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# Hush Don't Say a Word: Safeguarding Student's Freedom of Expression in the Trump Era

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## **HUSH DON'T SAY A WORD: SAFEGUARDING STUDENTS' FREEDOM OF EXPRESSION IN THE TRUMP ERA**

**Laura Rene McNeal\***

### ABSTRACT

The controversy surrounding NFL player Colin Kaepernick's act of kneeling during the national anthem in protest of police brutality against people of color continues to permeate public discourse. In March 2017, President Trump referenced Colin Kaepernick's symbolic act during a rally in Louisville, Kentucky, in an effort to illustrate his strong opposition to anyone kneeling during the national anthem. In this speech, President Trump stated that although many NFL franchise owners were interested in signing Colin Kaepernick, many were afraid of receiving a nasty tweet from him. Likewise, in another speech, President Trump stated, "I think it's a great lack of respect and appreciation for our country and I really think they should try another country, see if they like it better." Although President Trump is referring to professional athletes in both of the aforementioned public statements, what about the thousands of students who participated in the nationwide walkout to protest gun violence in the aftermath of the Parkland school shooting? Or the hundreds of youth football players that are kneeling during the national anthem in an effort to mimic their professional idols?

This article takes the position that students have the constitutional right under the First Amendment to engage in expressive activities, political speech, and symbolic speech without interference or censor

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from the state. Certainly, schools can educate, but they cannot indoctrinate based on a prescribed orthodoxy. Therefore, any attempts to limit or discipline students from participating in expressive activities, such as social protests, in K-12 schools that does not cause a material disruption to the learning environment is unconstitutional. Currently, students' First Amendment rights in K-12 schools reside in a sea of ambiguity where the Supreme Court has acknowledged that students are considered 'persons' under our Constitution and thus entitled to fundamental rights, such as freedom of expression, yet in the same vein marginalize those same rights in subsequent decisions by permitting school authorities to limit freedom of speech under certain circumstances. This article offers a path toward safeguarding students' First Amendment rights to engage in expressive activities, political speech and symbolic speech in K-12 schools by amending existing anti-*Hazelwood* statutes to explicitly include protections for student social protests, as long as such conduct does not cause a material disruption to the school learning environment. Furthermore, the proposed amendment to anti-*Hazelwood* statutes will limit the reach of *Tinker's* Material Disruption Standard so that school officials do not have unbridled discretion to censor student expression.

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## INTRODUCTION

“NFL owners don’t want to pick him up because they don’t want to get a nasty tweet from Donald Trump . . . [the American people] like it when people actually stand for the American flag.”<sup>1</sup> Trump Rally, Louisville, Kentucky.

The controversy surrounding NFL player Colin Kaepernick’s act of kneeling during the national anthem in protest of police brutality against people of color continues to permeate public discourse.<sup>2</sup> In March 2017, President Trump referenced Colin Kaepernick’s symbolic act during a rally in Louisville, Kentucky, to illustrate his strong opposition to anyone kneeling during the national anthem.<sup>3</sup> In this speech, President Trump stated that although many NFL franchise owners were interested in signing Colin Kaepernick, many were afraid of receiving a nasty tweet from the President.<sup>4</sup> A recent report substantiated President Trump’s beliefs, revealing that several NFL teams were interested in signing Colin Kaepernick to their rosters but feared the “Trump Effect,” which is the backlash that may result if President Trump sends a tweet condemning the NFL owner’s

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1. John Wagner, *Trump Takes Another Shot at Quarterback Who Wouldn't Stand for National Anthem*, WASH. POST (Mar. 20, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/trump-takes-a-renewed-shot-at-quarterback-who-wouldnt-stand-for-national-anthem/?noredirect=on&utm\\_term=.eac6f11a6c10](https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/trump-takes-a-renewed-shot-at-quarterback-who-wouldnt-stand-for-national-anthem/?noredirect=on&utm_term=.eac6f11a6c10) [https://perma.cc/56M3-WQAQ].

