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ESSAY

WALKING OUT THE SCHOOLHOUSE GATES

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In the wake of the Marjory Stoneman Douglas High School shooting in Parkland, Florida, tens of thousands of students from across the United States walked out of their classrooms in protest. One such walkout, known as #NationalSchoolWalkout ("#NSW"), rallied students from over 2,500 schools to join in a seventeen-minute demonstration on April 20, 2018.[1]

* University of Virginia School of Law, J.D. Candidate 2021. This piece is dedicated to my grandparents, all four of whom spent their lives as educators in America's public schools. I would like to thank my parents, Daryl and Lee Ann Pepper, and my dear friends, Justin Aimonetti, Nisha Jain, Alex Karahalios, and Amanda Lineberry for their endless support and encouragement. All errors are my own.

[1] Meg Wagner & Brian Reis, Student Walkouts Sweep the US, CNN (Apr. 20, 2018), https://www.cnn.com/us/live-news/national-school-walkout/index.html [https://perma.cc/F-DX5-E7M8]; Vivian Yee & Alan Blinder, National School Walkout: Thousands Protest Against Gun Violence Across the U.S., N.Y. Times (Mar. 14, 2018), https://www.ny-times.com/2018/03/14/us/school-walkout.html [https://perma.cc/5S5X-YDXG].

The date marked the nineteenth anniversary of the Columbine High School Massacre.[2] The seventeen minutes represented each of the seventeen victims of the shooting.[3] And the walkout itself symbolized a demand for gun reform legislation.[4] The student who launched the #NSW movement also developed a website that provided a "walkout planning guide."[5] The planning guide advised student leaders and organizers on how to work with school administrators, plan an agenda, and promote the event.[6] There was, however, no equivalent "walkout response guide" for school administrations contending with student participation in the #NSW. In fact, the reactions of various school district authorities to the planned student protests proved as diverse as their geographic locations.

For instance, Baltimore County Public Schools viewed the walkouts as a "constructive way for students to exercise their First Amendment rights."[7] In that vein, Baltimore County Public Schools allowed their students to take part in the walkouts and assured students they would not be punished for peaceful participation.[8] Meanwhile, the superintendent of Texas's Needville Independent School District took the opposite

[2] Id.

[3] See Yee & Blinder, supra note 1.

[4] Sarah Gray, Everything You Need to Know About the April 20 National School Walkout, Time (Apr. 20, 2018), http://time.com/5238216/national-school-walkout-april-20/ [https://perma.cc/GC3F-QF7N]. It is also important to note that not all of the school walkouts in response to the Parkland shooting advocated for gun control. For example, a walkout called "Stand for the Second" supported gun rights and the Second Amendment. "Stand for the Second" took place on May 2, 2018 and involved schools in forty states. Christal Hayes, 'We Are for Your Rights': Students Stage Walkouts Across U.S. to Back Second Amendment, USA Today (May 2, 2018), https://www.usatoday.com/story/news/2018/05/02/students-hold-walkouts-support-second-amendment/573420002/ [https://perma.cc/C9SR-MP5K]; Eric Levenson & David Williams, Pro-gun Students Walk Out of School to 'Stand for the Second,' CNN (May 2, 2018), https://www.cnn.com/2018/05/02/us/school-walkout-pro-second-amendment/index.html [https://perma.cc/JL92-BSRE].

[5] Lane Murdock, Paul Kim, & Grant Yaun, Walkout Planning Guide, #Nat'l Sch. Walkout https://www.nationalschoolwalkout.net/planning-guide/before-your-event [https://perma.cc/L2AM-QPMK]. Additionally, the ACLU published a similar guide that sought to educate students on their free speech rights during a walkout or protest. Student's Rights: Speech, Walkouts, and Other Protests, ACLU, https://www.aclu.org/issues/free-speech/student-speech-and-privacy/students-rights-speech-walkouts-and-other-protests [https://perma.cc/VD5M-YZDF] (last visited Nov. 6, 2019).

[6] Murdock et al., supra note 5.

[7] Talia Richman & Erika Butler, Schools in the Baltimore Region Prepare for National Student Walkout; Harford County Opts Out, Balt. Sun (Mar. 8, 2018) https://www.baltimoresun.com/education/bs-md-school-walkout-plans-20180308-story.html [https://perma.cc/FY9P-BGH5].

[8] Id.

approach, using a school Facebook account to threaten students with a three-day suspension for joining a walkout.[9] At Greenbriar High School in Arkansas, three students who took part in a walkout faced corporal punishment—each student received swats with a paddle for their walkout participation.[10] Kansas's Shawnee Mission School District allowed students to participate in the #NSW but refused to sponsor the event.[11] Despite an effort to embrace the middle ground, the Kansas school district still found itself embroiled in a lawsuit when a middle school tried to censor students' speech mid-walkout.[12]

Even though the local school districts in Maryland, Texas, Arkansas, and Kansas all reacted to the student walkout differently, the scope and nature of students' free speech rights took center stage nationwide. Interestingly, however, little ink has been spilled on the free speech rights of students in the context of the student walkout. Yet walkouts are neither a new means of student political expression nor a new problem for school districts.[13] In fact, the underlying student activism involved in a walkout parallels the very student expression that the landmark decision of *Tinker v. Des Moines* sought to protect. Conversely, thousands of students walking out of class is the kind of disruption, disorder, and distraction that school administrators are supposed to guard against. This tension places school administrators in the precarious position of needing to strike the

[9] Tom Steele, Texas School's Facebook Page Down After Superintendent Threatens to Suspend Students Who Walk Out, Dall. Morning News (Feb. 22, 2018), https://www.dallasnews.com/news/texas/2018/02/21/texas-superintendent-promises-suspend-students-leave-school-protest [https://perma.cc/4YRS-TR4A].

