

#Enough: A Look at Students' Seventeen Minute Walkouts Following the Parkland Shooting and the First Amendment

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Introduction

ON MARCH 14, 2018, A CRY FOR CHANGE rang across the country¹ after a mass shooting committed by an armed former student of Parkland, Florida's Marjory Stoneman Douglas High School killed seventeen students and staff.² As a reaction to the tragic shooting, a youth branch of the Women's March organization called EMPOWER organized a national school walkout event called #Enough.³ The #Enough walkouts were designed to demand that Congress pass legislation aimed at preventing gun violence at schools.⁴ The walkouts were to last seventeen minutes in tribute to the seventeen students

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1. Emanuella Grinberg & Holly Yan, A Generation Raised on Gun Violence Sends a Loud Message to Adults: Enough, CNN, (March 16, 2018, 5:03 PM), <https://www.cnn.com/2018/03/14/us/national-school-walkout-gun-violence-protests/index.html> [<https://perma.cc/Z9TU-UVRV>].

2. Elizabeth Chuck, Alex Johnson & Corky Siemaszko, 17 Killed in Mass Shooting at High School in Parkland, Florida, NBC News (Feb. 14, 2018, 12:18 PM), <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101> [<https://perma.cc/GQV6-5KTA>].

3. Women's March Nat'l & Women's March Youth EMPOWER, ENOUGH: National School Walkout, ACTION NETWORK, https://www.actionnetwork.org/event_campaigns/enough-national-school-walkout [<https://perma.cc/9XUU-GZZL>].

4. *Id.*

and staff that were killed during the Parkland shooting.⁵ Many schools permitted the walkouts by making the walkout a school sponsored event, whereas other schools reacted differently by outright disallowing their students from any sort of involvement with the walkouts.⁶

Tinker v. Des Moines Independent Community School District established a test (the “*Tinker* test”) that articulated some parameters for when and where school administrators may curtail the free expression of their students.⁷ After several schools suspended and discouraged students from participating in the walkouts, *Tinker’s* underlying message, that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”⁸ seemed to be silenced by the schools’ reproach of their students’ involvement. The schools that decided to prevent students from political activism during school hours undermined the role schools have in teaching students about political activism and civic engagement.

The purpose of this comment is to examine how schools handled high school students’ protests following the Parkland shooting, while exploring the parameters of the students’ First Amendment rights to protest during school hours. Furthermore, this paper will briefly shed light on the adverse psychological and physical effects students suffer when their protests are discouraged.

This piece is divided into five parts. Part I provides a brief timeline on how the Parkland shooting instigated the walkout movement at schools and examines how schools reacted to the student walkouts. Next, Part II discusses general concepts of the First Amendment and how it is applied to schools, specifically applying the *Tinker* test.⁹ Part II also examines when student speech is and is not protected by the First Amendment. Part III focuses on how courts generally treat walkouts and student protests and how those decisions are justified by ap-

5. Bernie Woodall, “Enough”: U.S. Student Walkout Sends Message on Gun Violence, REUTERS, (Mar. 14, 2018, 3:07 AM), <https://www.reuters.com/article/us-usa-guns/enough-u-s-student-walkout-sends-message-on-gun-violence-idUSKCN1GQ155> [https://perma.cc/5JYG-NDK8].

6. See Claire Lowe, *South Jersey Schools Participate in National #Enough Walkouts*, PRESS OF ATLANTIC CITY, (Mar. 14, 2018) https://www.pressofatlanticcity.com/news/south-jersey-schools-participate-in-national-enough-walkouts/article_f5c794a3-956a-5308-8782-826c37eb18f0.html [https://perma.cc/AAQ2-YQUU].

7. See John T. Ceglia, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 947–48 (2012).

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

9. Doug Criss, *If You’re Planning to Take Part in the National School Walkout, Read This*, CNN (Mar. 14, 2018), <https://www.cnn.com/2018/03/12/health/student-walkout-questions-trnd/index.html> [https://perma.cc/32GW-KYK6].

plying *Tinker*.¹⁰ Part IV analyzes whether the schools that prevented students from participating in the planned walkouts violated the students' First Amendment rights and evaluates the negative educational and psychological impact a student may suffer when the school administrator prevents their participation in political activism.¹¹ Finally, Part V offers two social science theories for the courts to consider when deciding if a student's political activism is protected speech.

I. From a Hashtag to a Movement: Recognizing the Seventeen Students Killed at the Parkland Shooting

The student walkouts scheduled on March 14, 2018 were a nationwide protest following the Parkland shooting that were both a memorial and protest.¹² Students across the United States were encouraged to walk out of their class to honor the lives of the seventeen people killed at Marjory Stoneman Douglas High School, to encourage lawmakers to pass stricter gun control laws.¹³ The demonstration was organized by a group called EMPOWER, a youth branch of the Women's March organization.¹⁴ Many schools that chose to participate in the event provided students direction and a physical space to voice their views with the movement.¹⁵ However, other schools discouraged students from participating in the movement by disciplining the students who partook in the walkout.¹⁶ Schools that disciplined their students cited safety concerns,¹⁷ attendance policy,¹⁸ and disagreement with the movement.¹⁹

10. *Id.*

11. Marc A. Zimmerman, The Relationship Between Political Efficacy and Citizen Participation: Construct Validation Studies, 53 J. PERSONALITY ASSESSMENT 554, 554–66 (1989).

12. Grinberg & Yan, *supra* note 1.

13. *Id.*

14. Women's March Nat'l & Women's March Youth EMPOWER, *supra* note 3.

15. *See e.g.*, Nancy Yang, What You Need to Know About the National School Walkout Wednesday, MPR NEWS (Mar. 12, 2018), <https://www.mprnews.org/story/2018/03/12/what-you-need-to-know-national-school-walkout-wednesday> [https://perma.cc/3F22-4XYG].

16. Grinberg & Yan, *supra* note 1.

17. *See e.g.*, Daily News, With Calls for "Enough," Thousands Participate in Walkouts in LA to Protest Gun Violence, DAILY NEWS (Apr. 19, 9:18 PM), <https://www.dailynews.com/2018/03/14/lapd-laused-urge-respectful-restraint-as-mass-student-protests-set-for-10-a-m-1-month-after-parkland-mass-shooting/> [https://perma.cc/8X47-5M88].

18. *See e.g.*, Vanessa McCray, Cobb Gives Students in Walkout In-School Suspension, ATLANTA-J. CONST. (Mar. 21, 2018), <https://www.ajc.com/news/local-education/cobb-gives-students-walkout-school-suspension/eKLVF0kzhIQEOjxFxjH1I/> [https://perma.cc/4HC7-R684].

