WALKING OUT ON STUDENT SPEECH: THE EROSION OF *TINKER* AND HOW *PICKERING* PROMISES TO RESTORE IT

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ABSTRACT

Tinker v. Des Moines Independent Community School District has been the law for fifty years, but it has failed to adequately protect student speech. Courts don't know how to apply it correctly, schools don't know how to implement it constitutionally, and students are left unable to contribute their views to the free marketplace of ideas. Nowhere were *Tinker*'s shortcomings more apparent than in the aftermath of the student walkouts in response to the February 14, 2018, shooting in Parkland, Florida. Schools scrambled to respond in a way that would protect their students and, in the process, ended up engaging in unconstitutional content and viewpoint discrimination. Meanwhile, courts have allowed censorship of students by gradually removing *Tinker*'s protective teeth, finding speech capable of causing the meagerest "disruption." A revised legal standard is in order so that student speech on important, school-related issues, like gun violence in schools, can be heard. This note proposes that student speech doctrine borrow from *Pickering v. Board of Education* and the public employee speech doctrine and find passive student protest on school-related matters of public concern per se not substantially disruptive under *Tinker*.

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"Chants of 'Grades up! Guns down! as hundreds of Baltimore students protest gun violence during a school walkout. One girl just turned around, looked at the massive line of students and said to her friend: 'Wow, that's all us.'"[1]

Tinker v. Des Moines Independent Community School District[2] was decided fifty years ago. And yet, public school officials still are unsure of the extent to which they can punish students for speaking.[3] Their uncertainty was brought to the fore by the mass student walkouts that followed the February 14, 2018, shooting at Marjory Stoneman Douglas High School in Parkland, Florida.[4] Seventeen people died during the Parkland shooting,

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[1] *Baltimore Students March on City Hall to Protest Gun Violence*, PBS NEWSHOUR (Mar. 6, 2018, 5:59 P.M.), https://www.pbs.org/newshour/nation/baltimore-students-march-on-city-hall-to-protest-gun-violence [hereinafter *Baltimore Students*].

[2] 393 U.S. 503 (1969).

[3] *See* Denise Lavoie, *Schools Brace for Massive Student Walkouts over Gun Violence*, PBS NEWSHOUR (Mar. 11, 2018, 1:54 P.M.), https://www.pbs.org/newshour/nation/schools-brace-for-massive-student-walkouts-over-gun-violence.

[4] Walkouts happened "sometimes in defiance of school authorities, who seemed divided and even flummoxed about how to handle their emptying classrooms." Alan Blinder & Vivian Yee, *Thousands Walk Out of Class, Urging Action on Gun Control*, N.Y.

and a month later nearly 1.6 million walked out of their respective schools in response.[5] Over 2,500 schools registered with Youth Empower, the subproject of the Women's March that organized the walkout.[6] But the scope of participation varied greatly by school. At Myers Park High School in Charlotte, North Carolina, the walkout had "hundreds" of participating students.[7] At Wilson Preparatory Academy two hundred miles east in Wilson, North Carolina, there was only one.[8]

The months following the Parkland shooting saw a series of walkouts. Although the March 14 walkout was the most widely publicized and participated in, there were other walkouts, including on February 27,[9] March 6,[10] and April 20.[11] Some were led primarily by the students,[12] while others were planned by parents[13] or in coordination school administrators.[14] Some took

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TIMES (Mar. 15, 2018), https://www.nytimes.com/2018/03/14/us/school-walkout.html.

[5] Press Release, Women's March Youth Empower, Women's March Youth Empower Announces Enough! Youth Week of Action, WOMEN'S MARCH (Feb. 21, 2019), https://womensmarch.com/press-releases/march-11-15-womens-march-youth-empower-announces-enough-youth-week-of-action [https://web.archive.org/web/20200211033744/https://womensmarch.com/press-releases/march-11-15-womens-march-youth-empower-announces-enough-youth-week-of-action].

[6] Scott Berson, *Is Walking Out of School Protected by the First Amendment?*, MIAMI HERALD (Mar. 12, 2018, 2:55 P.M.), https://www.miamiherald.com/article204724929.html.

[7] Hank Lee, *'Enough is Enough': Local Students Stage Walkout to Protest Gun Violence*, WCNC (Mar. 14, 2018, 11:08 A.M.), https://www.wcnc.com/article/news/politics/enough-is-enough-local-students-stage-walkouts-to-protest-gun-violence/275-528484704.

[8] Gianluca Mezzofiore & Paul P. Murphy, *At a School in North Carolina, He Was the Only One of 700 Students Who Walked Out*, CNN (Mar. 15, 2018, 2:55 A.M.), https://www.cnn.com/2018/03/14/us/student-walks-out-alone-trnd/index.html.

[9] Lavoie, *supra* note 3.

[10] *Baltimore Students*, *supra* note 1.

[11] Bruce Henderson, *Myers Park High Students Say They Were Suspended for Walkout Over Gun Violence*, CHARLOTTE OBSERVER (Apr. 20, 2018, 12:00 A.M.), https://www.charlotteobserver.com/news/local/article209440224.html.

[12] *Baltimore Students*, *supra* note 1.

[13] *See* Tom Dart, *Walkout Wednesday: Students Risk Punishment for Joining Gun Control Protest*, THE GUARDIAN (Mar. 13, 2018, 1:00 P.M.), https://www.theguardian.com/us-news/2018/mar/13/walkout-wednesday-students-gun-control-protest.

[14] Tim Moran, *Walkout at Bloom A Student Idea Embraced by Administration*, PATCH.COM (Mar. 14, 2018, 12:50 P.M.), https://patch.com/illinois/chicagoheights/walkout-bloom-student-idea-embraced-administration.

the form of vigils while others became public forums[15] or even miles-long marches.[16] But all of them encompassed a political message: that in light of the frequency of school shootings, gun control laws need to be more stringent.[17]

Lawmakers took notice of the widespread public support these students garnered and passed gun control legislation in twenty-six states.[18] Federal,[19] state,[20] and local[21] elected officials participated in walkouts across the country. And the Parkland survivors soon became nationally recognized activists.[22]

The Parkland walkouts were not the first time that student speech tipped the scales toward reform on an important school-related political issue.[23] Historically, student activism on school-related issues has been especially potent.[24] Some chalk this up to students' age,[25] but common sense tells us that when an issue

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[15] Mark Price, *SC School Backtracks: Students Can Debate Gun Control, but Can't Join National Walkout*, CHARLOTTE OBSERVER (Mar. 7, 2018, 2:39 P.M.), https://www.charlotteobserver.com/news/local/article203942129.html.
[16] *Baltimore Students*, *supra* note 1.
[17] *Id.*
[18] Dakin Andone, *Parkland Survivors Turned into Activists and Inspired a Wave of New Gun Safety Laws*, CNN (Feb. 11, 2019, 4:08 A.M.), https://www.cnn.com/2019/02/11/us/parkland-change-gun-control-legislation/index.html.
[19] *Hawai'i Governor, US Senator Join Student-Led Walkout*, MAUINOW.COM (Mar. 14, 2018 12:27 P.M.), https://mauinow.com/2018/03/14/governor-ige-joins-student-led-walkout/.
[20] *Id.*; Tim Willert, *Students walk out of class to protest gun violence*, THE OKLAHOMAN (Mar. 14, 2018, 1:39 P.M.), https://oklahoman.com/article/5587044/students-walk-out-of-class-to-protest-gun-violence.
[21] Willert, *supra* note 20; *Baltimore Students*, *supra* note 1.
[22] Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018, 7:00 A.M.), https://time.com/longform/never-again-movement/.
[23] Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U.L. REV. 253, 256 (2012) ("[C]hildren have been agents of transformative American legal reforms that began in public schools but later reshaped the wider constitutional consciousness."). In 1951, Barbara Johns and her fellow students walked out of R.R. Moton High School in Prince Edward County, Virginia in protest of the unequal conditions in black and white schools, initiating a series of events that led to the historic ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Id.* at 285. Over 10,000 students in Los Angeles public schools walked out in 1968 in protest of school policies discriminating against Mexican American students. Kathryn Schumaker, *Why the Parkland, Fla., High School Students Make Such Powerful Activists*, WASH. POST (Feb. 21, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/02/21/why-the-parkland-students-make-such-powerful-activists/.
[24] Brown, *supra* note 23; Schumaker, *supra* note 23.
[25] *See* Schumaker, *supra* note 23 (arguing that students are particularly effective advocates because "[y]oung people often have a greater sense of the possibilities for

concerns schools, students are the ones with the most at stake. As one parent of a student who walked out commented, "[t]hese kids are the ones in school having to deal with this issue, not us, . . . and I feel that they have every right to make their opinions known . . . ."[26]