2. John Branch, *National Anthem Protests Sidelined by Ambiguity*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/sports/nfl-national-anthem-protests.html> [https://perma.cc/7CCL-JKBN].

3. Wagner, *supra* note 1.

4. Live On-Air News, *President Trump Takes Shot at Colin Kaepernick During Louisville Rally*, YOUTUBE (Mar. 20, 2017), <https://www.youtube.com/watch?v=4hyI5R3FCfQ> [https://perma.cc/M9S7-C6X4].

decision.<sup>5</sup> Likewise, in another speech, President Trump stated, “I think it’s a great lack of respect and appreciation for our country[,] and I really said they should try another country, see if they like it better.”<sup>6</sup> Although President Trump is referring to professional athletes in both of the aforementioned public statements, what about the thousands of students who participated in the nationwide walkout to protest gun violence in the aftermath of the Parkland school shooting?<sup>7</sup> Or the hundreds of youth football players who are kneeling during the playing of the national anthem at high school athletic events in an effort to mimic their professional idols?<sup>8</sup> Should these youth be in fear of being the subject of a disapproving tweet from President Trump? Should they, too, consider living in another country? Should high school students in public schools have the same constitutional freedom-of-expression rights to engage in expressive activities, political speech, and symbolic speech as adults? This article addresses these crucial legal questions.

In today’s polarizing political climate, youth are choosing to take a more prominent role in social activism through their political speech, expressive activities, and symbolic conduct.<sup>9</sup> For example, students

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5. See Joe DePaolo, *‘A Desperate Act’: Watch Skip Bayless Condemn Trump for Taking Shots at Colin Kaepernick During Rally*, MEDIATE (Mar. 21, 2017, 2:31 PM), <http://www.mediaite.com/online/a-desperate-act-watch-skip-bayless-condemn-trump-for-taking-shots-at-colin-kaepernick-during-rally/> [https://perma.cc/UUB5-CVE7].

6. Jordan Heck, *Donald Trump: Colin Kaepernick, Other Protesters in NFL, Should Leave the Country*, SPORTINGNEWS (Sept. 12, 2016), <http://www.sportingnews.com/us/nfl/news/donald-trump-nfl-players-protest-on-911-marcus-peters-dolphins-seahawks/1x6muxaepfnyw1vxy2ywylseoa> [https://perma.cc/HB2R-X6VF].

7. Peter Weber, *Students Nationwide Plan to Walk Out of Class Today to Protest Gun Violence*, WEEK (Mar. 14, 2018), <http://theweek.com/speedreads/760867/students-nationwide-plan-walk-class-today-protest-gun-violence> [https://perma.cc/722V-QFAN]. Schools are mixed on whether they will support or discipline. See *id.* The ACLU says the schools “can discipline students for leaving class [without permission] to protest but [cannot] make the punishment any harsher because [of the] political nature of the walkout.” *Id.*

8. Bob Cook, *Youth Athletes, Again, Take a Knee During National Anthem*, FORBES (Sept. 26, 2017, 12:28 AM), <https://www.forbes.com/sites/bobcook/2017/09/26/youth-athletes-again-take-a-knee-during-national-anthem/#5ae9ee0e708e> [https://perma.cc/Z4L9-UFK5].

9. Ashraf Khalil & Calvin Woodward, *Thousands Gather Across U.S. to March for Gun Control and Spark Activism*, DENVER POST (Mar. 24, 2018, 8:52 AM), <https://www.denverpost.com/2018/03/24/thousands-gather-gun-control-us/> [https://perma.cc/F5LR-3QUX] (“Summoned by high school students swept up in school violence, thousands swarmed into the nation’s capital and cities across America on Saturday to march for gun control and ignite political