19. *See e.g.*, Kathy Boccella, Punished for Walkout, Bucks Students Turned Detention into Viral Gun Protest, INQUIRER (Mar. 21, 2018), <https://www.philly.com/philly/educa>

A. Schools That Supported the Walkout Movement

As a whole, most schools reacted positively to the walkout demonstration.²⁰ Some schools that were hesitant to encourage the students' participation in the walkout attempted to strike a balance between interrupting the educational process and recognizing students' desires to participate in a civil discourse and compromised by allowing their students to engage in a different form of civic engagement.²¹ Washoe County School District in Nevada struck this balance by permitting students to "t[ie] ribbons on the school fences or observ[e] moments of silence."²² The mentality of one school principal was to use the walkout as a moment to teach students responsibility and civic engagement.²³ This view was adopted by several schools that participated in the walkout.²⁴

Some schools reshaped the walkout. At Granada Hills High School in Los Angeles, California, the students organized a tribute and a protest. The students exhibited their disagreement with the current gun control laws by laying down on the football field at their school to spell out "enough."²⁵ #Enough was a hashtag widely used on Twitter to raise awareness to the walkouts and was a "call to action for Congress to pass gun control legislation."²⁶

Granada Hills High School was not the only school to advocate for both a protest and tribute demonstration, Marjory Stoneman Douglas' administration followed suit.²⁷ Marjory Stoneman Douglas

tion/national-school-walkout-detention-viral-gun-protest-students-pennridge-high-school-pennsylvania-20180321.html [https://perma.cc/R5R6-HTU6].

20. See e.g., *These Schools are Participating in the National School Walkout March 14*, TMJ4, (Mar. 12, 2018), <https://www.tmj4.com/news/local-news/these-schools-are-participating-in-the-national-school-walkout-march-14> [https://perma.cc/NC6F-284Z].

21. See e.g., Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/us/school-walkout.html> [https://perma.cc/CTW2-X7LA].

22. WASHOE CTY. SCH. DIST., STATEMENT REGARDING PROPOSED WALKOUT EVENTS (Feb. 23, 2018), <https://www.washoeschools.net/site/default.aspx?PageType=3&ModuleInstanceID=2000&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=24628&PageID=1> [https://perma.cc/DSG2-HXJ7].

23. Alexia Fernández Campbell, *Students Have a Right to Protest Gun Violence, but They Can't Disrupt Class*, VOX (Mar. 14, 2018, 8:55 AM), <https://www.vox.com/2018/3/13/17110210/national-school-walkout-free-speech-guns> [https://perma.cc/9TY4-59BS].

24. See e.g., *id.*

25. See DAILY NEWS, *supra* note 17.

26. Sarah Gray, *Thousands of Students Walked Out of School Today in Nationwide Protests. Here's Why*, TIME (Mar. 14, 2018, 6:14 AM), <http://time.com/5195960/national-school-walkout-march-14/> [https://perma.cc/2P6V-V4YT].

27. See AJ Willingham, *In the Wave of Walkouts, a Quote from Marjory Stoneman Douglas Becomes a Rallying Cry*, CNN, (Ma. 14, 2018, 5:25 PM), <https://www.cnn.com/2018/03/14/>

High School's superintendent supported a banner that was placed near the school that included the quote by environmentalist and activist Marjory Stoneman Douglas that urged to "be a nuisance when it counts. Do your part to inform and stimulate the public to join your action . . . [and] never give up."²⁸ Additionally, Marjory Stoneman students and teachers traveled to Washington, D.C. to attend a town hall meeting to attempt to change the minds of pro-gun legislators.²⁹

The schools that announced they would participate in the walkouts or related events were featured on the Women's March website.³⁰ These schools fostered a space for their students to commemorate those who were lost due to mass school shootings and also enabled their students to engage in the dialogue about gun violence and policy.³¹ Schools who encouraged the walkouts also created a safe space for dissenting viewpoints.³² At Lapeer High School in Lapeer, Minnesota students who did not think stricter gun control laws would be an effective method to solve mass school shootings were able to sit inside during the walkout.³³ Additionally, the "Young Republicans" of Lapeer High School were given a space in the school's cafeteria to share their reasons for why the Second Amendment should not be repealed.³⁴ In gratitude, the Young Republicans members thanked their school for enabling them to "voice [their] opinions in a safe [and] productive manner."³⁵

Other schools only permitted their students to participate in the walkout at school and discouraged students from hosting off-campus walkouts.³⁶ Los Angeles' Unified School District interim superintendent, Vivian Ekchian, encouraged Los Angeles' schools to participate in the walkout movement so long as the walkouts did not result in

us/marjory-stoneman-douglas-quote-walkout-trnd/index.html [https://perma.cc/BE3Q-H6X8].

28. *See id.*

29. Emanuella Grinberg & Steve Almasy, *Students at Town Hall to Washington, NRA: Guns are the Problem, Do Something*, CNN, (Feb. 22, 2018, 5:19 AM) <https://www.cnn.com/2018/02/21/politics/cnn-town-hall-florida-shooting/index.html?no-st=1555178081> [https://perma.cc/H9BM-8WAS].

30. TMJ4, *supra* note 20.

31. *See e.g.*, Holly Yan and Isabella Gomez, *Why These Students Disagree and Chose Not to Walk Out*, CNN (Mar. 16, 2018, 5:02 PM), <https://www.cnn.com/2018/03/14/us/students-who-did-not-walkout-trnd/index.html> [https://perma.cc/435N-VE8Z].

32. *See e.g., id.*

33. *See id.*

34. *Id.*

35. *Id.*

36. DAILY NEWS, *supra* note 17.

students hosting an off-campus event.³⁷ Although students in Los Angeles still walked to city hall, there were no reported police incidents³⁸ because the superintendent created an atmosphere of respect when the superintendent allowed students to participate in the school walkouts.

Numerous psychological studies have shown a correlation between personal psychological empowerment and its positive effects on leadership growth amongst individuals.³⁹ The correlation exists because psychological empowerment reinforces an individual's belief that their desire for and willingness to take action in a public domain leads to social and policy change.⁴⁰ In fact, one study reported that local leaders in grassroots organizations have a tendency to possess a perceived sense of efficacy, self-esteem, and importance.⁴¹ Moreover, due to this growth, these leaders felt they had the ability to play an assertive role in the community.⁴² This demonstrates that when schools empower their students to participate in a social cause, students' sense of self-confidence and self-acceptance is elevated.

B. Schools That Outright Banned Their Students from Participating in the Walkouts

Not all schools shared the same supportive views as the schools discussed above. Other schools dealt with walkouts harshly—choosing to suspend students who participated. Pope High School in Cobb County, Georgia was serious about its suspension policy and suspended all participants.⁴³ Furthermore, another school district, after receiving backlash from parents to curtail the walkouts, held a Remembrance Day Memorial instead of letting students participate in the walkout.⁴⁴

Additionally, Texas's Needleville Independent School District's superintendent Curtis Rhodes explicitly cautioned that any student participating in the walkout during school would be suspended for

37. *Id.*

38. *Id.*

39. *See* Zimmerman, *supra* note 11 at 554–56.