Many colleges and universities demonstrated their recognition of the importance of allowing students to speak on gun violence in schools by publicly announcing that they would not hold punishments for participating in the walkouts against applicants.[27] Richard H. Shaw, dean of undergraduate admission and financial aid at Stanford University, said, "[g]iven the nature of this national tragedy and the true and heartfelt response of students in expressing their perspectives and expectations, the University will not consider the choice of students to participate in protests as a factor in the review of present or future candidates."[28] But while colleges and universities had no qualms about supporting students' choice to walk out, elementary, middle, and high schools' responses showed misgivings.

According to Women's March Youth Empower, the March 14 walkout "was the largest distributed single-day protest in history."[29] With such high levels of participation, the walkout was bound to provoke enforcement actions from school officials. And it did.[30] The responses to the walkouts from principals, superintendents, and teachers were marked by confusion.[31]

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change than their elders do and less concern about the short-term consequences of seeking long-term reforms").

[26] Price, *supra* note 15 (quoting interview with parent Jo Stephens).

[27] Clay Calvert, *What the National School Walkout Says about Schools and Free Speech*, THE CONVERSATION (Mar. 14, 2018, 6:48 A.M.), https://theconversation.com/what-the-national-school-walkout-says-about-schools-and-free-speech-93327.

[28] *Id.*

[29] Women's March Youth Empower, *supra* note 5.

[30] *See, e.g.*, Lavoie, *supra* note 3; Samie Gebers, *40 Scottsdale Middle-school Students Suspended After Walkout*, AZ CENTRAL (Feb. 28, 2018, 5:59 P.M.), https://www.azcentral.com/story/news/local/scottsdale-education/2018/02/28/40-scottsdale-middle-school-students-suspended-after-walkout/381459002/.

[31] Blinder & Yee, *supra* note 4.

Suspending students for missing class is not necessarily an unconstitutional action.[32] But some school officials reacted in ways that demonstrated a disregard for the First Amendment rights of their students.[33]

In *Tinker v. Des Moines Independent Community School District*,[34] the Supreme Court held that although public school students do enjoy First Amendment protection while at school, the school may discipline students for engaging in speech that "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students."[35]

Schools need to be able to respond to situations on a case-by-case basis. Still, school principals are on the frontline of preserving students' First Amendment rights. There is a risk that administrators may attribute the aggregate disturbance a walkout causes to each individual participant.[36] For a school administrator, a disruption may seem more substantial, and therefore punishable, when two hundred students leave class than when one does, or when students walk out multiple times. But, in application, this kind of response can afford students at schools with less activism more of a right to speak than students at schools where the activism is stronger. This kind of disparate treatment shows that a more coherent rule is needed to protect student speech when they are engaging in political activism, that is, when it matters most.

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[32] *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 (last visited Jan. 14, 2021).

[33] *See infra*, Section A.

[34] 393 U.S. 503 (1969).

[35] *Tinker* , 393 U.S. at 509.

[36] During the Parkland walkouts, students at schools where activism was less widespread were sometimes punished less than their peers who participated in large-scale walkouts. *See, e.g.*, Alex Lasker, *Students punished for school walkout serve detention while holding signs featuring Parkland victims' names*, AOL.COM (Mar. 19, 2018, 12:55 P.M.), https://www.aol.com/article/news/2018/03/19/students-punished-for-school-walkout-serve-detention-while-holding-signs-featuring-parkland-victims-names/23389690/ (over 200 students walked out, and were given detention); Mezzofiore & Murphy, *supra* note 8 (one student walked out, and was not punished). Tellingly, in explaining why he did not discipline his students for walking out, Superintendent Jeffrey Rutzky of West Orange, New Jersey rationalized, "[i]t was a small group of students." Eric Kiefer, *West Orange Students Hold School Walkout For Parkland Victims*, PATCH.COM (Feb. 22, 2018, 2:11 P.M.), https://patch.com/new-jersey/westorange/west-orange-students-hold-school-walkout-parkland-victims.

Part I of this article addresses student speech jurisprudence and the erosion of *Tinker*'s First Amendment protections. Part II assesses the public employee speech framework's application to students. Part III explains how these two areas of the law can be fused to form a more coherent, more appropriately protective, and more constitutionally sound standard to apply to student speech.

A. Schools' Response to the Walkouts

In responding to the Parkland walkouts, schools seemed worryingly unaware of how to handle the potential disturbance to class without infringing on the speech rights of their students. For example, an online post by the Association of Wisconsin School Administrators (AWSA) attempted to provide guidance for principals planning response strategies to the walkouts.[37] The guidelines suggested that principals tell their communities that they want protests to be "peaceful and positive."[38] "Peaceful," to an extent, is a reasonable time, place, and manner requirement for a protest,[39] but "positive," insofar as it requires a certain tone or messaging, is a content-based distinction.[40] Here, the AWSA treated them as almost synonymous.[41]

The post shows great concern for non-protesting students, imploring principals to make sure they would not feel coerced into walking out, would not be harassed, would still get taught, and would be allowed to express a contrary viewpoint to those of the protesters.[42] But no recommendations were given as to whether to punish student protesters or how to do so without violating their rights.[43] The post also showed a worrying lack of knowledge about the historical significance of student speech:

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[37] Malina Piontek, *Student Walk Outs and Protests: Tips for Principals*, ASS'N OF WIS. SCH. ADM'RS https://awsa.memberclicks.net/update-article--student-walk-outs-and-protests--tips-for-principals (last visited Jul. 3, 2019).
[38] *Id.*
[39] *Cf.* Brown v. Louisiana, 383 U.S. 131 (1966) (explaining that the First Amendment extends to peaceful actions of protest).
[40] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Government regulation of speech" is content-based, if it "applies to particular speech because of the topic discussed or the idea or message expressed").
[41] *See* Piontek, *supra* note 37.
[42] *Id.*
[43] *See id.*

"Student protest is a relatively new issue for school leaders, but one that will likely to [sic] continue to impact schools, students, staff members and families in the months and years to come."[44] Again, *Tinker* was decided fifty years ago. Student activism is not a new issue, and yet the educators here were neither prepared to work around it nor aware of why it is important to do so.