[10] Josh Hafner, Students Paddled by Public School Staff After Participating in Walkout in Arkansas, USA Today (Mar. 19, 2018), https://www.usatoday.com/story/news/nation-now/2018/03/19/students-paddled-public-school-staff-after-participating-walkout-arkansas/-439141002/ [https://perma.cc/7NPV-F3U9].

[11] M.C. ex rel. Chudley v. Shawnee Mission Unified Sch. Dist. No. 512, 363 F. Supp. 3d 1182, 1191 (D. Kan. 2019).

[12] See id. at 1192.

[13] On May 2, 1963, approximately 800 school children in Birmingham, Alabama, walked out of their classrooms to take part in the "Children's Crusade," a multi-day, civil rights protest against segregation. Steven Levingston, Children Have Changed America Before, Braving Fire Hoses and Police Dogs for Civil Rights, Wash. Post (Mar. 23, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/02/20/children-have-changed-america-before-braving-fire-hoses-and-police-dogs-for-civil-rights/?utm_term=.a764ef759e35 [https://perma.cc/W488-7LHS]. More recently, students walked out to protest the end of the Deferred Action for Childhood Arrivals ("DACA") program. See Anna M. Phillips, Hundreds of Denver Students Walk Out in Protest of DACA's End, L.A. Times (Sep. 5, 2017), https://www.latimes.com/local/education/la-essential-education-updates-southern-hundreds-of-denver-students-walk-out-in-1504636607-htmlstory.html [https://perma.cc/JNA6-EAHJ].

right constitutional balance between respecting students' First Amendment rights, on the one hand, and preserving order in the school setting on the other. The range of local administrative attempts to strike this balance in the context of national school walkouts, particularly the #NSW protests, demonstrates the need for scholarship on the topic. This Essay, in response, contributes to the under-explored topic of student free speech rights in connection to student walkouts in three ways. First, this Essay lays out a framework for analyzing student free speech rights during permitted and unpermitted walkouts under the Supreme Court's current school speech jurisprudence. Second, it identifies the problems the current framework creates for both students and administrators. And third, it proposes a judicial solution.

Part I of this Essay briefly describes the Court's decision in *Tinker* and examines the protections afforded to students participating in prohibited walkouts. In addition, this Part submits that school restrictions and the subsequent punishment of students engaged in unpermitted walkouts are likely constitutional. Part II addresses student free speech rights when the school permits student participation in the walkout. Part II posits that student expression during a permitted walkout will receive constitutional protection, but the scope of that protection will depend on whether the speech falls under *Tinker* or *Hazelwood v. Kuhlmeier*. Since student free speech rights vary depending on whether *Tinker* or *Hazelwood* applies, Part III discusses the forum analysis and imprimatur determination used to decide whether a student walkout falls under *Tinker* or *Hazelwood*. Part IV asserts that the current framework offers inadequate guidance for administrators and too little protection for student political speech. Specifically, this Part identifies the practical, administrative, and constitutional issues involved in *Hazelwood's* application to student political speech in the walkout context. Ultimately, this Essay argues that both unpermitted and permitted walkouts should fall under the exclusive purview of *Tinker*. Part V offers concluding remarks.

I. FREE SPEECH RIGHTS OF STUDENTS IN THE UNPERMITTED WALKOUT CONTEXT

In 1965, high school students in Des Moines, Iowa, wore black armbands to express their opposition to the Vietnam War.[14] In a matter of days, the high school adopted a policy that suspended any student for

[14] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

refusing to remove the armband.[15] In *Tinker,* the Supreme Court held that the school policy violated the students' First Amendment rights and famously stated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16] To suppress student speech after *Tinker*, a school must show that "its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[17] In other words, *Tinker* generally requires a school to tolerate student expression, even on "controversial subjects."[18] Yet that toleration is not without limit. When pure student speech turns into expressive conduct that could cause a "substantial disruption of or material interference with school activities," then the student speech loses its constitutional protection.[19]

Pure speech and expressive conduct are naturally implicated in the walkout context. The very act of leaving the classroom to protest is expressive conduct.[20] Additionally, the chants, signs, and speeches that accompany the physical walkout qualify as pure speech. In the handful of decisions applying *Tinker* to unpermitted student walkouts, the courts' First Amendment analysis generally describes student walkout activity as either pure speech or expressive conduct.[21] That said, when a school administration has not signed off on a walkout, the "forecast of a reasonable likelihood of substantial disruption" posed by an unpermitted

[15] Id.

[16] Id. at 506.

[17] Id. at 509.

[18] Id. at 513.

[19] Id. at 513–14.