40. *See id.* at 554.

41. *See id.* at 554–56.

42. *Id.* at 555.

43. McCray, *supra* note 18.

44. Boccella, *supra* note 19.

three days.⁴⁵ Rhodes stated he would suspend all students who participated “if it is one, fifty, or five hundred students involved, all will be suspended for three days and parent notes will not alleviate the discipline.”⁴⁶ However, in some schools the threat of punishment for participation in the walkouts did not deter students.⁴⁷ One student criticized the hypocrisy behind her school’s policy prohibiting student participation in the walkouts. Anna Sophie Tinneney remarked, “[t]hey tell us in the announcements every day to be the change you want to see in the world . . . and then when we tried to do it, they told us we couldn’t.”⁴⁸

There are several reasons schools reacted harshly to the walkouts. In a letter to parents, Superintendent Rhodes spelled out that students attempting to protest is disrespectful because school is a space for “education and not a political protest.”⁴⁹ Furthermore, in justifying his stance he told the Houston Press, “a school district is a reflection of the community; we’ve consistently been very conservatively dressed, very conservatively disciplined. It’s no secret what our policy is: You’ll cut [your] hair to the right point” and that “we’re not going to succumb to everything and just wash away our policies and procedures.”⁵⁰ Given the Needleville community’s conservative views, it begs the question whether Superintendent Rhodes would have reacted differently if the protest’s content adhered to the conservative viewpoint.⁵¹

Other superintendents followed the example of Superintendent Rhodes by suspending middle school students who participated in the protest at Ingleside Middle School in the Phoenix area.⁵² School board members at Pennridge illuminated their conservative views on the walkouts.⁵³ Joan Cullen, a school board member, wrote on her Twitter account, “it’s very important the public know the truly radical,

45. David Williams, *Schools Threaten to Punish Students who Join Walkouts over Gun Control*, CNN (February 21, 2018), <https://www.cnn.com/2018/02/21/us/student-walkout-punishment-trnd/index.html> [<https://perma.cc/QT7D-VGTN>].

46. *Id.*

47. Boccella, *supra* note 19.

48. *Id.*

49. Eli Rosenberg, *A Superintendent Threatens to Suspend Students Protesting Gun Laws, but That’s Not Legal*, WASH. POST (February 21, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/02/21/a-texas-school-superintendent-threatens-to-suspend-students-protesting-gun-laws-but-thats-not-legal/?utm_term=.bd52835ab474 [<https://perma.cc/QK3U-2JUP>].

50. *Id.*

51. *Id.*

52. *See, e.g.*, Campbell *supra*, note 23.

53. *See* Boccella, *supra* note 19.

anti-police, anti-U.S. govt. [government] nature” of both the walkout and the Women’s March.⁵⁴ The school board members of the Penridge district voted against school participation in the walkouts and board members like Cullen referred to the walkout organizers as “misinformed Marxist truant peers.”⁵⁵

However, there were other schools that prohibited the walkouts not because of their conservative views, but because of administration purposes and school attendance policies.⁵⁶ Certain schools discouraged the walkouts because they occurred during school hours.⁵⁷ Furthermore, other schools voiced safety concerns, which required the school to prohibit any walkout because it would be held off campus.⁵⁸ Overall, the walkouts elicited mixed reactions by students, administrators, and parents.

These schools’ actions implicate the amount of discretion schools have over student speech. Although courts have held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” courts give a lot of discretion for schools to determine what constitutes “disruptive” speech.⁵⁹ The question remains: if school districts like Penridge, Needleville, and those in the Cobb County school district have left the boundaries of *Tinker*, does a constitutional issue arise under these facts?

II. To What Extent Does the First Amendment Allow Schools to Silence Students’ Speech at School?

The walkouts implicate several First Amendment issues. First, physically leaving class during school hours could be considered “disruptive” under the framework of *Tinker*. As for the second legal issue, typically government entities (including public schools) can limit speech based on subject matter but not viewpoint. Arguably, the reasons behind the suppression of students’ speech during the walkouts was due to schools’ disagreement with the viewpoints expressed in the movement.

54. *See id.*

55. *Id.*

56. *See Criss, supra* note 9.

57. *See id.*

58. Boccella, *supra* note 19.

59. Criss, *supra* note 9.

A. The First Amendment Right to Speech Under the *Tinker* Framework

The framework in assessing public schools' ability to limit students' freedom of speech under the First Amendment was addressed by the Supreme Court in the *Tinker* decision.⁶⁰ The standard in *Tinker* of whether a student's speech is protected at school is based on whether the student's speech will "substantially disrupt the work of the school or invade other students' rights."⁶¹ If the speech will either invade other students' rights or materially and substantially disrupt the work of the school, then the speech is not protected.⁶² Subsequent decisions by the Supreme Court refined the *Tinker* framework⁶³ to also balance students' First Amendment rights against the need to affirm "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."⁶⁴ This refinement allowed schools to prohibit a student's particular expression of opinion if the school "can show that their 'action was caused by something more than a mere desire to avoid the discomfort,' " which was "based on something identifiable in the school setting, rather than on an unsubstantiated fear that a minority viewpoint will engender opposition."⁶⁵

Courts have not addressed specifically whether schools suppressing student participation in 2018 walkouts stifles students' First Amendment rights.⁶⁶ However, the question is currently being litigated in the Kansas district court.⁶⁷ Students who attend high school in the Shawnee Mission Unified School District brought an action against their school district because their school prohibited discussing the specific topics of gun control and school shootings during the walkouts.⁶⁸ A number of students were suspended or received detention for participating in the walkout.⁶⁹ Although the court has not issued a ruling yet, the court denied the school district's motion to

60. See generally DERECK W. BLACK, EDUCATION LAW, EQUALITY, FAIRNESS, AND REFORM 653 (2d. ed. 2015) (indicating that first Supreme Court decision regarding First Amendment rights occurred in the year 1969, which was the year that *Tinker* was decided).

61. *Id.* at 653.

62. *Id.* at 656.

63. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988); *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

64. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

65. *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 854 (E.D. Mich. 2003).

66. See generally 363 F.Supp.3d 1182 (D. Kan. Jan. 28, 2019).

67. *Id.* at 1194.

68. *Id.* at 1191.