Some schools reacted negatively to the political nature of the walkouts. Needville Independent School District Superintendent Curtis Rhodes, of Needville, Texas, said that the school would discipline a walkout *specifically* for being political speech.[45] In Lafayette Parish, Louisiana, the school board decided that students would not be punished for participating because the board understood it to be an act of memorial for the victims of the Parkland shooting.[46] When it became clear that the walkouts were also a political protest of the effects of gun policy on schools, the school board changed its position.[47] These policies of restricting political speech for being political are "a quintessential First Amendment violation."[48]

Prior to the walkout at Powdersville High School in Greenville, South Carolina, the school posted on its Facebook page that "[a]ny students involved in the event have been asked to focus on school safety, including increased mental health counselors and increased funding and training for SRO officers, not gun control."[49] When asked, the school explained that it was against the walkout because school officials believed students were "being told by outside groups what [they] should do and how [they] should react."[50] Here, Greenville school officials were threatening not mere content-based discrimination, but viewpoint-based discrimination.[51]

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[44] *Id.*
[45] Karma Allen, *Texas Superintendent Vows to Suspend Students Who Walk Out to Protest Guns*, ABC NEWS (Feb. 22, 2018, 6:32 A.M.), https://abcnews.go.com/US/texas-superintendent-vows-suspend-students-walkout-protest-guns/story?id=53268955.
[46] Blinder & Yee, *supra* note 4.
[47] *Id.*
[48] Sarah Gray, *Texas School Threatens to Suspend Any Students Who Leave Class to Protest*, TIME (Feb. 22, 2018, 5:18 P.M.), https://time.com/5171089/texas-school-threatens-suspend-students-protest/ (quoting Georgetown law professor Heidi Li Feldman).
[49] Price, *supra* note 15.
[50] *Id.*
[51] "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the

Unconstitutional treatment by schools even spawned litigation in at least two courts. In *M.C. ex rel. Chudley v. Shawnee Mission Unified School District No. 512*,[52] students planned to participate in the April 20 walkout by assembling outside and giving speeches.[53] The school district said that it would not punish students for participating, but it did not endorse the event.[54] Like in Powdersville, the district notified students that during the walkout, they could only discuss school safety and would not be permitted to discuss gun control or school shootings.[55] School officials enforced this policy by ordering students off of the microphone when they mentioned shooting or gun violence, punishing students who stayed outside beyond the first seventeen minutes, and prohibiting student journalists from documenting the event.[56] The court found the plaintiffs' claim that the schools' actions were unconstitutional survived a motion to dismiss.[57]

In *M.O. v. Hononegah Community High School District #207*,[58] students alerted school officials that they planned to participate in the March 14 walkout. The school agreed to not punish students for participating and allowed them to assemble on the football field.[59] During the actual walkout, however, the plaintiff and a small group of other students seeking to express pro-gun views were directed to a section of the parking lot out of view and earshot of the group on the football field.[60] When the plaintiff asked why she was not allowed to join the large group, staff replied that no one else agreed with their views and that they

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speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" Reed v. Town of Gilbert, 576 U.S. 155, 168 (2015) (citation omitted).

[52] 363 F. Supp. 3d 1182 (D. Kan. 2019).

[53] *Id.* at 1191.

[54] *Id.* at 1191–92 (stating that "[a]s a public institution, [the district] cannot take a stand one way or the other on Second Amendment rights").

[55] *Id.* at 1191.

[56] *Id.* at 1192–93.

[57] *Id.* at 1202 ("Because the only justification for the speech restrictions alleged in the Complaint is the need to avoid association with a controversial topic, the Court cannot find at this stage of the litigation that SMSD reasonably forecast that the students' speech during the walkout would cause substantial disruption with discipline or student safety. Therefore, the Court finds that Plaintiffs have stated a plausible claim that their First Amendment rights were violated by the District's speech restrictions during the walkout.").

[58] No. 18 C 50260, 2019 U.S. Dist. LEXIS 81773 (N.D. Ill. May 15, 2019).

[59] *Id.* at *5.

[60] *Id.* at *5–6.

would cause trouble.[61] The court said that, drawing all reasonable inferences in the plaintiff's favor, her First Amendment rights had been violated because the school discriminated against her viewpoint.[62]

Student protests happen over other school-related national issues besides gun control. For example, hundreds of students at Bartlesville High School in Bartlesville, Oklahoma walked out in February of 2018 to protest cuts in state education funding.[63] In other cases, students have been threatened with disciplinary action for kneeling during the national anthem at school sporting events in protest of police violence against communities of color.[64] Students have also been punished for their participation in the National Day of Silence, on which students take a vow to remain silent during the school day to draw attention to the plight of bullied LGBTQ students.[65]

But the walkouts in response to the Parkland shooting in particular are a powerful example of how students can engage in large scale speech that is both school-related and political.[66] Students' speech on this issue exemplifies why speech is protected in the first place. It was important to shaping the national debate, it was important to students' expressing grief, frustration, and apprehension, and it was important to their engagement as active citizens. And yet, many students were unsure of their right to speak out on this issue. Meanwhile, school officials themselves were unsure of how to treat student protesters, or outright refused to protect their students' rights. These are the exact kind of conditions in which speech can be chilled.

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[61] *Id.*
[62] *Id.* at *22.
[63] Yee & Blinder, *supra* note 4.
[64] Evie Blad, *Can Schools Punish Students for Protesting the National Anthem?*, PBS NEWSHOUR (Oct. 7, 2016, 2:03 P.M.), https://www.pbs.org/newshour/education/schools-students-protesting-national-anthem.
[65] *See* Hatcher v. Fusco, 570 F. App'x. 874, 876 (11th Cir. 2014).
[66] *See Baltimore Students*, *supra* note 1; Brian Dickerson, Opinion, *Teachers and Students, Unhappy and Fired-Up*, DETROIT FREE PRESS (Apr. 22, 2018, 6:00 A.M.), https://www.freep.com/story/opinion/columnists/brian-dickerson/2018/04/22/student-gun-control-protests/536652002/.

B. The Trouble with Tinker

It is well-established that public school students enjoy some amount of First Amendment protections, especially when engaging in political speech. *Tinker*, the case that articulated the standard against which these protections are measured, was about students wearing black armbands to protest the Vietnam War.[67] A fundamental principle of First Amendment jurisprudence is that protections are most important when they are about political speech.[68] This principle is no less applicable when the speaker is a student.[69]

Even so, student speech has been treated unfavorably by courts over the past five decades as several categorical exceptions to the *Tinker* rule have been added, and even the *Tinker* rule itself has been applied less and less stringently.[70] Although courts never admit to it, it seems like a large part of the reason for this decline in protection is that the student speech evaluated by courts is often crude in tone.[71] Courts compare students calling

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

[68] New York Times Co. v. Sullivan, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring) ("We should be ever mindful of the wise counsel of Chief Justice Hughes: 'Imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'") (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)); *See* Cohen v. California, 401 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry.").

[69] *See Tinker*, 393 U.S at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[70] *See* Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006). The Second Circuit expressed confusion and frustration with the application of Tinker's scope as "[i]t is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools . . . or whether it applies only to political speech or to political viewpoint-based discrimination." *Id.*; *see also* Geoffrey A. Starks, Tinker*'s Tenure in the School Setting: The Case for Applying* O'Brien *to Content-Neutral Regulations*, 120 YALE L.J. ONLINE 65 (2010), http://yalelawjournal.org/forum/tinkers-tenure-in-the-school-setting-the-case-for-applying-obrien-to-content-neutral-regulations (noting that United States v. O'Brien, 391 U.S. 367 (1968) is favored by the Fifth, Sixth, Ninth, and Eleventh Circuits over a *Tinker* analysis).

[71] Brown, *supra* note 23, at 328 (stating that there is a "mounting number of incidents involving extreme, vulgar, and intemperate on-line student speech about school personnel.").

principals "douchebags"[72] and the like to the silently dignified act of wearing a black armband, and find the former disruptive and, therefore, unprotected.[73] The actual difference between these situations is likely the courts' perceived importance of the speech at issue, not how disruptive it is. Couching this distinction in terms of the reasonable likelihood of a substantial disruption does not disguise the fact that courts are disfavoring speech based on content.