[20] See, e.g., Texas v. Johnson, 491 U.S. 397, 404 (1989) (noting that conduct receives the protection of the First Amendment only when "[a]n intent to convey a particularized message was present, and [in the surrounding circumstances] the likelihood was great that the message would be understood by those who viewed it" (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974))).

[21] See, e.g., Corales v. Bennett, 567 F.3d 554, 563 (9th Cir. 2009) (finding that a reasonable jury could conclude that students leaving school to participate in a walkout were engaged in expressive conduct); Karp v. Becken, 477 F.2d 171, 176 (9th. Cir. 1973) (concluding that protest signs associated with a planned walkout "constituted the exercise of pure speech rather than conduct"); Tate v. Bd. of Educ., 453 F.2d 975, 978 (8th Cir. 1972) (accepting the argument that a student walkout from a pep rally was a "symbolic action" constituting speech under the First Amendment); Dodd v. Rambis, 535 F. Supp. 23, 28–29 (S.D. Ind. 1981) (reasoning that student distribution of pamphlets protesting school disciplinary policy and advertising a walkout was action falling under "the protective umbrella of the First Amendment").

walkout allows the school to restrict and punish the expressive walkout conduct.[22] By contrast, even when a walkout is unpermitted, the school cannot punish the pure speech components of a walkout unless the speech violates a school regulation or policy.[23] Put simply, the government has a "freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[24]

This differentiation between expressive conduct and pure speech arises from courts' longstanding recognition of the government's substantial interest in maintaining academic order and discipline.[25] It follows that school officials possess the "inherent authority to prescribe and control conduct in the schools."[26] For instance, in *Dodd v. Rambis*, student distribution of leaflets advertising a walkout qualified as expressive conduct, but the court upheld the subsequent student discipline as constitutional because the promoted walkout would have substantially disrupted and materially interfered with school activities.[27]

Conversely, when the walkout activity constitutes an instance of "pure speech rather than conduct," school officials may curtail or restrict the activity if they can "reasonably forecast . . . substantial disruption."[28] Yet, absent a school regulation or policy, like the "violation of a statute or school rule," school officials may not punish students for use of pure speech.[29] For example, in *Karp v. Becken*, the school was permitted to curtail student speech by confiscating the walkout protest signs a student retrieved from his car. That student nonetheless was constitutionally immune from punishment because the signs qualified as "pure speech" and the school had no explicit policy on suspension of students for signs.[30] In short, a student's spoken or written speech that accompanies expressive walkout conduct can be restricted if it would lead to "substantial

[22] See *Karp*, 477 F.2d at 176.
[23] Id.
[24] *Johnson*, 491 U.S. at 406.
[25] Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966).
[26] *Karp*, 477 F.2d at 174.
[27] 535 F. Supp. 23, 29–30 (S.D. Ind. 1981).
[28] *Karp*, 477 F.2d at 176.
[29] Id.
[30] Id. The court noted that the student, in securing the signs, violated a school regulation that prohibited students from going in the parking lot during school hours. If the school had punished the student for violating this regulation, instead of simply punishing him for possession of the signs, the suspension would have been upheld. Id. at 177.

disruption."[31] But the student can be punished only if the school can provide further justification like a school policy or rule.[32]

Ultimately, however, the distinction between expressive conduct and pure speech is one without much bite, as schools often possess broad policies that provide a textual basis to punish a student's pure speech. In *Karp*, for instance, the student's punishment would have been upheld if the school had suspended the sign-wielding student for going to his car during school hours instead of for the signs themselves.[33] It follows that schools' broad ability to regulate student conduct will often allow administrators to punish students' pure speech during a walkout without explicitly saying so. The breadth of school regulations that prohibit truancy, class disturbance, and the like, will provide schools with the required textual justification to punish a student's pure speech in the context of a walkout. In practice, then, whether speech is categorized as pure speech or expressive conduct carries facial, but ultimately unmeaningful, weight during unpermitted student walkouts as both forms of speech will receive similar levels of protection. That said, students who wish to engage in civic activism through walkouts are not entirely out of luck. This Essay now turns to the increased free speech protections that exist when schools permit, rather than prohibit, student walkouts.

II. STUDENTS' FREE SPEECH RIGHTS IN THE PERMITTED WALKOUT CONTEXT

To restrict a permitted walkout under *Tinker*, a school's "reasonable forecast of substantial disruption" must go above and beyond the expressive conduct and pure speech that a walkout naturally entails. *Tinker*'s central command is that schools must tolerate student expression on controversial, political, and unpopular issues, even if it proves uncomfortable or unpleasant for school authorities.[34] Therefore, when schools permit a walkout, which at a minimum involves promising not to

[31] Id. at 176.

[32] Id.; see also Morse v. Frederick, 551 U.S. 393, 396–97 (2007) (upholding the suspension of a student who, by unfurling a banner reading "BONG HiTS 4 JESUS," violated a school policy prohibiting messages promoting illegal drug use); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (finding that a school disciplinary rule proscribing "obscene" speech gave a student adequate warning that his lewd speech could subject him to school sanctions); Dodd v. Rambis, 535 F. Supp. 23, 30 (S.D. Ind. 1981) (finding that the school's punishment for the pure speech of the leaflets was justified because of the presence of a school regulation).