69. *Id.* at 1192.

dismiss the case under a 12(b)(6) motion (for failing to state a claim that is plausible on its face).⁷⁰ The court found that the students have a claim for a First Amendment violation against the school district's conduct during the 2018 walkouts.⁷¹

B. The *Tinker* Test

Tinker v. Des Moines Independent Community School District set the extent to which schools may regulate student speech.⁷² In *Tinker*, the plaintiff, Mary Beth Tinker, wore black armbands to exhibit her political stance against the Vietnam War.⁷³ The black armband was symbolic speech that illustrated her support for peace.⁷⁴ After discovering her plan to wear the black armbands to express her anti-war call for peace against the Vietnam War, the school administrators prohibited the wearing of black armbands.⁷⁵ Interestingly though, the school did not prohibit other students from wearing iron cross insignia, a symbol of Nazism.⁷⁶ After Tinker refused to remove the armband, she was sent home from school.⁷⁷

The Court's holding in *Tinker* maintained that students do not "shed their constitutional right to freedom of speech and expression at the schoolhouse gate."⁷⁸ This meant that students' rights to speech and expression could not be silenced just because they are at school. However, there are limitations: conduct by a student (in class or outside class) that materially disrupts classwork or involves substantial disruption in regards to the work and discipline of the school is not constitutionally protected.⁷⁹ The Court did not find that the students' expression—wearing black armbands—was materially disruptive, reasoning that the school failed to illustrate that wearing the armbands reasonably would trigger disruption during class or out of class.⁸⁰ Furthermore, the school appeared to regulate the armbands due to the very controversial nature of the Vietnam War and anti-war protests.⁸¹ However, the Court was not convinced by the defendant's argument

70. *See id.* at 1212.

71. *Id.* at 1202.

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

73. *Id.* at 504.

74. *Id.*

75. *Id.*

76. *Id.* at 510.

77. *Id.* at 504.

78. *Id.* at 506.

79. *Id.* at 513.

80. *Id.* at 514.

81. *Id.* at 510.

that the controversial nature of the subject matter constituted a reasonable forecast of a substantial disruption.⁸² Given that the student wore a band of black cloth on her sleeve which was no more than two inches wide, to exhibit a message of peace, her action did not trigger a reasonable forecast of substantial disruption of or material interference with school activities.⁸³

The fact the subject matter the students wished to protest was controversial did not permit the school to suppress the students' right of speech just because the school presumed a reasonable forecast of disruption might occur.⁸⁴ Schools are only allowed to curtail student speech when it materially and substantially interferes with the operation of the school and interferes with the rights of other students. Regardless of the controversy surrounding a particular subject, in this case the Vietnam War, if the speech does not materially and substantially interfere with the requirements appropriate to discipline in the operation of the school and it does not collide with the rights of the others, then the school cannot discipline nor curb the students' right of speech and expression.⁸⁵ The Court further held that when schools choose to suppress speech, they have to confirm that their action was caused by something more than a mere desire to avoid the "discomfort" and "unpleasantness" that always accompanies unpopular viewpoints, like the anti-war viewpoint here.⁸⁶

C. When Speech Does Not Comport with a School's Mission, the Speech is Still May Be Protected Under the First Amendment

In *Morse*, the school barely had to meet the materially and substantially disruptive standard from *Tinker* because the political message dealt with drug abuse.⁸⁷ This is because *Morse* is a stand-alone exception to students' free speech right. In *Morse*, the Court held that the constitutional rights of students are not equivalent to the rights of adults in outside settings.⁸⁸ The Court reasoned that both the school and the government have an important interest in stopping and protecting students from drug abuse.⁸⁹ Although the students' banner

82. *Id.* at 511.

83. *Id.* at 513.

84. *Id.* at 510.

85. *Id.* at 514.

86. *Id.* at 509.

87. *See, Morse v. Frederick*, 551 U.S. 393, 408 (2007).

88. *Id.* at 396-97.

89. *Id.* at 407.

“Bong hits for Jesus” was likely a joke, the Court relied heavily on the school’s argument that such a banner was an action that advocated for the use of drugs and it could not be interpreted as amusing.⁹⁰ Again, there is a pattern of the Court giving deference to schools on suppressing speech based on content. Arguably, the banner advocated for the “unpleasant” and “uncomfortable” viewpoint that drug use is an enjoyable activity. The Court held that the banner’s viewpoint message is the type of content that the school’s educational mission should be able to specifically suppress because the banner is an endorsement of illegal drug use.⁹¹ Given the school district’s and the government’s commitment to terminate drug abuse among high school students, the Court settled on a narrower view of deference. However, the Court rejected the argument that schools may limit any speech that contradicts a school’s asserted mission or values.⁹² The Court’s reasoning was to prevent a slippery slope type application, where schools could easily ban all kinds of political speech simply by manipulating their mission statements.⁹³

In *Bethel School Dist. No. 403 v. Fraser*, the Court gave school districts some deference in deciding which speeches fall under the category of “lewd” and “vulgar.”⁹⁴ In *Bethel*,⁹⁵ more deference was given to school districts than in the *Morse v. Frederick*⁹⁶ decision.

D. Courts Provide Less Deference to Schools if Suppression of Speech Was in Opposition to School’s Values

Similar to the reasoning in *Tinker*, *B.H. v. Easton Area School District* held that a school cannot suppress speech merely because the speech was not palatable under the school’s values.⁹⁷ In *B.H.*, the Third Circuit instituted a special exception on unprotected lewd and vulgar speech.⁹⁸ In *B.H.* two students were disciplined for wearing the iconic “I ? Boobies” bracelet for an ongoing breast cancer awareness campaign.⁹⁹ Within the holding the court articulated that “total defer-

90. *Id.* at 401–02.

91. *Id.* at 425.

92. *Id.* at 423.

93. *See id.*

94. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 536–37 (2000).

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

96. *See Morse v. Frederick*, 551 U.S. 393, 446 (2007).

97. *See B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 (3d Cir. 2013).

98. *Id.* at 298.

99. *Id.* at 297–98.

ence to school officials is incompatible with the Supreme Court's teachings in *Tinker*, *Hazelwood*, and *Morse*.¹⁰⁰ In *B.H.* the court made it abundantly clear that in situations when lewd and vulgar speech could plausibly be interpreted as commenting on a political or social issue, then the school may not punish and suppress the speech.¹⁰¹ The *B.H.* court furthered that a school cannot make the slippery slope argument which involves the following logic: if it allowed students to wear merchandise such as I ? Boobies, then students will start wearing and engaging in sexualized advocacy campaigns.¹⁰² It was significant that the court in *B.H.* focused on one of the prongs from *Tinker*: the reasonable forecast of the speech to create a substantial and material disruption to the school environment.¹⁰³ In contrast to *Morse*, where the Court did not apply *Tinker*'s reasonable forecast prong, in *B.H.* the court clarified that the reasonable forecast of disruption has to be based on an anticipation of disruption.¹⁰⁴ In *B.H.*, there was no anticipation of disruption element.¹⁰⁵ Given that the students who wore the bracelets did not cause any disruption and the school failed to address the anticipation of disruption with their slippery slope argument, the court ruled in favor of plaintiffs.¹⁰⁶ Thus, the element of reasonable anticipation must be met.¹⁰⁷

In contrast to the reasoning in *Morse* where schools could not suppress viewpoints if they don't meet the school's educational mission,¹⁰⁸ the holding in *Barr v. Lafon* established that a school was permitted to suppress symbols like the confederate flag.¹⁰⁹ The Sixth Circuit's decision was grounded on the fact that the school had a history of physical altercations and threats of violence arising from students wearing racially divisive symbols.¹¹⁰ Thus, the school banned racially divisive symbols because it reasonably forecasted the symbols would substantially and materially disrupt schoolwork and school discipline based on the previous years.¹¹¹ Although the petitioners ar-

100. *Id.* at 316.