This is not a faithful interpretation of the standard set down in *Tinker*. Aside from general jurisprudential coherency concerns, this interpretation is problematic because it allows content discrimination without subjecting it to strict scrutiny.[74] Content discrimination is held to the strictest scrutiny because it can easily be a cover for viewpoint discrimination.[75] This is especially troubling in the school environment, where students are under the power and control of the school. Students who complain about teachers or school officials may do so simply because they were disciplined and are unhappy about it. But their unhappiness might also stem from being disciplined under arbitrary or unjust school policies.[76] School officials cannot be allowed to discriminate against student viewpoints, and courts cannot permit them to do so based on content.

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[72] *See, e.g.*, Doninger v. Niefhoff, 642 F.3d 334, 340 (2d Cir. 2011).

[73] *See, e.g.*, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 402 (5th Cir. 2015) (Costa, J., concurring) (implying that the whistleblowing aspect of plaintiff's rap was outweighed by the violence of his lyrics). *See also* J.S. v. Blue Mt. Sch. Dist., No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008) ("The type of speech involved in *Tinker* is political speech. In the instant case, the speech is not political; rather it [sic] was vulgar and offensive statement . . .").

[74] "[T]he First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." Turner Broad. Sys. v. FCC, 512 U.S. 622, 641–42 (1994) (citations omitted).

[75] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (standing for the idea that First Amendment doctrine may be most coherently understood as "tools to flush out illicit motives and to invalidate actions infected with them").

[76] This form of student dissent is especially vulnerable to covert viewpoint discrimination. *See* Brown, *supra* note 23, at 255.

On the other hand, allowing some speech can be detrimental for schools. School officials have legitimate concerns about maintaining authority and a mutually respectful environment for students and teachers.[77] The inexactness of the current standard does not adequately protect those concerns and, as a result, is being misapplied in such a way as to allow schools to *overly* protect them.

I propose a revision to address this flaw in the application of the *Tinker* standard. To make sure that student speech is protected where and when it matters most, courts should incorporate a version of the *Pickering*[78] rule into their student speech analysis. In *Pickering v. Board of Education*, the Supreme Court held that public employees enjoy First Amendment protections when their free speech interest in commenting on matters of public concern is not outweighed by the government's interest in restricting such speech as an employer.[79]

The key element of this rule is that *Pickering* offers protection to public employees when they speak on matters of public concern.[80] The Supreme Court held that this protection applies because public employees have expertise in matters of public concern, making their speech about those areas especially valuable.[81] By nature of their position as students, when students speak on school-related issues, they have a similar level of expertise. Protecting student speech any time a student speaks on a school-related issue, however, would be overly broad and lead to schools not being able to control their students appropriately. That is why I propose that the standard apply only to speech that is about issues that are both school-related *and* of public concern.

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[77] Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).
[78] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
[79] *Id.* at 573.
[80] *Id.* at 568.
[81] *Id.* at 571–72.

I. STUDENT SPEECH JURISPRUDENCE: *TINKER* AND ITS CARVE-OUTS

Student speech jurisprudence is notoriously convoluted.[82] Since *Tinker* was decided fifty years ago, the Supreme Court has established three carve-outs in *Fraser*,[83] *Hazelwood*,[84] and *Morse*.[85] If student speech is lewd or obscene,[86] school-sponsored,[87] or promotes illegal drug use,[88] it is unprotected by the First Amendment. *Fraser*'s holding is parallel to First Amendment law outside the school setting, which also does not protect obscene speech.[89] *Hazelwood* and *Morse* represent modifications based on the special characteristics of the school setting.[90] And yet, the Court was not united in making those decisions,[91] nor have lower courts found this framework simple to apply.[92]

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[82] *See* Doninger v. Niefhoff, 642 F.3d 334, 353 (2d Cir. 2011) ("The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges."); Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 690 (2010) ("A somewhat incoherent collection of cases governs student speech.").

[83] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

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

[85] Morse v. Frederick, 551 U.S. 393 (2007).

[86] *Fraser*, 478 U.S. at 685.

[87] *Hazelwood*, 484 U.S. at 273.

[88] *Morse*, 551 U.S. at 403.

[89] Roth v. United States, 354 U.S. 476, 481–85 (1957).

[90] *See Hazelwood*, 484 U.S. at 266 (finding that the rights of students "must be 'applied in light of the special characteristics of the school environment.'") (quoting Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); *Morse*, 551 U.S. at 406 ("[T]he "nature of [students' First Amendment] rights is what is appropriate for children in school.") (citation omitted).

[91] Justice Thomas lamented the Court's failure to clearly articulate when *Tinker* applies: "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not." *Morse*, 551 U.S. at 418 (Thomas, J., concurring).

[92] Courts have used a mix-and-match approach to student speech cases. *See, e.g.*, Lowery v. Euverard, 497 F.3d 584, 591 (6th Cir. 2007) (noting that "hate" is akin to obscene speech in discussing applicability of *Fraser* to student speech); Wildman *ex rel* Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 771–72 (8th Cir. 2001) (applying both *Tinker* and *Fraser* to student speech that used the word "bullshit"); Doninger v. Niefhoff, 642 F.3d 334, 354 (2d Cir. 2011) ("[I]t is not entirely clear whether *Tinker*'s rule (as opposed to other potential standards) applies to all student speech not falling within the holdings of *Fraser*, *Hazelwood*, or *Morse*."); Brown, *supra* note 23, at 331 ("Lower courts' vigilance in protecting the participatory dimensions of citizenship at school has been inconsistent, a deficiency likely traceable to changing cues from the Supreme Court's student speech cases."); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 657 (2011) (describing how courts have overly restricted student speech that expresses a "genuine opinion" that is hostile about school officials based on a "blended rationale" drawing on *Tinker* and *Fraser*).

In *Tinker*, the Supreme Court held that student speech that reasonably threatens to materially and "substantially interfere with the work of the school or impinge upon the rights of other students" may be censored.[93] This requires a showing that the censorship was "necessary to avoid material and substantial interference with schoolwork or discipline."[94] Most circuits have interpreted this to mean that if a substantial disruption is reasonably foreseeable, school officials may punish the speaker.[95] To constitutionally censor student speech, a school "must be able to 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."[96]

A. Tinker*'s Weakening*

Because of the subjectiveness of the substantial disruption rule, courts have ruled differently on almost identical fact patterns.[97]As a result, *Tinker*'s effectiveness in defending student free speech has decreased over time. Despite its holding that the Tinkers' protest was protected, and its iconic declaration that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[98] courts mostly cite *Tinker* for the principle that students have

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[93] *Tinker*, 393 U.S. at 509.
[94] *Id.* at 511.
[95] *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 394 (5th Cir. 2015); S.J.W. *ex rel* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 574 (4th Cir. 2011); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 218 (3d Cir. 2011); Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 38–39 (2d Cir. 2007).
[96] *Tinker,* 393 U.S. at 509.
[97] *See, e.g.*, West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (ban on wearing confederate flags upheld); Bragg v. Swanson, 371 F. Supp. 2d 814, 826–27 (S.D. W. Va. 2005) (ban on wearing confederate flags found unconstitutional); *see also* Nuxoll *ex rel.* Nuxoll v. Ind. Prairie Sch. Dist., 523 F.3d 668 (7th Cir. 2008) (finding a student's claim that the school could not prevent him from wearing a shirt with an anti-gay message in counter-protest of the Day of Silence likely to succeed); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (finding no constitutional violation when a student was suspended for wearing a shirt with an anti-gay message in counter-protest of the Day of Silence).
[98] *Tinker*, 393 U.S. at 506.

limited rights in schools.[99] The movement toward limiting student speech has been led by the Supreme Court in finding three broad carve-outs.[100] But the application of *Tinker* itself in lower courts has resulted in weak protections for students.