[33] 477 F.2d at 177.

[34] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506–09 (1969).

punish students for their participation, administrators implicitly approve the basic expressive conduct and pure speech involved in the demonstration. By permitting the walkout, the school is essentially announcing that neither the walkout itself nor the accompanying pure speech will cause a "substantial disruption with discipline or student safety."[35]

In *M.C. ex rel. Chudley v. Shawnee Mission Unified School District No. 512*, for instance, the school district allowed students to participate in the #NSW demonstration.[36] The school made it clear, however, that the walkout was student-led, optional, and not school-sponsored.[37] After disclaiming sponsorship, the school district then attempted to prohibit student discussion of gun-violence, shootings, and gun reform during the demonstration.[38] Shortly thereafter, a certain student who was punished for discussing prohibited topics during her scheduled walkout speech filed suit.[39] The district court applied *Tinker* to assess the school's actions in response to the walkout speech.[40] It found that the school could not justify the speech restrictions based solely on its desire to avoid controversy.[41] Since there was no additional indication that the permitted walkout would threaten student safety, the school also could not justify the content restrictions on speech through any reasonable forecast of substantial disruption.[42] Simply put, if a school permits a walkout, but does not sponsor the walkout, then *Tinker* applies and the underlying expressive conduct and pure speech of the walkout will receive constitutional protection unless the school presents a legitimate justification beyond a desire to avoid controversy.[43] But that invites the question, what are students' free speech rights when the school both permits *and* sponsors the student walkout?

[35] M.C. ex rel. Chudley v. Shawnee Mission Unified Sch. Dist. No. 512, 363 F. Supp. 3d 1182, 1201–02 (D. Kan. 2019).

[36] Id. at 1191.

[37] Id. at 1191–92. District spokesperson Shawna Samuel stated that the district "encouraged the students to keep the topic to school safety," and adopted the prohibitory guidelines because "[a]s a public institution, [the district] cannot take a stand one way or the other on Second Amendment rights." Id.

[38] Id. at 1192.

[39] Id. at 1191–92.

[40] Id. at 1201.

[41] Id. at 1201–02.

[42] Id.

[43] Id. at 1201.

In *Hazelwood v. Kuhlmeier*, the Supreme Court explained that when speech is "school-sponsored," or when a school affirmatively promotes student speech, then the school has more leeway to restrict the speech without offending the First Amendment.[44] There, the Court considered school censorship of two controversial student newspaper articles, one about teen pregnancy and the other about divorce.[45] The Court held that if the student speech concerned the "educators' authority over . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," then the speech was considered sponsored by the school.[46] It followed that school administrators "[did] not offend the First Amendment" by restricting the speech as long as the restrictions were "reasonably related to legitimate pedagogical concerns."[47]

The *Hazelwood* standard, by and large, is extremely deferential to school curtailment of student expression, be it speech or conduct, once the court deems the student expression to bear the imprimatur of the school.[48] Accordingly, restrictions on speech during a school-sponsored event that are motivated by a "desire to avoid controversy within the school environment" are constitutional under the *Hazelwood* standard.[49] For that reason, when a school permits a student walkout, "sit-in," or a different "on-property alternative,"[50] and the demonstration is found to be school-sponsored, the school can both curtail students' conduct and restrict controversial, political speech during the permitted activity.[51]

[44] 484 U.S. 260, 273 (1988).

[45] Id. at 263.

[46] Id. at 271.

[47] Id. at 273.

[48] See id. (stating that "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights" (citation omitted)).

[49] Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 925–26 (10th Cir. 2002) (noting that "[m]any cases have applied a *Hazelwood* analysis to activities outside the traditional classroom where, so long as the imprimatur test is satisfied, the pedagogical test is satisfied simply by the school district's desire to avoid controversy").

[50] Meagan Fitzgerald et al., DC-Area Schools Brace for Student Walkouts over Gun Violence, NBC Wash. (Mar. 13, 2018), https://www.nbcwashington.com/blogs/first-read-dmv/DC-Area-Schools-Brace-for-Student-Walkouts-Over-Gun-Violence-476584613.html [https://perma.cc/2R9W-5NPZ] (describing the approaches of different schools in the Washington, D.C., Virginia, and Maryland area to the #NSW walkouts).

[51] See *Fleming*, 298 F.3d at 926–27.

In summary, when a school allows students to participate in a walkout, the scope of student free speech rights will depend on whether the walkout falls under *Tinker* or *Hazelwood.* When the school does not sponsor the student activity, *Tinker* applies. Students, therefore, cannot be punished for engaging in the walkout itself or for the accompanying pure speech, no matter how political or controversial, absent further justifications. By contrast, when the student activity is school-sponsored and *Hazelwood* applies, a school will be able to restrict student political speech and curtail the expressive conduct, even if the only justification is to avoid controversy. This means that a student's free speech rights will hinge on whether the student activity is categorized as school-sponsored—signifying that it is perceived to bear the imprimatur of the school.