101. *Id.* at 302.

102. *Id.* at 317.

103. *Id.* at 303-04.

104. *See id.* at 321.

105. *See id.*

106. *See id.* at 321-24.

107. *See generally id.* at 322-24 (where the element of "reasonable anticipation" was not expressly stated but was implicitly referenced in the court's discussion).

108. *Morse v. Frederick*, 551 U.S. 393, 423 (2007).

109. *Barr v. Lafon*, 538 F. 3d 554, 573 (6th Cir. 2008).

110. *Id.* at 568.

111. *Id.* at 566.

gued the school's new policy discriminated against "one side of a debate," the court held that policy discriminated against all symbols that cause disruption to the educational process.¹¹² Therefore, there was no evidence that the ban on disruptive symbols applied only to supporters of the confederate flag.¹¹³ The significance here is that there was a line drawn as to when schools are permitted to suppress certain kinds of speech.¹¹⁴ In the event the speech causes a reasonable forecast of disruption, but the reasonable forecast is found to be a pretextual excuse for viewpoint discrimination, courts will not accede with the school.¹¹⁵ With this in mind, the discussion below will examine how *Tinker* applies in the context of students' activism such as walkouts.

E. Courts Have Not Determined How to Treat Walkouts

The courts' treatment of student walkouts varies depending on the circumstances and the level of the school's evidence that a reasonably forecasted disruption is likely to occur due to the speech.¹¹⁶ Courts apply the *Tinker* test.¹¹⁷ However, no case law has conclusively held walkouts are materially and substantially disruptive.¹¹⁸ Generally, whenever students attempted to exercise their First Amendment right to speech by arranging a walkout, courts applied *Tinker*.¹¹⁹

In *Dodd v. Rambis*, students staged a walkout at their high school to protest the administration's disciplinary procedure; the students who organized the walkouts were expelled.¹²⁰ The Seventh Circuit applied *Tinker* and found that the students' actions fell within the protection of the First Amendment.¹²¹ The court balanced the students' rights with the state's interest in promoting a learning environment for the students.¹²² In applying *Tinker*, the ultimate question rested on whether the students' walkout materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.¹²³ The school argued that the students' actions of inter-

112. *Id.* at 572.

113. *See id.*

114. *See id.* at 568.

115. *See id.* at 572.

116. *See e.g.*, *Dodd v. Rambis*, 535 F. Supp. 23, 29–30 (S.D. Ind. 1981).

117. *See e.g.*, *id.*

118. *See id.*

119. *See id.* at 27–28.

120. *Id.* at 26.

121. *Id.* at 28–29.

122. *Id.* at 28.

123. *Id.* at 30.

rupting several classes through their rowdy walkout and causing distractions by their loud voices justified the school's decision to expel the students.¹²⁴ However, the court wrote in dicta that the form of discipline should be reasonable and expulsion was too extreme of a punishment.¹²⁵

What is interesting about *Dodd* is the court was not disturbed by the fact that students staged a walkout. Instead, the turning point in *Dodd* was the fact that the staged walkout substantially disrupted school activities.¹²⁶ This begs the question whether the *Tinker* test might have helped plaintiffs prevail against the school if the students held their walkout without disrupting class time. The important rule from *Dodd* is that the material and substantial disruption was not the walkout itself, it was the students' manners and behavior that transformed the walkout into a disruptive ordeal.¹²⁷ Thus, the court might not have ruled in favor of the school if the walkout was held as a silent protest rather than a shouting spectacle that led to frequent class interruption.

One issue in determining the First Amendment rights of students in public schools is that each case is fact specific, as First Amendment protection is dependent on whether the action or speech is disruptive.¹²⁸ This fact specific game is shown in *Tinker*.¹²⁹ The dissent in *Tinker* pointed towards evidence that the plaintiffs' conduct disrupted a math lesson, and this should have withstood the material and substantial interference test because the speech directly stopped class.¹³⁰ However, the Court was not convinced that the "wrecked" math lesson was evidence of a substantial and material disruption.¹³¹ In *Tinker*, the Court observed the number of students in protest to measure the material and substantial level of disruption.¹³² In *Dodd* fifty-four students participated in the walkout.¹³³ In comparison to *Tinker* only five students participated in wearing the arm band, so the level of disruption did not rise to the same level as in *Dodd*.¹³⁴ The facts in *Dodd* furnish

124. *Id.* at 29.

125. *See id.* at 31.

126. *Id.* at 30.

127. *See id.* at 29.

128. Criss, *supra* note 9.

129. *See* Ben Lee, What Tinker Got Wrong, FIRE (Sept. 28, 2018), <https://www.thefire.org/what-tinker-got-wrong/> [<https://perma.cc/UJ98-UTCU>].

130. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 517–18 (1969).

131. *See id.* at 518.

132. *See id.* at 508.

133. *Dodd v. Rambis*, 535 F. Supp. 23, 25 (S.D. Ind. 1981).

134. *Tinker*, 393 U.S. at 508.

an insight to what courts look for in considering whether students' speech rises to the level of substantial disruption.

The holding in *Dodd* clarified that a walkout as a form of protest is arguably permitted so long as the manner of the walkout does not substantially and materially disrupt and interfere with the activities of the school.¹³⁵ However, in *Corales v. Bennett*, three or four students left school without permission or supervision to attend an immigration reform protest.¹³⁶ Because of their unexcused absences, the students were disciplined for leaving the school.¹³⁷ The court found that a desire to exercise free speech rights did not give the students license to leave school without permission or supervision.¹³⁸ The court reached this decision by balancing the free speech rights of students and effective school administration.¹³⁹ Here, the interest of an effective school administration surpassed the students' right to speech. However, the court's concern in this case was the students' safety after they left campus to participate in the protest.¹⁴⁰ Thus, perhaps the school and the court would have been less restrictive if the students decided to host their protest on campus instead of departing school for an off-site event.