who survived the tragic school shooting at Marjory Stoneman Douglas High School in Parkland, Florida, in which seventeen students were killed, organized a national school walkout in protest of gun violence.<sup>10</sup> This heroic show of activism by students led to the national March for Our Lives rally in our nation's capital for gun control legislation.<sup>11</sup> Similarly, high school student athletes around the country are kneeling during the national anthem in protest of police brutality against people of color.<sup>12</sup> However, unlike Colin Kaepernick, their symbolic expression often has immediate adverse consequences. For example, Mike Opong, a football player at Doherty High School in Worcester, Massachusetts, received a one-game suspension for kneeling during the national anthem in solidarity with Colin Kaepernick to protest police brutality against people of color.<sup>13</sup> Similarly, another student, Dylan Bruton, was suspended from Bishop Gorman High School in Las Vegas, Nevada, and placed on a disciplinary contract for kneeling during the national anthem.<sup>14</sup> Although these two high school athletes are located in different geographic regions of the country, they both represent the disturbing trend of school leaders infringing on students' freedom of

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activism among the young.”); 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/RP3V-YU7N>] (“Even after a year of near continuous protesting—for women, for the environment, for immigrants and more—the emergence of people not even old enough to drive as a political force has been particularly arresting, unsettling a gun control debate that had seemed impervious to other factors.”).

10. Peter Jamison et al., *‘Never again!’ Students Demand Action Against Gun Violence in Nation’s Capital*, WASH. POST (Mar. 24, 2018), [https://www.washingtonpost.com/local/march-for-our-lives-huge-crowds-gather-for-rally-against-gun-violence-in-nations-capital/2018/03/24/4121b100-2f7d-11e8-b0b0-f706877db618\\_story.html?utm\\_term=.fa4708207683](https://www.washingtonpost.com/local/march-for-our-lives-huge-crowds-gather-for-rally-against-gun-violence-in-nations-capital/2018/03/24/4121b100-2f7d-11e8-b0b0-f706877db618_story.html?utm_term=.fa4708207683) [<https://perma.cc/L4T3-3LPJ>] (“Hundreds of thousands of demonstrators gathered in the nation’s capital and cities across the country Saturday to demand action against gun violence, vividly displaying the strength of the political movement led by survivors of a school massacre in Parkland, Fla.”); Yee & Blinder, *supra* note 9.

11. Jamison, *supra* note 10.

12. Emmett Knowlton, *High School Player Suspended for Kneeling During Anthem Has Suspension Lifted After Public Outcry*, BUS. INSIDER (Sep. 12, 2016, 10:15 AM), <http://www.businessinsider.com/high-school-football-player-suspended-kneeling-during-national-anthem-2016-9> [<https://perma.cc/TEE4-66R8>].

13. *Id.*

14. Mahsa Saeidi, *High School Football Player Suspended for National Anthem Protest*, NBC 26 (Nov. 23, 2016, 1:39 AM), <http://www.nbc26.com/news/national/bishop-gorman-football-player-suspended-for-national-anthem-protest> [<https://perma.cc/2KPV-WW9R>].

expression rights.<sup>15</sup> Likewise, school administrators had varied responses to students participating in school walkouts in protest of gun violence.<sup>16</sup> Some administrators supported student walkouts and allowed students to return to school without admonishment, whereas others emphasized that leaving school without permission would result in swift disciplinary sanctions.<sup>17</sup>

Currently, students' First Amendment rights in K–12 schools reside in a sea of ambiguity,<sup>18</sup> where the Supreme Court has acknowledged that students are considered “persons” under the Constitution and, thus, are entitled to fundamental rights, such as freedom of expression,<sup>19</sup> yet in the same vein marginalize those fundamental rights in a series of decisions that expand school administrators' authority to limit students' free speech.<sup>20</sup> Thus, although the Court posits that neither teachers nor students relinquish their constitutional freedom of speech and expression rights at the

15. Knowlton, *supra* note 12; Saeidi, *supra* note 14.

16. Camila Domonoske, *Across the Country, Students Walk Out to Protest Gun Violence*, NPR (Mar. 14, 2018, 11:01 AM), <https://www.npr.org/sections/thetwo-way/2018/03/14/593433911/across-the-country-students-walk-out-to-protest-gun-violence> [<https://perma.cc/92EJ-UQKL>] (“Various school districts also face different responses from administrators. Some have told students they won’t punish walkout participants. Others emphasize that normal school rules are still in place, and leaving class or campus without permission will result in disciplinary action.”).