III. THE *HAZELWOOD*, "SCHOOL-SPONSORED" CALCULATION

To determine whether a student walkout falls under *Hazelwood*, courts first consider whether the student speech bears the imprimatur of the school, and second, whether the student speech occurred in a school-sponsored, non-public forum.[52] Broadly speaking, student speech satisfies *Hazelwood*'s imprimatur requirement when the speech is "so closely connected to the school that it appears the school is somehow sponsoring the speech."[53] In the context of a student walkout, the imprimatur determination will largely turn on the degree of school involvement in walkout planning and supervision.[54] For instance, in *Fleming v. Jefferson County School District R-1*, a school's tile painting and installation project bore the "imprimatur of the school" because school administrators initiated the endeavor, organized the event, paid for the tiles, directed the painting, and even developed guidelines for tile content and screening.[55] Likewise, in *Corder v. Lewis Palmer School District No. 38*, a graduation ceremony carried the school's imprimatur because school officials planned the event, chose its speakers, and reviewed the speeches.[56] These

[52] See *Hazelwood*, 484 U.S at 267, 270–73.

[53] *Fleming*, 298 F.3d at 925.

[54] M.C. ex rel. Chudley v. Shawnee Mission Unified Sch. Dist. No. 512, 363 F. Supp. 3d 1182, 1200 (D. Kan. 2019).

[55] 298 F.3d at 929–32 (holding that a tile memorial project established by a school district as part of its reconstruction after multiple fatal shootings was school-sponsored speech under *Hazelwood* and that the school could therefore exercise editorial control over the project).

[56] 566 F.3d 1219, 1229–30 (10th Cir. 2009) (concluding that speeches at a high school graduation ceremony were school-sponsored under *Hazelwood* and that the school district did

examples make it apparent that for a walkout to bear the imprimatur of the school, administrative involvement must go beyond cursory supervision of the walkout. Instead, school officials must play a significant role in the walkout itself.

In addition to school administrative involvement, the walkout imprimatur determination will also depend on the public's awareness of a student-led walkout at the national, state, or local level. For example, in *M.C. ex rel. Chudley v. Shawnee Mission Unified School District No. 512*, the walkout fell under *Tinker*, as opposed to *Hazelwood*, because no student, parent, or member of the public would think the "nationally organized, student-led" #NSW demonstration "bore the imprimatur of the school."[57] Practically speaking, then, if a walkout is coordinated by students at a national level and involves an issue of widespread controversy, members of the public are less likely to believe the walkout was sponsored by the school. In contrast, if a school walkout movement is relatively unknown to the public and planned by students at the local level, members of the community are more likely to believe it is a school-sponsored activity. Thus, the *Hazelwood* "imprimatur" calculation hinges on whether a school is significantly involved in the organization of the walkout *and* whether the general public is aware that the walkout is "student-led" as opposed to "school-sponsored."

As for the second prong—the public forum analysis—a court will consider whether a school has designated a public forum. One might assume that the "public" forum question would answer itself in the context of a "public" school walkout. Public schools, however, are distinguished from places like streets, parks, and other traditional public forums whose primary purposes are "assembly, communicating . . . and discussing public questions."[58] In these traditional public forums, the government's ability to restrict speech is sharply curtailed.[59] But since "public schools do not possess all of the attributes of . . . traditional public forums," the government may impose reasonable content restrictions on the speech of "students, teachers, and other members of the school community."[60] By default, therefore, public schools are not categorized

not violate a student's First Amendment free speech rights by exercising editorial control over her speech at that ceremony).

[57] *M.C. ex rel. Chudley*, 363 F. Supp. 3d at 1200.

[58] Hague v. C.I.O., 307 U.S. 496, 515 (1939).

[59] See Perry Edu. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[60] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

as public forums in the context of school-sponsored activities. Yet, if public school authorities "by their policy or practice" intentionally open school facilities to "indiscriminate use by the general public" then the school designates a public forum.[61] Once a school has opened a public forum, the content of the student speech is protected.[62] Thus, the key question in the school walkout forum analysis is whether a public school has transformed itself into a designated public forum by opening its facilities to indiscriminate public use.

Generally, the question of whether a school has designated a public forum turns on a highly fact-specific inquiry that varies by circuit. For the most part, courts will examine a school district's "polic[ies] and practice[s]" concerning a certain activity, facility, or program when deciding whether a school created a designated public forum.[63] Courts differ, nonetheless, in the weight they accord the public forum category. Some circuits treat the forum analysis as a subset of an ultimate imprimatur determination.[64] Other circuits treat the forum analysis as an alternative to the imprimatur calculation—meaning that the finding of a designated public forum signifies that the activity in question is not school-sponsored.[65] The varying weight conferred on the public forum category can create inconsistent and unpredictable results when it comes to deciding whether *Hazelwood* applies.[66] All in all, however, the finding that a school did not create a public forum will by and large weigh in favor

[61] Id. (citing *Perry*, 460 U.S. at 47). In the public-school context, "general public" is interpreted as the student body or a segment of the student body, like a school organization. Id.

[62] See *Perry*, 460 U.S. at 46.