Based on these decisions, there are three major points flowing from these cases that are relevant to the #Enough walkouts: (1) schools cannot suppress student speech unless the speech materially and substantially disrupts work and the discipline of the school; (2) schools may restrict student speech when the speech creates a reasonable anticipation of disruption; and (3) if lewd or offensive speech was reasonably determined to have a political or social message, then the form of speech does not fall under the offensive category. Most importantly, courts give less deference when the school's suppression is not based on reasonable forecast of disruption but is based on a pretextual excuse for viewpoint discrimination.

III. Whether Walkouts Qualify as Materially and Substantially Disruptive Conduct

This section focuses on whether the schools discouraging students from participating in the walkouts went beyond their constitu-

135. *Dodd*, 535 F. Supp. at 30.

136. *Corales v. Bennett*, 488 F. Supp. 2d 975, 979–80 (C.D. Cal. 2007).

137. *Id.* at 980.

138. *Id.* at 984.

139. *Id.* at 983.

140. *Id.* at 984.

tional bounds. As addressed above, students have the First Amendment right to protest.¹⁴¹ In regard to the walkouts, there are two issues flowing from this type of protest that are different from the other cases outlined above. First, according to the ACLU, the legal issue with the walkouts is that for students to participate in the walkouts, the student has to physically leave the classroom.¹⁴² Subsequently, because schools can discipline students for missing class, this action becomes an issue of school attendance¹⁴³ because preventing absences is the school's mission and interest.¹⁴⁴ The second issue arising from the walkouts is whether the conduct qualifies as the type of conduct that materially and substantially disrupts classwork and invades the rights of others.

A. Schools Can Punish Students for Attendance Reasons But Punishment Must Adhere to the School Districts' Attendance Policies

Schools have the authority to ensure that their students do not have unexcused absences.¹⁴⁵ The Every Student Succeeds Act ("ESSA") specifically mentions measures of attendance in kindergarten through twelfth grade.¹⁴⁶ Since schools have to track both excused and unexcused absences as benchmarks for assessing student success,¹⁴⁷ students' walkouts need to be recorded as a school activity. Schools that made the walkouts either a school sponsored event or after school hours would not have a problem with the student attendance policy. However, students' right to speech might not extend to the students' right to leave class without an excused absence, even if it is for a political cause. The school may argue that it has a compelling interest to ensure students do not miss any class time. Nevertheless, the school cannot discipline students' absences more harshly than the school district's attendance policy.¹⁴⁸

141. See *Dodd v. Rambis*, 535 F. Supp. 23, 28–29 (S.D. Ind. 1981).

142. See *Students' 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/JS48-UQRH>].

143. See *id.*

144. See *Federal Policy*, ATTENDANCE WORKS, <https://www.attendanceworks.org/policy/federal-policy/> [<https://perma.cc/ST24-UYTE>].

145. New Federal Education Law includes Chronic Absence Tracking, Training, ATTENDANCE WORKS, (Dec. 10, 2015), <http://www.attendanceworks.org/new-federal-education-law-includes-chronic-absence-tracking-training/> [<https://perma.cc/SGP4-34UF>].

146. See *id.*

147. *Id.*

148. ACLU, *supra* note 142.

In regard to the walkouts that occurred in March 2018, the schools that prevented the walkouts could have given the absent students a truancy or tardy depending on the amount of time missed.¹⁴⁹ Punishment and discipline is contingent upon the individual school's policy on missing class.¹⁵⁰ On that note, the school could not punish students' absences severely, since absences are controlled by the procedures of the district's attendance policy. Passing heavier discipline on students for absences would violate students' due process rights.¹⁵¹ In regard to schools who suspended students for participating in the walkout, in some school districts the punishment did not fit the crime. According to Pennridge High School's Student Handbook, an unexcused absence of seventeen minutes qualifies for an unexcused tardy.¹⁵² However, Sayreville High School's administrator made a policy that gave a two-day suspension to students who participated in the walkout.¹⁵³ Thus, suspension would not pass muster with the school district's policy unless the student had other trancies¹⁵⁴ and would violate a students' due process rights.

B. Balancing Viewpoint Suppression with Disruption Violates the *Tinker* Test

Courts will be persuaded by a school's reasonable concern of disruption.¹⁵⁵ However, in the March 2018 walkouts, suppressed speech was a pretextual excuse for viewpoint discrimination.¹⁵⁶ The pretextual excuse for viewpoint discrimination is shown through the statements by the schools' administrators.¹⁵⁷ Because there is evidence of viewpoint discrimination, courts will be hesitant to give those schools deference in categorizing walkouts as materially and substantially disruptive.¹⁵⁸

149. See STUDENT HANDBOOK, PENNRIDGE HIGH SCHOOL 23, 25 (Pennridge School District ed., 2014-2015) (hereinafter "Pennridge Handbook").

150. See *id.*

151. *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

152. Pennridge Handbook, *supra* note 149.

153. Nick Muscavage, *Sayreville High School Students Walk Out After School Threatens to Suspend Protesters*, MY CENT. JERSEY (Mar. 14, 2018) <https://www.mycentraljersey.com/story/news/education/in-our-schools/2018/03/14/one-sayreville-student-risks-suspension-walks-out/424965002/> [<https://perma.cc/WCG7-VQPF>].

154. Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1113 (2010).

155. Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129 (2009).

156. See Rosenberg, *supra* note 49.

157. See *id.*

158. *Barr v. Lafon*, 538 F. 3d 554, 576 (6th Cir. 2008).

Furthermore, courts would look at the discipline in the school districts to determine whether the punishment was justifiable based on the schools' attendance policy. According to the attendance policy in Pennridge and Cobb County School Districts, students do not receive detention until they have three tardies.¹⁵⁹ Thus, the schools' deviation from their attendance policy suggests the punishment was not about the concerns of attendance or disruption.

C. The Walkouts Would Not Rise to the Disruptiveness Standard in the *Tinker* Test

Although the Supreme Court has not provided a set of facts that could help determine when students' conduct amounts to substantial disruption, courts weigh the totality of the circumstances.¹⁶⁰ There is an underlining balancing test between government wanting to protect students' right to speech and the state's interest in meeting their educational mission.¹⁶¹ The educational mission of a school entails that no material and substantial disruption occurs that could invade the rights of others.¹⁶² Coupled with this is the schools' ability to take disciplinary measures for students' absences.¹⁶³ Taking this into account, many of the schools who objected to students' participation in the walkout should raise the reasonable anticipation of disruption argument, if sued. The problem with this argument is that it relies on the premise that students missing seventeen minutes of class time would disrupt class.