In *Pinard v. Clatskanie Sch. Dist. 6J*,[101] high school basketball players circulated a petition calling for their coach's resignation.[102] The players then refused to play at the next game and were dismissed from the team.[103] The Ninth Circuit declined to determine whether the players' boycott of the game was expressive conduct, concluding that even if it was expressive conduct, the boycott caused a substantial disruption because the game had to be played with replacement players.[104] This was a flawed ruling because the cancellation of a high school basketball game does not interfere with the education of other students or endanger the operation of the school as a whole. It does not necessarily even endanger the operation of the basketball program.

In *Doninger v. Niehoff*,[105] student Avery Doninger was Junior Class Secretary and organizer of a school-wide musical competition called Jamfest.[106] The event had to be rescheduled because the staff member who ran the lights and sound for the auditorium was unavailable on the planned day.[107] Interpreting the rescheduling of the event as a de facto cancellation, Avery spoke out in response in several ways, first by emailing a group

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[99] *See, e.g.*, J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 926 (3rd Cir. 2011) (citing *Tinker*, 393 U.S. at 506); Doninger v. Niehoff, 642 F.3d 332, 348 (2d Cir. 2011) ("*Tinker* itself provides substantial grounds for the school officials here to have concluded [they] had legitimate justification under the law for [punishing student speech].") (internal quotation and citation omitted); Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) (citing *Tinker*, 393 U.S. at 526 (Black, J., dissenting)); Bowler v. Town of Hudson, 514 F. Supp. 2d 168, 177 (D. Mass. 2007) (citing *Tinker*, 393 U.S. at 507).

[100] Forster, *supra* note 82, at 690 ("Although *Tinker*'s holding reads like a general rule, the Court has not treated it as such, and indeed has retreated from the holding in later student speech cases, generally upholding schools' power to regulate student speech.").

[101] 467 F.3d 755 (9th Cir. 2006).

[102] *Id.* at 760–61.

[103] *Id.* at 762.

[104] *Id.* at 769–70.

[105] 642 F.3d 334 (2d Cir. 2011).

[106] *Id.* at 339.

[107] *Id.*

of parents, students, and others encouraging their intervention,[108] then by posting on a personal blog informing her classmates about the situation.[109] School administrators received calls and emails about the perceived cancellation of the event.[110] Some students gathered outside the principal's office with the intent to stage a sit-in, but dispersed as soon as Avery asked them to.[111] The blog post came to the attention of the administration and Avery was prohibited from running for Senior Class Secretary.[112] At the assembly during which candidates for student council made campaign speeches, students wore shirts saying "Team Avery," "Support LSM Freedom of Speech" and "RIP Democracy" in protest of the administration's preventing Avery's candidacy.[113]

The Second Circuit held that substantial disruption was foreseeable because it was reasonably foreseeable that the speech contained in Avery's blog post would reach campus.[114] There has been much discussion over whether speech taking place on or off-campus should affect *Tinker*'s applicability.[115] This article will not comment on that debate, except to point out that in *Doninger*, the Second Circuit did not just decide that *Tinker* applied because it was reasonably foreseeable that the speech would reach campus, it also factored that finding into the substantial disruption analysis.[116] In other words, the Circuit held that it being reasonably foreseeable that the post would reach campus meant both that the substantial disruption standard was the correct one to apply *and* that the post was in fact substantially disruptive.[117]

In a discussion of whether there was a substantial disruption in an earlier decision in the *Doninger* case, the Second Circuit held that it was reasonably foreseeable that "administrators and teachers would be further diverted from

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[108] *Id.* at 339–40.
[109] *Id.* at 340–41.
[110] *Id.* at 340–41.
[111] *Id.* at 341.
[112] *Id.* at 342.
[113] *Id.* at 343.
[114] *Id.* at 348.
[115] *See, e.g.*, J.S. ex rel. Snyder v. Blue Mt. Sch. Dist., 650 F.3d 915, 931 n.8 (3d Cir. 2011); Waldman, *supra* note 92, at 654–56.
[116] *Doninger*, 642 F.3d at 348.
[117] *Id.*

their core educational responsibilities by the need to dissipate misguided anger or confusion over purported cancellation" of the student event.[118] In the subsequent opinion's evaluation of the reasonable foreseeability of substantial disruption, the Circuit pointed to the phone calls and emails administrators received about Jamfest, the fact that those administrators were taken away from other duties to respond to those queries, students being upset and gathering outside the principal's office, and that Avery and three other students were called out of class to the principal's office as evidence of substantial disruption.[119] Administrators taking time to respond to community concern about a school issue, multiple students being in the same place in the school hallway and shortly dispersing, and four students being temporarily removed from class, which presumably carried on without them. This is a much lower standard than the one contemplated in *Tinker*.[120]

Refocusing students from anger or confusion-inducing stimuli is a routine part of classroom management.[121] That one of these stimuli could be sourced to student speech does not mean that substantial disruption occurred. This principle should apply to administrators as well. In *Doninger*, the Second Circuit said administrators being forced to respond to calls and emails from community members was a substantial disruption.[122] Responding to calls and emails is a normal function of school administrators. Even if the volume of calls and emails was particularly high, it would not prevent teachers from teaching and students from learning. To cause a substantial disruption,

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[118] Doninger v. Niehoff, 527 F.3d at 51–52 (2d Cir. 2008), *aff'd in part and rev'd in part*, 642 F.3d 334 (2d Cir. 2011).
[119] *Doninger*, 642 F.3d at 349.
[120] *See* Waldman, *supra* note 92, at 652 ("With regard to disruption . . . courts tend to use this term loosely . . . sometimes implying that any 'disrespectful' or 'insubordinate' speech is inherently disruptive . . . . Although it may be true that such speech typically causes some degree of disruption, it is important to keep in mind *Tinker*'s focus on '*substantial* disruption of or *material* interference with school activities . . . .") (emphasis in original).
[121] Robert J. Marzano & Jana S. Marzano, *The Key to Classroom Management*, 61 BUILDING CLASSROOM RELATIONSHIPS 6 (2003), http://www.ascd.org/publications/educational-leadership/sept03/vol61/num01/The-Key-to-Classroom-Management.aspx ("[S]eminal research points to the importance of establishing rules and procedures for general classroom behavior, . . . transitions and interruptions, . . . and beginning and ending the period of the day.") (citations omitted).
[122] *Doninger*, 642 F.3d at 349.

the call and email volume should have to be so high it actually impedes the functioning of the school. Speech may impel teachers and administrators to perform an essential part of their jobs; it rarely would inhibit them from doing their jobs altogether. The inclusion of the word "substantial" in *Tinker* should be interpreted to mean an effect on the classroom beyond the ordinary disruptions that occur in a roomful of teenagers.[123]

B. Vanishing the Language in Tinker

Another way in which courts have neutralized *Tinker*'s protections is by reading "substantial" out of its holding. Many courts complete the *Tinker* analysis by simply identifying potential sources of any disruption, lending no words to whether or not that disruption is substantial.[124]

The *de facto* elimination of "substantial" from the *Tinker* holding does not just confuse lawyers and judges. There are real-world consequences for students and school officials. The AWSA guidelines on handling student walkouts informed its members: "[S]tudents have First Amendment rights, and school officials may not censor student speech unless it becomes *disruptive* to the educational process. Moreover, a school may regulate speech when it can reasonably forecast that the speech will cause a *material disruption* at school or *interfere* with the rights of others."[125] At first glance, this looks like a simple misquote of *Tinker*. But the misquote is not benign—it permits censorship for mere disruption and regulation for mere interference.

The Sixth Circuit similarly read essential language out of a *Tinker* holding in *Lowery v. Euverard*.[126] In justifying the coach's dismissing the players before they presented their petition to

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[123] Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 400 (5th Cir. 2015) (Jolly, J., concurring) ("When *Tinker* refers to a disruption, it is saying that student ideas may be expressed on campus unless they are so controversial that the expression creates a disruption.").