[63] See *Hazelwood*, 484 U.S. at 267–68 (holding that the school newspaper was a nonpublic forum because the school reserved the paper as a supervised learning experience for school journalism students and did not deviate from the policy that the newspaper was part of the educational curriculum); see also Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 929–30 (10th Cir. 2002) (deciding that a school's affirmative intent to retain editorial control and responsibility over a project did not create a limited public forum); O.T. ex rel. Turton v. Frenchtown Elem. Sch. Dist. Bd. of Educ., 465 F. Supp. 2d 369, 375–78 (D.N.J. 2006) (determining that an afterschool talent show constituted a limited public forum because it was open to the whole community, was not part of the school curriculum, and required participants to rehearse their pieces at home).

[64] 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, 770 (2009).

[65] Id.

[66] Id. at 774.

of the application of *Hazelwood*.[67] This means that if a student walkout takes place in a nonpublic forum, the school may impose reasonable, content-based restrictions on student speech. By contrast, if a school permits a walkout and opens it up to indiscriminate use by its students, it designates a public forum. And in a designated public forum, the school cannot restrict student speech merely because it wishes to avoid controversy. Other things being equal, the school cannot limit student expression during a permitted walkout unless the restriction serves a compelling state interest—meaning *Tinker* applies.

In summation, the *Hazelwood* standard will apply to a permitted school walkout when two factors are met. First, the "imprimatur" calculation hinges on whether a school is significantly involved in the organization of the walkout *and* whether the general public is aware that the walkout is "student-led" as opposed to "school-sponsored." Second, the walkout must occur in a school-centric, nonpublic forum. Admittedly, both prongs turn on fact-specific, interconnected considerations that will vary based on the school district and the particular walkout. For instance, in a #NSW demonstration in Montgomery County, Maryland, the school replaced the walkout with "on-property alternatives" like letter-writing, dialogue sessions, and moments of silence.[68] Because the school supplanted the #NSW with its own activities and did not appear to then open those activities to indiscriminate use by its students, *Hazelwood* would likely apply. Since *Hazelwood* applies, the school would be able to restrict student political speech and curtail the expressive conduct in the permitted on-property alternatives, even if the sole justification is to avoid controversy. But on the other hand, if *Tinker* applies to a student walkout demonstration, the school could not punish the students for engaging in the walkout itself or for the accompanying pure speech, no matter how political or controversial, absent further compelling justifications. Given all this, the *Hazelwood*, "school-sponsored" calculation is crucial for determining what amount of free speech the student walkout participators will enjoy.

[67] See generally id. at 772 (stating that "[v]irtually all cases involving school-sponsored activities discuss whether a public forum has been created. . . . [I]n the great majority of cases the court ultimately answers this question in the negative").

[68] Fitzgerald, supra note 50.

IV. APPLYING THE WALKOUT FRAMEWORK TO THE FREE SPEECH RIGHTS OF STUDENTS MARCHING FORWARD

If the prior exploration of student free speech rights makes anything clear, it is that the Court's First Amendment jurisprudence, when applied to student walkouts, results in an analysis as potentially complicated and disordered as many of the walkouts themselves. Free speech rights will vary depending on whether the walkout is permitted or unpermitted; whether pure speech or expressive conduct is at issue; and whether a multi-factor, forum-focused analysis places the walkout under *Tinker*, as opposed to *Hazelwood*. In summary, if a school does not permit a walkout, neither the walkout conduct nor the pure speech is likely to receive protection under *Tinker*. At the same time, if a school does permit a walkout, and the administration becomes so involved that it appears to be 'school-sponsored,' then the school can restrict the content of student speech. For student speech to receive any protection, the walkout must be permitted and *Tinker* must apply. Thus, under the current framework student political speech voiced during a walkout receives but a narrow window of protection.

Yet, at the heart of *Tinker* lies student freedom to engage in political dialogue. Fifty years after that seminal decision, students are walking out of class to protest gun violence and climate change instead of donning black armbands in opposition to the Vietnam War.[69] The mode and subject matter of student political speech, however, are not the only things to have evolved. In the half-century since *Tinker*, the Supreme Court has chipped away at student speech rights—the primary blow coming from *Hazelwood*.[70] When that precedent is applied to student walkouts, it allows schools to permit student demonstrations but then restrict the content of student speech. The high level of deference afforded schools

[69] The most recent national student walkout took place on September 20, 2019. Tens of thousands of students in the United States took to the streets to attend the Global Climate Strike and advocate for government action in the face of the growing climate crisis. See Sarah Kaplan, Lauren Lumpkin & Brady Dennis, 'We Will Make Them Hear Us': Millions of Youths Around the World Strike for Action, Wash. Post (Sept. 20, 2019), https://www.washingtonpost.com/climate-environment/2019/09/20/millions-youth-around-world-are-striking-friday-climate-action/ [https://perma.cc/R42B-4J8Q].

[70] See supra Part II; see also Morse v. Frederick, 551 U.S. 393, 397 (2007) (allowing schools to restrict speech advocating illegal drug use); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (permitting schools to regulate speech that is vulgar, lewd, or obscene).

under the *Hazelwood* standard makes it difficult to argue that the content-based restrictions are unrelated to a school's pedagogical purpose.[71]

Although *Hazelwood*'s deference to a school may be justified in the context of a school newspaper, a high school graduation, or a school decoration project, it seems less appropriate in the context of a student walkout for multiple reasons. To begin with, several circuits have held that if a student speech activity falls under *Hazelwood*, a school's regulation of that speech's content does not have to be viewpoint neutral.[72] This means when *Hazelwood* applies, a school may restrict student speech for the sole reason that administrators disagree with that student's point of view. For instance, if a #NSW demonstration met the *Hazelwood* standard, administrators could theoretically restrict the speech of a pro-gun student and at the same time allow the speech of an anti-gun student, or vice versa. The First Amendment should not allow administrators to pick and choose which speech will be silenced based on unwelcome viewpoints.