17. *Id.*

18. Over time, the Court has acknowledged that children are entitled to the same constitutional protections as adults, yet it undermined those various protections through a series of limitations and exceptions. In *New Jersey v. T. L. O.*, the court held that children are entitled to Fourth Amendment prohibitions from unreasonable search and seizures by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). However, the court severely marginalized those Fourth Amendment prohibitions by allowing public school officials to conduct searches based on reasonable suspicion as opposed to applying the higher standard required for adult searches by state actors, which is probable cause. In *Thompson v. Oklahoma*, the Court held that the Eighth and Fourteenth Amendments prohibit the execution of a fifteen-year-old. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). Whereas in *Stanford v. Kentucky*, the Court established that sixteen and seventeen-year-old minors may be eligible for the death penalty depending on the crime. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). Thus, the Court acknowledged that children are “persons” and entitled to constitutional protections, yet it mandated a series of standards that undermine those very protections. *See id.*; *see also* Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 626 (2002) (highlighting a series of exceptions to students' free speech protections).

19. *Stanford*, 492 U.S. at 380.

20. *See* Miller, *supra* note 18, at 626. It is important to note that the First Amendment safeguards the infringement of students' rights by the state, not private actors. *See id.* Therefore, free speech jurisprudence applies to public schools, but not private schools. *See id.* Thus, this article focuses on students' First Amendment rights in K–12 public schools.

schoolhouse door, the reality is students are denied the full extent of First Amendment protections afforded to adults.<sup>21</sup> Because students are arguably one of the most vulnerable sectors of our society, they should be afforded equal, if not more, constitutional protections than adults to ensure they are in a safe learning environment that adequately prepares them to actively participate in democracy. Limiting students' constitutional protections in schools denies them the opportunity to fully understand the extent of their substantive rights as adults.

This essay takes the position that students have the constitutional right under the First Amendment to engage in expressive activities, political speech, and symbolic speech without interference or censorship from the state. Certainly, schools can educate, but they cannot indoctrinate based on a prescribed orthodoxy. Therefore, any attempts to limit or discipline students from participating in expressive activities, such as social protests, in K–12 schools that do not cause a material disruption to the learning environment are unconstitutional. School authorities' interpretation of students' constitutional right to engage in social protests has been antithetical.<sup>22</sup> Some school authorities not only support but encourage

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21. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost fifty years.”).

22. Evie Blad, *Can Schools Punish Students for Protesting the National Anthem?*, PBS NEWS HOUR (Oct. 7, 2016, 2:03 PM), <http://www.pbs.org/newshour/updates/schools-students-protesting-national-anthem/> [https://perma.cc/MB88-UA3A]. Whether students who choose to kneel during the national anthem are disciplined largely depends on whether the school administrator approves of the symbolic conduct, with little consideration for the students' First Amendment rights. *Id.* For example, students-athletes attending Parkway High School in Louisiana who choose to kneel during the national anthem will be punished by being removed from the team, whereas student-athletes attending Centerville High School in Ohio may kneel during the national anthem without fear of disciplinary action. Jacob Bogage, *Louisiana High School Will Kick Students Off Team if They Don't Stand for National Anthem*, WASH. POST (Dec. 28, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/09/28/louisiana-high-school-will-kick-students-off-team-if-they-dont-stand-for-national-anthem/?utm\\_term=.5c2e87159f4a](https://www.washingtonpost.com/news/early-lead/wp/2017/09/28/louisiana-high-school-will-kick-students-off-team-if-they-dont-stand-for-national-anthem/?utm_term=.5c2e87159f4a) [https://perma.cc/PH89-NTA4]; Dana Smith, *High School on Students Kneeling During National Anthem*, WDTN (Dec. 29, 2017, 6:15 PM), <http://wdtn.com/2017/09/29/high-school-on-students-kneeling-during-national-anthem/> [https://perma.cc/9ALS-AQ5Q]. The principal of Centerville High stated, “I personally am disheartening [sic] when people [kneel during the national anthem] but that’s because I choose to stand so that people have the right to freedom of expression and if they choose to kneel then that’s what I’m standing for.” *Id.*



