bowman, *supra* note 253, at 233 (“[I]n the famous footnote four of *United States v. Carolene Products*, the Court emphasized the special importance of judicial review when the political process is unable to provide a meaningful check on government action.”).

260. Bowman, *supra* note 253, at 223; see *What School Boards Do*, NAT’L SCH. BDS. ASS’N, <https://www.nsba.org/about-us/what-school-boards-do> (last visited Oct. 23, 2018). School board members are “elected . . . by their communities, [and] represent the community’s beliefs and values.” *What School Boards Do*, *supra*. The “school board sets the standard for achievement in [the] district, [and is] . . . accountable for the performance of the schools in [the] district.” *Id.*

261. Bowman, *supra* note 253, at 223; see, e.g., *The Role of the School Board*, MINN. SCH. BDS. ASS’N, <http://www.mnmsba.org/Portals/0/PDFs/RoleSchoolBoard.pdf> (last visited Oct. 24, 2018); see also *Expulsion*, MINN. DEP’T EDUC., <https://education.mn.gov/MDE/fam/disc/exp/> (last visited Oct. 24, 2018) (describing expulsion as “a school board action”).

check on the authority of school principals and superintendents.²⁶² Since members of school boards are elected to the position, the public can vote them out at the following election if they make decisions that do not support community values about free speech.²⁶³ It is the responsibility of school board members to educate their constituencies and ensure that students are being protected and nurtured.

CONCLUSION

“The *Tinker* case arose at the end of 1965 as the Vietnam War was becoming increasingly controversial.”²⁶⁴ Nearly 2,000 U.S. soldiers had perished to date, and an additional 6,000 soldiers would die in the following year.²⁶⁵ “John Tinker, then fifteen years old, and his thirteen-year-old sister Mary Beth, an eighth-grader,” chose to show their disagreement with U.S. involvement in the conflict “by wearing black armbands to school.”²⁶⁶ Even though the school board held an emergency meeting adopting a policy that prohibited the students from wearing the armbands, seven students in the district still chose to participate and wear the armbands.²⁶⁷ “Five students who violated the policy were suspended from school, including John and Mary Beth Tinker, who, along with another student named Christopher Eckhardt, challenged the ruling in court.”²⁶⁸

Fifty years later, high school student Emma Gonzalez stood up and said, “Just like in *Tinker v. Des Moines*, we are going to change the law. . . . That’s going to be Marjory Stoneman Douglas [High School] in that textbook and it’s going to be due to the tireless effort of the school board, the faculty members, the family members, and—most of all—the

262. Bowman, *supra* note 253, at 223.

263. *Id.*; see Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer’s Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL’Y 417, 419–21 (2006) (discussing school board members’ failure to win re-election following adoption of controversial evolution policy).

264. Brief for Mary Beth Tinker & John Tinker as Amici Curiae Supporting Petitioners at 1, *Dariano v. Morgan Hill Unified Sch. Dist.*, 135 S. Ct. 1700 (2015) (No. 14-720) [hereinafter *Tinker Brief*]; see Rostron, *supra* note 60, at 637–38.

265. *Tinker Brief*, *supra* note 264; RONALD K.L. COLLINS & SAM CHALTAI, WE MUST NOT BE AFRAID TO BE FREE 270 (2011).

266. *Tinker Brief*, *supra* note 264; Brief for Petitioners at 2, 3 n.1, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968) (No. 21).

267. *Tinker Brief*, *supra* note 264; Brief for Petitioners, *supra* note 266, at 3–4.

268. *Tinker Brief*, *supra* note 264, at 1–2; Brief for Petitioners, *supra* note 266, at 5, 7–8; *Tinker v. Des Moines—Landmark Supreme Court Ruling on Behalf of Student Expression*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/tinker-v-des-moines-landmark-supreme-court-ruling-behalf-student-expression> (last visited Nov. 5, 2018).

students.”²⁶⁹

Youth activists are leaders of change. Adults, including school officials, must facilitate that reform and protect students’ First Amendment rights.²⁷⁰ Schools must be able to embrace a more open-minded viewpoint toward student disagreement in order to fulfill their obligation to prepare students to be our future leaders. By appropriately dealing with their activism, schools across the country can come closer to meeting their goal of teaching our leaders of tomorrow to be active citizens.

269. Keierleber, *supra* note 18.

270. Schools are beginning to use the national school walkouts as part of lesson plans to teach students the importance of activism. *See* Rosinbum, *supra* note 39.