[124] *See, e.g.*, J.S. ex rel. Snyder v. Blue Mt. Sch. Dist., 650 F.3d 915, 945 (3d Cir. 2011) (Fisher, J., dissenting); *Doninger*, 642 F.3d at 50–52; Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 767 n.17, 768 (9th Cir. 2006). One court referred to this type of analysis as a "somewhat softened form" of *Tinker*. Schoenecker v. Koopman, 349 F. Supp. 3d 745, 752 (E.D. Wis. 2018).

[125] Piontek, *supra* note 37 (emphasis added).

[126] 497 F.3d 584, 596 (6th Cir. 2007).

school administrators, the Sixth Circuit said "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* 'require certainty that disruption will occur.'"[127] *Absolute* certainty is not required; *reasonable* foreseeability *is*.[128]

Comparing laypeople's understanding of a legal rule with how courts understand it can be a helpful way of determining whether it is being interpreted cogently. Attempting to explain *Tinker* in advance of the Parkland walkouts, one journalist wrote:

> Does a mass walkout qualify as a 'substantial' disruption in the school? That's a call school officials would have to make. But they would have to show that the walkout made it impossible for school staff to do their jobs or for teachers to continue their lessons with those who stayed in class.[129]

This is a much higher standard than has been applied by courts. To bring the reality more in line with our purported law, courts need a revised student speech framework.

II. PUBLIC EMPLOYEE SPEECH RIGHTS

Pickering did not set out standards for how to weigh the interests between public employers and employees generally. But it did set out that the petitioner's interests outweighed the school's interests.[130] The petitioner's interests included the general interest in "free and unhindered debate on matters of public importance," and the contribution of their school-specific expertise to that debate.[131] Importantly, the Court pointed out that teachers, as a class, are more likely to have expertise relevant

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[127] *Id.* at 591–92 (quoting *Pinard*, 467 F.3d at 767 n. 17).
[128] *See id.*
[129] Alexia Fernández Campbell, *Students Have a Right to Protest Gun Violence, but They Can't Disrupt Class*, VOX (Mar. 14, 2018, 8:55 A.M.), https://www.vox.com/2018/3/13/17110210/national-school-walkout-free-speech-guns.
[130] Pickering v. Bd. Educ., 391 U.S. 563, 573 (U.S. 1968).
[131] *Id.* at 572–73.

to how school funds are allocated than non-teachers.[132] The Court held that because their contributions to the free marketplace of ideas on a school-related issue are especially valuable, they must be especially protected.[133]

In *Connick v. Myers*,[134] the Supreme Court held that *Pickering* balancing may only be done when the employee's speech is on a matter of public concern.[135] The Court explained that speaking "as an employee upon matters only of personal interest" was not protected.[136] Following *Connick*, *Pickering* would be applied with a two-step analysis. First, was the speech about a matter of public concern?[137] Second, did the government employer's interest outweigh the employee's free speech interest?[138] In applying the first prong, the Court advised that lower courts should examine "the content, form, and context of a given statement, as revealed by the whole record."[139] More specifically, matters of "political, social, or other concern to the community," but not matters "only of personal interest," are of public concern.[140]

Speech that is not about a matter of public concern includes "'bickering,' 'running disputes,' or a personal grievance."[141] In a school context, students' opinion that a particular teacher is bad at teaching would not be a matter of public concern, but an opinion that there should be more stringent qualifications for being a public school teacher would be.[142]

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[132] *Id.* at 572.
[133] *Id.* at 571–72.
[134] 461 U.S. 138 (1983).
[135] *Id.* at 147.
[136] *Id.*
[137] *Id.* at 146–48.
[138] *Id.*
[139] *Id.* at 147–48.
[140] *Id.* at 146–47.
[141] Joan M. Eagle, *First Amendment Protection for Teachers Who Criticize Academic Policy: Biting the Hand That Feeds You*, 60 CHI.-KENT L. REV. 229, 259 (1984) (citation omitted).
[142] The Court refined the public employee speech framework one more time in *Garcetti v. Ceballos*, 47 U.S. 410 (2006). In *Garcetti* the Court held that for *Pickering* to apply, speech must be about a matter of public concern, *and* the speaker must be speaking as a citizen rather than as an employee. *Garcetti*, 47 U.S. at 418.

A. Traces of the Pickering *Framework in School Settings*

Several courts have grappled with the idea of "importing" *Pickering* into *Tinker*.[143] However, whenever considered, the importation involves narrowing *Tinker* to apply only to matters of public concern.[144] This is a different modification to the doctrine from the one proposed here. In *Pinard*, the district court analogized the players' situation to public employees and applied *Connick* to find that the petition was unprotected because it was about a private grievance with no "political dimension," rather than a matter of public concern.[145] The Ninth Circuit reversed, finding that *Connick* was not applicable.[146]

In *Lowery v. Euverard*,[147] high school football players circulated a petition among the team that said "I hate Coach Euvard [sic] and I don't want to play for him."[148] A few days later, the coach learned about the petition and dismissed several players from the team.[149] The majority opinion hinged on the different set of rights and institutional interests that come with being a student athlete, as opposed to a student.[150] The Sixth Circuit clarified that "[t]his case [was] not primarily about [the] Plaintiffs' right to express their opinions, but rather their alleged right to belong to the Jefferson County football team on their own terms."[151] With this in mind, the majority analogized student-athletes to public employees and applied a *Pickering* balancing test that incorporated the *Connick* public concern requirement.[152]

The District Court of Connecticut used public employee case law on retaliation to evaluate whether the plaintiff had been

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[143] Doninger v. Niehoff, 642 F.3d 334, 349–50 (2d Cir. 2011); Lowery v. Euverard, 497 F.3d 584, 587–88 (6th Cir. 2007).
[144] *See, e.g.*, Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 766 n.16 (9th Cir. 2006) ("We did not, however, hold that *Tinker* protected only political speech or speech that touches upon a matter of public concern.").
[145] *Id.* at 763.
[146] *Id.* at 766, 771–72.
[147] 497 F.3d 584 (6th Cir. 2007).
[148] *Id.* at 585.
[149] *Id.* at 586.
[150] *Id.* at 587.
[151] *Id.* at 589.
[152] *Id.* at 587–88, 596–99; *see also id.* at 601 (Gilman, J., concurring) (discussing the application of *Connick*).

subjected to viewpoint discrimination in *Doninger*.[153] The Second Circuit declined to adopt that line of reasoning,[154] but did adopt the Sixth Circuit's reasoning in *Lowery*, saying that students who speak as students involved in extracurricular activities get banned from those activities (instead of speaking as just students) do not enjoy full protection under *Tinker*.[155] In other words, the Second and Sixth Circuits found that students' speech rights do not fully extend to the extracurricular sphere.[156] At the same time, however, both courts grafted the *limits* of *Tinker* onto the extracurricular context.[157]

B. Public Concern in School-Related Speech

Courts have generally shied away from applying *Pickering* to student speech in a way that would require the student's speech be about a matter of public concern to be protected. But students have made arguments claiming protection because they spoke on matters of public concern, and courts have commented on whether student speech touches on such matters.

In *Morse*, Justices Alito and Kennedy joined the majority's opinion expressly "on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . . ."[158] Justices Alito and Kennedy saw the need to protect the ability of students to engage in discourse about matters of public concern.[159] Notably, the Third Circuit has interpreted this limiting principle as controlling.[160]

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[153] Doninger v. Niehoff, 594 F. Supp. 2d 211, 219 (D. Conn. 2009) (citing Locurto v. Giuliani, 447 F.3d 159, 179 (2d Cir. 2006)), *rev'd*, 642 F.3d 334 (2d Cir. 2011).
[154] *Doninger*, 642 F.3d at 349–50.
[155] *Id.* at 351 ("Here, however . . . it was objectively reasonable for school officials to conclude that Doninger's behavior was potentially disruptive of student government functions . . . .").
[156] *See id.*; *Lowery*, 497 F.3d at 589.
[157] *See Doninger*, 642 F.3d at 351; *Lowery*, 497 F.3d at 589.
[158] Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring).
[159] *Id.*
[160] *See, e.g.*, B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 309–14 (3d Cir. 2013) (discussing "linchpin concurrences"); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 927 (3d Cir. 2011) (emphasizing the narrowness of the *Morse* holding as stated by Justice Alito's concurrence).