students to exercise their freedom of expression,<sup>23</sup> whereas other school leaders issue disciplinary sanctions to any student engaging in social protests during school activities.<sup>24</sup> As a result, every school year, potentially thousands of students are at risk for having their freedom-of-expression rights violated by overzealous school administrators who impose disciplinary sanctions upon students who engage in social protests.<sup>25</sup> This essay offers a path toward safeguarding students' First Amendment rights to engage in expressive activities, political speech, and symbolic speech in K–12 schools by amending existing anti-*Hazelwood* statutes to explicitly include protections for student social protests, as long as such conduct does not cause a material disruption to the school learning environment. Furthermore, the proposed amendment to anti-*Hazelwood* statutes will limit the reach of *Tinker*'s material disruption standard to help ensure school officials do not have unbridled discretion to censor student expression. The adoption of anti-*Hazelwood* legislation was an effort by some states to shield students from the harmful effects of the Court's decision to limit students' freedom-of-expression rights in *Hazelwood School District v. Kuhlmeier*.<sup>26</sup> In this landmark decision, the Court established that school authorities may censor education-related speech.<sup>27</sup> Concomitantly, the *Hazelwood* decision and the First Amendment establish the minimum constitutional protections afforded to students; however, states may, through progressive legislation like anti-*Hazelwood* statutes, expand students' free speech protections.<sup>28</sup>

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23. See Blad, *supra* note 22.

24. *Id.*

25. *High School Facts at a Glance*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ovae/pi/hs/hsfacts.html> [https://perma.cc/7EFY-KV38] (last visited Mar. 20, 2018). According to the U.S. Department of Education, there are over 26,000 secondary schools in the United States. *Id.*

26. Bruce L. Plopper, *A Synthesis Model for Passing State Student Press Legislation*, 51 JOURNALISM & MASS COMM. EDUCATOR 61, 61 (1996).

27. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1987) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

28. Plopper, *supra* note 26, at 61.

The proposed legislative solution would restore the expansive free speech rights established in *Tinker v. Des Moines Independent Community School District*,<sup>29</sup> thereby shielding students from unlawful infringements on their First Amendment rights by audacious administrators. This approach balances the educational mission of the school and the expressive free speech rights of students. Part I of this essay discusses the growing trend of school authorities violating students' First Amendment rights by prohibiting them from engaging in social protests, such as kneeling during the national anthem, to indoctrinate them into a proscribed orthodoxy.<sup>30</sup> Part II discusses the existing free speech jurisprudence for assessing students' freedom-of-expression rights in K–12 schools and how it fails to adequately safeguard students from viewpoint discrimination.<sup>31</sup> Part III highlights the evolution of anti-*Hazelwood* statutes and the implications for students' free speech rights.<sup>32</sup> Part IV proposes an innovative statutory solution to safeguard students' free speech rights by amending existing anti-*Hazelwood* statutes to create more expansive freedom-of-expression rights for students in K–12 schools.<sup>33</sup> The proposed solution would help protect students from school authorities who engage in viewpoint discrimination under the guise of school discipline and order.

### *I. The Rise of Social Activism in K–12 Schools*

A renaissance of political and social activism is currently emerging among K–12 schools as students protest a myriad of controversial issues affecting their communities.<sup>34</sup> Students' efforts to promote substantive change through informal democratic mobilizations has ignited a sea of controversy as school authorities struggle to find a balance between maintaining school safety and discipline while

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29. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

30. *See infra* Part I.