Moreover, the *Hazelwood* standard puts administrators in a predicament. Well-meaning educators who wish to encourage student civic activism through walkout participation may unintentionally curtail student free speech rights when their enthusiasm causes them to become too involved. Simply put, the more involved a school administration is in a given event, the more likely the appearance of school sponsorship. In addition, the imprimatur and forum analysis used to determine whether the event is school-sponsored often makes it difficult to know when a school is crossing into *Hazelwood* territory. Consider the #NSW demonstration that occurred in Virginia's Stafford County Public Schools.[73] In lieu of the planned walkouts, school administrators established safe places within the building allowing students to participate

[71] See supra notes 48–49 and accompanying text.

[72] Circuits are split over whether *Hazelwood* requires school restrictions of student, school-sponsored speech to be viewpoint neutral. Compare Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002) (concluding that "*Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech"), and C.H. ex rel. Z.H. v. Oliva, 195 F.3d 167, 172–73 (3d Cir. 1999) (deciding that Hazelwood permits educators to impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored activities), with Planned Parenthood of S. Nevada, Inc., v. Clark Cty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (incorporating viewpoint neutrality into its analysis of school-sponsored speech), and Searcey v. Harris, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (stating that under *Hazelwood*, school officials may constrain student speech based on the speech's content but not its viewpoint).

[73] Fitzgerald, supra note 50.

in "sit-ins."[74] On the one hand, the role of school officials in this instance seemed to go far beyond 'cursory supervision'—indeed, administrators supplanted the walkout with their own event, the 'sit-in.' On the other hand, the #NSW walkouts were coordinated by students at a national level and therefore members of the general public may not perceive the opinions expressed at the 'sit-in' to "bear the imprimatur of the school." Likewise, it is unclear whether administrators intended to designate the sit-in event as a public forum, open to indiscriminate student use, or if they reserved the forum as a school-centric, non-public forum. With the various *Hazelwood* factors pointing in all directions, the sit-in's status, and thus administrators' ability to impose content restrictions on student speech, is ambiguous. For educators contending with a walkout, then, *Hazelwood*'s murky, inconclusive analysis is of little help in determining the level of school involvement necessary to meet or avoid *Hazelwood*'s school-sponsored standard.

Finally, as *Tinker* made clear, students' personal, political speech is the very speech the First Amendment was intended to protect.[75] Schools, therefore, must perform their function "within the limits of the Bill of Rights."[76] Part of this function is educating students for citizenship in a pluralistic society.[77] It follows that schools maintain both a constitutional duty to respect student political speech and an academic duty to promote tolerance of diverse political perspectives. Consequently, the potential for *Hazelwood*'s content-restricting application to the political, highly personal speech of student-initiated walkouts is at odds with both *Tinker* and a school's pedagogical purpose. *Hazelwood* allows school administrators to engage in viewpoint discrimination, provides confusing guidance as to what speech may be silenced, and is inherently at odds with the promises of *Tinker* and a school's function in a democratic society.

Hazelwood's ill fit to the student political speech at issue in walkouts calls for a solution. One possible answer is for courts to eschew the *Hazelwood* inquiry entirely, deciding that all walkout demonstrations fall

[74] Id.

[75] See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–13 (1969).

[76] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are 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.").

[77] See id.

exclusively under the purview of *Tinker*. Fifty years ago, *Tinker* struck a balance between a school's need to maintain order and a student's free speech rights. Fifty years later, that balance is just as salient. Normatively speaking, the sole application of *Tinker* would adequately protect student political speech while also granting schools enough leeway to preserve discipline. Furthermore, such a solution is judicially feasible under the current school speech jurisprudence.

Under *Tinker*, schools retain the ability to preserve order by simply saying no to a walkout. As explained above, the underlying conduct, and most often, the pure speech involved in an unpermitted walkout can be both punished and restricted.[78] At the outset, this may seem like an unduly harsh limitation on a student's ability to engage in political activism. Yet, teachers, administrators, and other students need stability in the school environment to accomplish the primary goal of a school—education. Moreover, the denial of a walkout request does not silence student political speech. *Tinker* makes it clear that students are free to engage in conversation about political subjects at school—as long as it does not substantially disrupt school activity.[79] Students are also still free to engage in political protest activity outside of school hours. In sum, the need to maintain discipline in the education environment is such an important interest that school ability to forbid a walkout under *Tinker* is a desirable outcome.