As detailed above, in *Pinard* the Ninth Circuit declined to apply *Pickering* to students.[161] However, the Ninth Circuit was mostly concerned that there was no precedent in which *Pickering* was applied to students, and the Ninth Circuit in fact weighed in on whether the students' complaints about their basketball coach constituted speech on a matter of public concern:

> But even assuming *Tinker* were to include a public concern requirement, the district court erred in concluding that the plaintiffs' speech was 'merely a private grievance.' The plaintiffs' criticisms of Baughman were related to various issues of 'concern to the community,' including the school's performance of its duties to supervise its teachers, monitor extracurricular activities and provide a safe and appropriate learning environment for its students. These are matters of public concern.[162]

In *Lowery*, the Sixth Circuit applied *Pickering* because it held that a student-athlete was analogous to a public employee.[163] It did not look at whether the team was speaking on a matter of public concern,[164] but it did imply that the importance of the content of student speech could affect how the speech would be treated.[165]

In *Posthumus v. Board of Education*,[166] the court similarly commented on the plaintiff's speech against a teacher: "Moreover, Posthumus' speech did not concern a political issue or a matter of public concern, as in *Tinker*, but instead was directed at Posthumus' private grievance regarding Vanderstelt's confiscation of Posthumus' graham crackers."[167]

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[161] Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 765–66 (9th Cir. 2006).
[162] *Id.* at 767 n.18 (citation omitted).
[163] Lowery v. Euverard, 497 F.3d 584, 596–97 (6th Cir. 2007).
[164] *Id.* at 598 n.5 ("Our holding in no way rests on a determination of whether Plaintiffs' speech touched on a matter of public or private concern.").
[165] *Id.* at 600 ("Nor was this a whistleblower situation, where players were disciplined for reporting improprieties.").
[166] 380 F. Supp. 2d 891 (W.D. Mich. 2005).
[167] *Id.* at 902 (citation omitted).

In *Kyung Hye Yano v. City Colleges of Chicago*,[168] the district court asserted that "[t]he functional compromise hashed out in *Connick/Pickering* does not apply to student speech."[169] However, it also found that "student speech in school that relates solely to matters of private concern is subject to lower protections than speech on matters of public concern . . . ."[170]

In *Bell v. Itawamba County School Board*,[171] a student wrote and recorded a rap song that alleged sexual misconduct on the part of two school coaches.[172] The rap included lyrics about the student perpetrating violence against the coaches in retaliation for their misconduct. [173] The student posted the rap on Facebook and YouTube, expressed hope that the songs would be heard by the administration and something would be done about the coaches' misconduct, and at trial testified that the rap "addressed a matter of public concern."[174] The majority did not address this argument beyond refuting Judge Dennis's dissent, which argued strongly for protection of the rap because it addressed a matter of public concern.[175]

Judge Dennis wrote that the public concern test used in *Snyder v. Phelps*[176] of whether "the overall thrust and dominant theme of [the song] spoke to broader public issues" was the appropriate one, and that Bell's rap satisfied the test.[177] Judge Dennis explained that, even when presented in unpalatable forms, speech on matters of public concern needs protection: "'Freedom of speech' is thus a hollow guarantee if it permits only praise or state-sponsored propaganda. Freedom of speech exists exactly to protect those who would criticize, passionately and vociferously, the actions of persons in power."[178]

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[168] No. 08 CV 4492, 2013 U.S. Dist. LEXIS 101121 (N.D. Ill. Jul. 19, 2013), *aff'd on other grounds by* 651 F. App'x. 543 (7th Cir. 2016).
[169] *Id.* at *23.
[170] *Id.*
[171] 799 F.3d 379 (5th Cir. 2015).
[172] *Id.* at 383–84.
[173] *Id.*
[174] *Id.* at 385, 387.
[175] *Id.* at 404 (Dennis, J., dissenting).
[176] 562 U.S. 443, 452 (2011).
[177] *Bell*, 799 F.3d at 409.
[178] *Id.* at 405.

In defining what qualifies as a matter of public concern, Judge Dennis again cited *Snyder*, which provides that:

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.[179]

In *Doninger*'s discussion of whether *Tinker* applied, the Second Circuit noted what it called "salient differences" between Avery's speech and the protest of the *Tinker* plaintiffs.[180] This passage was vague on what exactly it was that distinguished the two cases, seeming to imply both the number of students involved and the importance of the issue were factors.[181] This inexact analysis resulted, somehow, in a finding of qualified immunity for the school officials: "In light of these significant differences . . . an official in Defendants' position who thought that a less demanding standard of potential disruption might apply could not be said to have an unreasonable understanding of what the law requires."[182] It is true that a reasonable principal might think that a student overreacting to the rescheduling of Jamfest would be less constitutionally protected than a political protest. But, under the current case law, that principal would have been mistaken. If principals are allowed to make these sorts of content-based distinctions, and courts are not going to correct them, a new standard should be employed that reflects the actual needs of schools.

III. PROPOSED REVISION TO THE APPLICABLE LEGAL STANDARD

To review, the public employee speech framework mandates that when a public employee is speaking as a citizen (*Garcetti*) on a matter of public concern (*Connick*), the court

[179] *Id.* at 406–07 (quoting *Snyder*, 562 U.S. at 453).
[180] Doninger v. Niehoff, 642 F.3d 334, 354 (2d Cir. 2011).
[181] *Id.*
[182] *Id.*

performs a *Pickering*- style balancing of interests.[183] The factors of a *Pickering* balance are not set in stone because the government has different interests in different employment contexts, but *Pickering* showed that courts should strongly protect free speech rights and value the expertise public employees have on matters of public concern pertaining to their position.[184] The student speech framework mandates that, unless the speech advocates illegal drug use, is school-sponsored, or is lewd or obscene, students retain full First Amendment rights when their speech does not cause or cannot be reasonably foreseen to cause substantial disruption or material interference with the rights of others at school.[185] That said, courts have broadly read "substantial" and "material" out of this standard.[186]

I propose that courts recommit to *Tinker* by incorporating a new bright-line rule about what qualifies as substantially disruptive in conjunction with public employee-speech-style limitations on the applicability of that rule. The new rule would say that passive forms of protest are per se not substantially disruptive, and the limiting factor would be whether the speech pertains to a school-related matter of public concern. [187] Speech about other matters would still be evaluated under *Tinker*.[188]

Protest is passive when it takes a form that does not interfere with the routine conduct of others within the forum in which it takes place. For example, the Supreme Court held that civil rights protesters were protected when they engaged in a silent sit-in in a segregated library because, in a library, maintaining a "silent and reproachful presence" was an "appropriate type[] of action."[189] The action was considered appropriate because "no claim [could] be made that use of the library by others was disturbed by the demonstration."[190] This case was cited by the *Tinker* court in its discussion of non-

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[183] *See supra* Part II.
[184] *See supra* text accompanying notes 130–142.
[185] *See supra* Part I.
[186] *See supra* Part Section I.B.
[187] *Cf.* Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 37 (10th Cir. 2013) ("When . . . speech is neither passive nor silent, restrictions are more readily (but not always) upheld.").
[188] J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 926 (3rd Cir. 2011) ("Although *Tinker* dealt with political speech, the opinion has never been confined to such speech.").
[189] Brown v. Louisiana, 383 U.S. 131, 142 (1966).
[190] *Id.*

disruptive, protected speech.[191] Student walkouts are passive because they do not necessarily disrupt the learning of students who choose to remain in class. Other students may stay in class and continue to be taught. Under the proposed standard, Courts would look at the facts of the protest itself to determine whether that protest is passive or substantially disruptive. This would represent a departure from courts' current application of *Tinker*, in which tenuous connections are drawn between protest and disruption and interference because of the hypothetical undermining of authority officials might have reasonably foreseen. Passive protests would be protected under *Tinker* as per se not substantially disruptive.