In *Dodd* the court focused on the manner of the students' speech during their walkout to determine disruption.¹⁶⁴ In *Dodd* the disruption addressed was the students' rowdiness during the protest and the court found that this prevented other students from learning due to the level of distraction and noise projected from outside the classroom.¹⁶⁵ However, the court did not discuss if walking out of class is a form of disruption by itself. Perhaps, if the students in *Dodd* held a walkout that was less noisy and more peaceful, the court would not have found the walkout materially and substantially disruptive.

159. Pennridge Handbook, *supra* note 149, at 41.

160. See *Dodd v. Rambis*, 535 F. Supp. 23, 28 (S.D. Ind. 1981).

161. *B.H. ex. rel. Hawk v. Easton Area Sch. Dist.*, 725 F. 3d 293, 297 (3d Cir. 2013).

162. See *id.* at 303.

163. See *ACLU*, *supra* note 142.

164. See *Dodd*, 535 F. Supp. at 28–29.

165. *Id.* at 29.

The manner of the March 2018 walkouts previewed on the Women's March website were intended to be peaceful overall.¹⁶⁶ The Women's March website encouraged students to circle their schools holding hands, sing songs together, or stand in silence together.¹⁶⁷ Another recommendation included students speaking on behalf of the students killed at the Parkland shooting.¹⁶⁸ The March 2018 walkouts are distinguishable from the one in *Dodd* because the walkout in *Dodd* was not intended to be a peaceful protest and students were arguably intentionally loud and rowdy.¹⁶⁹ The walkout in *Corales* occurred outside of school premises, and the court's decision focused on leaving campus as a safety issue.¹⁷⁰ The March 2018 walkouts were supposed to be held on school grounds, so the same concerns are not applicable.

Based on these distinguishable facts, a court might not find a reasonably forecasted material and substantial disturbance. On the other hand, some facts in the March 2018 walkouts may be similar to the facts in *Dodd* because in *Dodd* the lesson in a particular class was derailed.¹⁷¹ As the very nature of the walkouts requires students to leave during class time, thereby there is also potential for derailing the lesson plan and disrupting students who chose to not participate in the walkouts. Perhaps, these similarities alone could trigger a finding of material and substantial disruption to the operation of the school.

D. Disruptiveness Should Not be the Standard Courts Use to Determine if Schools Lawfully Can Suppress the Walkouts

Courts should consider that all schools were aware of national walkout day when they apply *Tinker* to the set of facts here.¹⁷² There is a reasonable forecast from the campus climate that students would want to participate in the protest. Thus, the school should want to mediate and protect students' right of speech by using the walkout as a teachable moment. Although the walkouts could cause teachers to lose seventeen minutes from their lesson plan, the time lost can be

166. Hannah Golden, What Time Is the National Student Walkout? Set Your Reminder, *ELITE DAILY* (Mar. 13, 2018), <https://www.elitedaily.com/p/what-time-is-the-national-student-walkout-set-your-reminder-8489517> [<https://perma.cc/PE62-ARQZ>].

167. *Id.*

168. *Id.*

169. *Dodd*, 535 F. Supp. at 28.

170. *Corales v. Bennett*, 488 F. Supp. 2d 975, 990 (C.D. Cal. 2007).

171. *Dodd*, 535 F. Supp. at 25.

172. *See e.g.*, Gray, *supra* note 26.

regained through an assignment or a reflection discussing the walk-out. But yet again, the same problem remains in effect in a *Tinker* framework. It seems odd that an act of political activism by students is categorized as disruptive just because the method of expression is a sit out for seventeen minutes. The whole policy behind *Tinker* is to create a space for students to express their views in a manner that is productive and non-disruptive.¹⁷³ The peaceful nature of the walkouts adheres to the policy behind *Tinker*.¹⁷⁴ The walkout was a productive outlet for students to participate in a movement that was non-disruptive because the walkout was a dialogue of solidarity similar to the black armbands' symbolic message. Courts should note in their analysis that the test of disruptiveness fails to accommodate certain types of speech protected by the Constitution such as walkouts as a form of political movement.

E. The Walkouts Were Not Disruptive at Many Schools

Looking at the schools that did participate during the walkouts it does not seem that the walkout caused a material and substantial disruption.¹⁷⁵ Courts should also compare whether certain forms of expression that were accepted at certain schools do in fact meet the disruption test. Evidence of a productive curriculum after a material and substantial disruption occurred should somewhat loosen the rigidity of the *Tinker* test. As shown in precedent, courts rely heavily on the *Tinker* test to determine whether the speech caused substantial interference with the school curriculum.¹⁷⁶ Arguably, school curricula across schools that participated did not falter from losing seventeen minutes of class time, in fact it was a teachable moment. Thus, it would not have been to the school's detriment if students left class for seventeen minutes to engage in a politically driven conversation on gun reform.

173. *Dodd*, 535 F. Supp. at 27–8.

174. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

175. *Cf. Isabel Fattal, What Will the Nationwide School Walkouts Accomplish?*, ATLANTIC, (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/what-will-the-nationwide-walkouts-accomplish/555638/> [<https://perma.cc/L9AT-7DDE>] (discussing the positive effects the walkouts stir, and none of the effects impact student's learning or school's mission).

176. *See Tinker*, 393 U.S. at 506.

IV. Silencing Students' Speech Undermines Schools' Interest in Achieving Learning Outcomes Because Suppression of Speech Materially and Substantially Interferes with Schools' Educational Goals

If an action is brought before any court, just as courts must weigh the potential disruptiveness of the walkouts and the attendance implications when deciding on the school bans on students participating the March 2018 walkouts, courts should also look at how forbidding participation in a national movement undermines students' education. The below policy argument highlights how schools suppressing students' participation and speech undermines the schools' main purpose of educating their students.

A. School Suppression of Student Participation in the Walkout was Futile and Counterproductive

Students who participated in the walkouts despite their schools' prohibitions felt small and disruptive for participating in the movement rather than empowered.¹⁷⁷ The irony is the walkouts addressed a dialogue that directly impacts students and schools. The statistics of school shootings and gun reform laws make it near impossible to ignore such a dialogue.¹⁷⁸ Although some students were unable to actively participate in the walkout due to school policies, social media provided a platform for other forms of participation in these crucial conversations.¹⁷⁹

At Pope High School, an estimated 170 students out of the roughly 200 students walked out during class time, even though many understood they would receive punishment.¹⁸⁰ Lian Kleinman, a student and walkout organizer, said the students were scheduled to serve their one-day suspension in the school's theater because it was a space big enough to accommodate everyone.¹⁸¹ The students' action show

177. See e.g., Erin Davis, An Opportunity Lost—A Look at the Other Side of the National School Walkout, VOX ATL (Mar. 14, 2018), <https://voxatl.org/north-cobb-national-school-walkout-otherside/> [https://perma.cc/R6A5-XC8Y].