If a school does elect to permit a walkout, the application of *Tinker* adequately protects student political speech. When the administration permits a walkout, and the walkout falls solely under *Tinker*, the institution is required to tolerate student free speech—no matter the viewpoint. This is not to say, however, that students' freedom of speech in such contexts is not without limits. *Tinker* and its progeny allow a school to shut down certain problematic walkout speech and behavior. Under current precedent, a school does not have to tolerate walkout speech that is lewd, indecent, or obscene.[80] Likewise, a school could shut down speech that promotes drug use.[81] Lower court rulings also make it clear that *Tinker* does not require a school to permit racially inflammatory speech that administrators reasonably foresee could be substantially

[78] See supra Part I.
[79] Id.
[80] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[81] Morse v. Frederick, 551 U.S. 393, 397 (2007).

disruptive to the school environment.[82] And, of course, if a school reasonably feared that tension over a student walkout would result in violence or a threat to student safety, then the incendiary conduct could be restricted. In short, exclusive application of *Tinker* to permitted school walkouts gives schools adequate flexibility to ensure student safety and proscribe certain types of speech that would be truly disruptive to the school environment.

Importantly, this approach would also facilitate cooperation between students and administrators. Once students realize that excessive administrative involvement leads to the application of *Hazelwood*, that knowledge may discourage students from working with administrators to plan a safe, productive walkout. Conversely, keeping walkouts under *Tinker*'s purview would allow students to feel confident that working with administrators to create a secure walkout environment would not result in restrictions on their political speech.

While normatively desirable, the exclusive application of *Tinker* to permitted walkouts is also judicially feasible under current school speech jurisprudence. If the precedents following *Tinker*—*Bethel v. Fraser*, *Hazelwood*, and *Morse v. Frederick*—are interpreted as merely limited departures from *Tinker*'s broad protections for student speech, walkouts are unlikely to fall under the purview of post-*Tinker* case law.[83] Professor Laura McNeal recognizes this, arguing that "[i]n all three cases, the Supreme Court carved out narrow exceptions that permit school authorities to censor student speech, none of which are applicable to the type of speech at issue in . . . school walkouts."[84] Likewise, Professor

[82] See Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 440 (4th Cir. 2013) ("[M]ultiple incidents of racial tension in Latta schools and the potential for such vastly different views among students about the meaning of the Confederate flag provide a sufficient basis to justify the school officials' conclusion that the Confederate flag shirts would cause a substantial disruption."); Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246, 1249 (11th Cir. 2003) (finding a school ban on the display of Confederate symbols was not unconstitutional); see also Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 670, 674 (7th Cir. 2008) (deciding that a school rule forbidding derogatory comments, oral or written, that referred to race, ethnicity, religion, gender, sexual orientation, or disability satisfied *Tinker*'s substantial disruption standard).

[83] See supra note 70.

[84] See Laura Rene McNeal, Hush Don't Say a Word: Safeguarding Students' Freedom of Expression in the Trump Era, 35 Ga. St. U. L. Rev. 251, 290 (2019). In her article, Professor McNeal argues that the current ambiguous state of student political speech rights should be addressed through a legislative, rather than judicial, solution. To this end, she asserts that state legislatures should amend "existing anti-*Hazelwood* statues to explicitly include protections for student social protests." Id. at 252.

Mark Cordes has concluded that the majority and concurring opinions in *Morse*, "[t]aken together . . . reflect a strong sentiment to protect student speech perceived to be at the heart of the First Amendment."[85] In short, room exists between the joints of *Tinker* and its progeny for school walkouts to fall solely under the former's broad protections.

Briefly stated, *Hazelwood*'s application to school walkouts creates a multitude of problems. The precedent's murky analysis is practically inappropriate in the context of student-initiated, and school-permitted, demonstrations. By a similar token, the deference given to administrators to restrict the content, and even the viewpoint, of student walkout speech is constitutionally dubious because political speech is the very speech the First Amendment was intended to protect. The host of issues inherent to *Hazelwood*'s application to school walkouts calls for a judicial solution: when a school permits a walkout, it should fall exclusively under the purview of *Tinker*.

V. CONCLUDING REMARKS

School administrators are tasked with the difficult job of striking the right balance between respecting students' First Amendment rights and preserving discipline in the school setting. In the context of a school walkout, the difficulties inherent to this job are exacerbated by the current student free speech rights framework. For unpermitted walkouts, the law under *Tinker* is clear—student conduct and speech will not receive the protection of the First Amendment. But for permitted walkouts, the scope of permissible student political speech and school regulation of that speech is hazy—it depends on whether a fact-specific imprimatur inquiry and inconsistent forum analysis places the walkout under *Tinker*, as opposed to *Hazelwood*. *Hazelwood*'s application to school walkouts grants student political speech uncertain protection and administrators inadequate guidance on what speech can or cannot be restricted. Going forward, student commitment to civic activism at both the local and national level means that school walkouts will continue to set the pace as the chosen means of student political expression. This reality calls for a clearer standard that both offers greater protection to student political speech and proves more administrable for school educators. As this Essay argues, one solution is the exclusive application of *Tinker* to both

[85] Mark W. Cordes, Making Sense of High School Speech After *Morse v. Frederick*, 17 Wm. & Mary Bill Rts. J. 657, 713 (2009).

permitted and unpermitted walkouts. Although decided fifty years ago, *Tinker* still provides the most sensible solution, because its application to walkouts in the present day would: one, make clear that student political speech is protected; two, facilitate cooperation between students and teachers; and three, ensure that schools continue to strike the right balance marching forward into the twenty-first century.