A protest being protected because it is passive is a reasonable interpretation of the *Tinker* rule as is,[192] but as detailed above, courts have not adhered to a strict interpretation of the "substantial disruption" and "material interference" language.[193] To account for schools' interests that courts have invoked in reading *Tinker* broadly,[194] I propose limitations on the applicability of the new standard. Much as public employees enjoy First Amendment protection only when they are speaking as citizens on matters of public concern, passively protesting students would enjoy First Amendment protection when speaking on matters of public concern that are school-related.

In sum, the test would have two prongs. First, courts would determine if the manner of the speech was passive. If it was not, courts would apply a substantial disruption analysis under *Tinker*. If it was passive, courts would then determine if the speech was about a school-related matter of public concern. If it was not, courts would still apply *Tinker*. If it was, the speech would be protected under the First Amendment.

This two-pronged limitation will function much as *Connick* and *Garcetti* do in limiting the application of *Pickering*.

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[191] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).
[192] *See J.S.*, 650 F.3d at 943 ("The speech at issue in *Tinker* did 'not concern aggressive, disruptive action or even group demonstrations . . . . [It was] a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.'") (quoting *Tinker*, 393 U.S. at 508).
[193] *See supra* Part I.
[194] *See* Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) (explaining why it is important for school administrators to maintain authority over students).

Pickering already limits public school teachers much as *Tinker* was intended to limit public school students.[195] *Pickering* requires an interest on the part of the school that is "significantly greater" than the employee's free speech right.[196] *Tinker* fits within *Pickering* easily because a school's interest in maintaining discipline *is* only significantly greater than the student's free speech interest when it is reasonably foreseeable that it will cause a material interference or substantial disruption.

Students have a particularly important role to play in the national dialogue around school-related issues. The Supreme Court said in *Citizens United v. FEC*[197] that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[198] Officials must be held accountable to those whom their policies impact the most directly and—on school-related issues-—those most impacted are students. Concerning student protest of gun violence, as one journalist wrote, "[p]erhaps now is the time for students, who are the most affected by school shootings, to contribute their own ideas for change."[199]

The free speech interests of the teacher in *Pickering* were just as strong as the free speech interests of the students who participated in the Parkland walkouts. The interests of society are just as strong as well. According to the marketplace theory, the First Amendment protects freedom of speech because open competition between ideas allows the best ones to come to the fore and inform policy.[200] Under this theory, by not allowing students to contribute to the marketplace, we are inhibiting its

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[195] In describing the development of the *Pickering* doctrine, one author explained that "the Court is generally willing to tolerate a *substantial interference* in the working relationship between an employee and employer before the employee's speech will be considered unprotected." Eagle, *supra* note 141, at 235 (emphasis added). *See also* Trotman v. Bd. Trustees Lincoln Univ., 635 F.2d 216, 230 (3d Cir. 1980), *cert. denied sub nom* Lincoln Univ. v. Trotman, 451 U.S. 986 (1981) (adopting the *Tinker* standard in evaluating a faculty member's First Amendment claim).

[196] Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

[197] 558 U.S. 310 (2010).

[198] *Id.* at 339.

[199] Schumaker, *supra* note 23.

[200] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Gitlow v. New York, 268 U.S. 652, 673 (Holmes, J., dissenting) ("Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.").

usefulness by stifling the voices of the actors with the most relevant expertise to the school environment.[201]

Determining whether an issue is school-related should not be difficult for courts. "[W]hen the type of violence threatened does not implicate 'the special features of the school environment,' *Tinker*'s 'substantial disruption' standard is the appropriate vehicle for analyzing such claims."[202] If, as Justice Alito said in *Morse*, courts can find that the content of speech uniquely threatens schools,[203] courts should similarly be able to find that the content of speech uniquely comments on schools.

IV. CONCLUSION

In setting a new legal standard, it is important to consider how easily it will be applied by non-judicial actors. As Justice Breyer wrote in *Morse*, "[t]eachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence."[204] Determining whether a protest is passive is not a complicated legal determination like determining a reasonably foreseeable "substantial disruption" has turned out to be. Teachers and school administrators are in the best position to determine whether they can continue teaching in the face of a protest.

In preparing for the Parkland walkouts, schools knew what to expect on March 14, 2018: at 10 o'clock in the morning,

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[201] Students are like experts when it comes to school-related issues because they spend their days attending school. As Brown puts it, "[s]tudents are an underutilized source of 'critical local knowledge,' and their aired concerns and grievances offer data about both a school's climate and practices." Brown, *supra* note 23, at 312 (citation omitted). She also points out that teachers, who, like students, are particularly well-positioned to act as whistleblowers about school-related issues, are not well-protected by the First Amendment after *Garcetti*. *Id.* at 308. Therefore, the ability of students to speak about school-related issues is even more crucial.

[202] Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 392 (quoting Morse v. Frederick, 551 U.S. 393, 425 (2007) (Alito, J., concurring)).

[203] *Morse*, 551 U.S. at 425 (Alito, J., concurring).

[204] *Id.* at 427 (Breyer, J., concurring in part and dissenting in part).

students would walk out of class, for seventeen minutes.[205] Instead of grappling with whether to enforce school rules prohibiting cutting class against students engaging in political protest, or trying to ascertain if classrooms partially emptying for seventeen minutes amounted to a "substantial disruption," schools should have been permitted to know from the outset that allowing the walkouts to proceed would not be unconstitutional. Instead of making ambiguous announcements to their communities,[206] issuing confusing guidelines to their staff,[207] and giving detention to large portions of their student body,[208] under the proposed standard schools could have permitted their students to participate in an important national conversation. And it is essential that students be permitted to participate in conversations like the one around gun violence in schools. *Tinker* is meant to prevent students from experiencing substantial disruptions to their education. Meanwhile, the constant threat of school shootings has become its own substantial disruption to students' education.[209] The proposed standard would enable students to contribute their own ideas to discussions about issues where they are the ones with the most at stake.

No court has applied *Tinker* in the way proposed here. Courts have rejected applying *Pickering* to students as a limitation within *Tinker*. But the proposed standard would instead use a *Pickering*-style threshold inquiry to selectively offer heightened protection in accordance with *Tinker*. Courts have recognized the value of student speech on matters of public concern. History has shown us the value of that speech when those matters are school-related. The doctrine must reflect and account for these paramount interests.

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[205] Isabella Gomez & Amanda Jackson, *Women's March organizers are planning a national student walkout to protest gun violence*, CNN (Feb. 18, 2018, 11:15 P.M.), https://edition.cnn.com/2018/02/18/us/national-student-walkout-womens-march-trnd/index.html (quoting @womensmarch, TWITTER (Feb. 16, 2018, 2:11 P.M.), https://twitter.com/womensmarch/status/964578070307987456).
[206] *See, e.g.*, Price, *supra* note 15.
[207] *See, e.g.*, Piontek, *supra* note 37.
[208] *See, e.g.*, Lasker, *supra* note 36.
[209] *See* Wesley Lowery, *He survived the Florida school shooting. He vows not to return to classes until gun laws change.*, WASH. POST (Feb. 18, 2018, 7:06 P.M.), https://www.washingtonpost.com/news/post-nation/wp/2018/02/18/students-organize-to-fight-for-gun-law-changes/.