178. See *K-12 School Shooting Database, Incidents by Year*, CTR. FOR HOMELAND DEF. & SEC., <https://www.chds.us/ssdb/incidents-by-year/> [https://perma.cc/3J66-27VS] (where ninety-seven school shootings incidents occurred in 2018).

179. See Maureen Downey, *Cobb's Resistance to National Walkout Met with Student Resolve*, AJC (Mar. 15, 2018), <https://www.ajc.com/blog/get-schooled/cobb-resistance-national-walkout-met-with-student-resolve/GHussQnVmu5qs3gSmUM0eK/> [https://perma.cc/DR5S-9YAW].

180. McCray, *supra* note 18.

181. *Id.*

how powerfully the walkouts resonated with the student body given the number of students who chose to receive suspension for participating. Students who participated in the walkout did so knowing they would be punished because they felt they needed to be part of the protest.¹⁸²

It was not only the students at Pope High School who ignored their school's decision to forbid them from protesting.¹⁸³ Students in Phoenix walked out and received one day of suspension.¹⁸⁴ For some of these students, the school's suspensions did not matter because the walkout was a moment in history where students of all schools participated in a common cause and goal.¹⁸⁵ They wanted to be heard. They felt they needed to make a grand gesture so that something would be done to prevent mass shootings at schools.¹⁸⁶

The least these schools should have done was to educate their students on gun reform laws instead of limiting the dialogue by punishing participation in the walkouts. However, the schools' punishment failed to deter students from participating in the movement given the number of suspensions given.¹⁸⁷ In fact, students walked out for the seventeen minutes in spite of the punishments they would receive.¹⁸⁸

Instead, the schools could have used the seventeen minutes of time to develop dialogues and reach territory that is usually not discussed in classrooms. However, that was not the case for these schools. Some of these students who received suspensions used that time to further protest for gun reform.¹⁸⁹ In fact, Kleinman said Pope students planned to "wear orange on the day of their punishment—the color associated with activists against gun violence—and sport the 'Not One More' pins they donned during the walkout."¹⁹⁰ If anything, attempting to suppress the conversations had the opposite effect on

182. *Id.*

183. See e.g., Samie Gebers, 40 Scottsdale Middle-School Students Suspended After Walkout, *AZCENTRAL*, (Feb. 28, 2018, 5:59 PM) <https://www.azcentral.com/story/news/local/scottsdale-education/2018/02/28/40-scottsdale-middle-school-students-suspended-after-walkout/381459002/> [<https://perma.cc/4WAG-25MX>].

184. See e.g., *id.*

185. See e.g., *id.*

186. See e.g., *id.*

187. See e.g., *id.*

188. See e.g., *id.*

189. See e.g., Boccella *supra* note 19.

190. McCray, *supra* note 18.

students because students continued to work towards the cause that began with the Parkland students.¹⁹¹

V. Solution to Reconciling the Flaws in *Tinker* Decision

Tinker sometimes does not achieve what it set out to do for students. But the central problem is the manner of speech cannot be disruptive. Subsequently, when courts handle a *Tinker* framework, certain theories of education should drive their conclusion in deciding whether the facts prompt a *Tinker* violation.

A. Schools Fostering the Social Reconstruction Theory of Education

Under the social reconstruction theory, the school is an institution that attempts to reconstruct a new perspective by wielding its power to push its students for cultural change.¹⁹² This cultural change is a way to challenge and perhaps reverse the traditional norms to create social change. In schools that attempt to adhere to a social reconstruction model, the school's goal is to teach children to understand the flaws in society.¹⁹³ The school is supporting its students to rebut the values that are normally accepted in order to see the world with a new lens. As one scholar states, the school is educating its students "not on the demands of society, nor on any conception of what an educated person should be, but on the developing needs and interests of the child."¹⁹⁴ Thus, schools that permitted students to participate in the walkouts are shaping the students to reconstruct and stir change, since they provided them with these tools through the channels of the First Amendment.

B. Schools Fostering a Social Reproduction of Society Theory of Education

On the other hand, if the school adheres to social reproduction, then its mission is to inculcate society's traditions and habits through the students' education.¹⁹⁵ This ultimately means using education to produce model citizens that exhibit the traditions and habits of the

191. See e.g., Boccella *supra* note 19.

192. Anne Proffitt Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 GEO. WASH. L. REV. 49, 53 (1996).

193. *Id.*

194. *Id.* at 66.

195. *Id.* at 67.

community.¹⁹⁶ Although there is value to fostering this mentality, it leaves no room for students to challenge the norm.¹⁹⁷ With this in mind, students are deterred from expressing their views if the expression is unconventional. Additionally, there is a method of speaking and of protesting that adheres to the traditions and habits of our society. A walkout does not adhere to the conventional methods of expression because students are not allowed to express their opinions when it undermines the authority of schools in administering class attendance.

At the heart of the walkouts are these two juxtaposing theories. Schools must balance the need to command authority and the need to maintain the regular school operation free from disturbances. However, this theory is flawed in terms of what occurred at the walkouts, since most students partook in the walkouts, the schools' authority was not maintained.

C. Combining the Theories in Jurisprudence

Taking these two social models of schooling, courts have inserted *Tinker* to attempt to reconcile students' constitutional rights and the school's authority.¹⁹⁸ Schools should have an environment where school officials have control over the operation of student lessons and learning objectives. At the same time, it is the mission of the school to give room for the students to grow and find their voices. Silencing them during the 2018 walkouts did not work, in fact if anything, it further emboldened students to violate the school's attendance policy and knowingly accept punishment for their participation in the walkouts. It is important for schools to step in and control students' speech only when it does truly substantially and materially disrupt student learning and school operations.

Conclusion

The 2018 walkouts were a momentous time in history where students and teachers became part of a national dialogue in protest of insufficient gun control laws and high incidence of school shootings.¹⁹⁹ The fact that some schools punished students who participated in the walkout violated the very foundation of student's First

196. *Id.* at 65.

197. *See id.*

198. *Barr v. Lafon*, 538 F.3d 554, 562 (6th Cir. 2008).

199. *See Grinberg & Yan, supra* note 1.

Amendment rights because these schools fundamentally required students to shed their constitutional rights at the gates of the school, thereby going against the standard *Tinker* established. Moreover, although it is within a school's right to punish students for a lack of attendance, the walkouts did not furnish a need to suspend or give detention for the students who decided to participate.

Although schools receive deference in restricting certain types of speech, there should be certain circumstances that schools should not receive such deference. When speech contains an underlying political message that is fostered by a national dialogue, schools should create a space where students can express their voices. Furthermore, schools should use school shootings as way to meet learning objectives because schools should be the focal center of learning, rather than stifle learning through silencing students of their right to political activism.