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See* Domonoske, *supra* note 16; *supra* text accompanying note 7.

preserving students' freedom of expression rights.<sup>35</sup> Student activism is not a new phenomenon but rather has been an intricate part of the K–12 education landscape.<sup>36</sup> Historically, students have played a significant role in social movements through their efforts to help dismantle systemic inequalities within society such as desegregation in K–12 public schools, voting rights, the Vietnam War, and police brutality.<sup>37</sup> For example, in 1963 more than 200,000 students in Chicago Public Schools organized a one-day boycott in protest of racially-segregated schools.<sup>38</sup>

Similarly, one year later over 450,000 African-American and Puerto Rican students protested segregation and inequality in the New York City public school system.<sup>39</sup> Students have also participated in social activism through the Black Lives Matter movement, which is a campaign against violence and systemic racism directed toward people of color by law enforcement.<sup>40</sup> The current wave of student activism permeating K–12 schools is in response to increased instances of police brutality against African Americans and the tragic school shooting at Marjory Stoneman Douglas High School in Parkland, Florida.<sup>41</sup> Students who survived

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35. See Domonoske, *supra* note 16; *supra* text accompanying note 7.

36. Melinda D. Anderson, *The Other Student Activists*, ATLANTIC (Nov. 23, 2015), <https://www.theatlantic.com/education/archive/2015/11/student-activism-history-injustice/417129/> [<https://perma.cc/VQZ8-UWN8>].

37. *Id.*

38. *Id.*

39. *Id.*

40. Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 541 (2016) (“As a social movement, Black Lives Matter can be understood as growing out of a specific opposition to respectability politics by insisting that regardless of any ostensibly non-respectable behavior—from Martin’s hoodie to Eric Garner selling loose cigarettes—their lives matter and should not be treated with deadly force.”); see also Corinthia A. Carter, *Police Brutality, the Law & Today’s Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 523 (2017) (“The Black Lives Matter (“BLM”) movement and others are products of the continued failure of this country’s legislature and judiciary to enact and apply laws that effectively address the racially driven violence that police officers commit against Blacks. BLM calls for a complete reform in policing policies as well as true accountability for police departments that systematically violate the rights of Black individuals.”).

41. Leah Shafer, *Student Activism and Gun Control*, HARV. GRADUATE SCH. EDUC. (Feb. 25, 2018), <https://www.gse.harvard.edu/news/uk/18/02/student-activism-and-gun-control> [<https://perma.cc/2V64-KHQW>].

the shooting in Parkland, Florida, have become the new face of school safety and gun control as they petition lawmakers to enact tougher gun restrictions through a series of political protests.<sup>42</sup> For instance, students organized the National Walkout Day, which encouraged high school students throughout the country to walk out of their schools to advocate for federal gun reform legislation.<sup>43</sup> Furthermore, survivors of the Marjory Stoneman Douglas High School shooting also organized a national March for Our Lives rally at the National Mall in Washington, D.C., and over 800 other simultaneous marches in cities across the nation such as Chicago, Miami, and Dallas, to protest gun violence in schools.<sup>44</sup>

As previously mentioned, a great deal of student activism in K–12 schools has ensued around another important social issue—police brutality against black males.<sup>45</sup> Last season, high school football players across the nation kneeled during the national anthem in solidarity with former NFL player Colin Kaepernick and his efforts to increase awareness about police brutality.<sup>46</sup> National anthem

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42. *Id.*

43. Christal Hayes, *Students Plan to Walk Out of Schools to Protest Gun Laws*, USA TODAY (Feb. 18, 2018), <https://www.usatoday.com/story/news/2018/02/17/students-teachers-planning-nationwide-walkout-protest-gun-control-inaction-students-fed-up-they-plan/348752002/> [<https://perma.cc/U8U5-GHLJ>].

44. *March for Our Lives Highlight: Students Protesting Guns Say 'Enough is Enough,'* N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/march-for-our-lives.html> [<https://perma.cc/CV3S-HG8H>] (“Demonstrators flooded streets across the globe in public protests on Saturday, calling for action against gun violence. Hundreds of thousands of marchers turned out, in the most ambitious show of force yet from a student-driven movement that emerged after the recent massacre at a South Florida high school.”); *see also* Sarah Gray, *The March for Our Lives Protest is This Saturday. Here’s Everything to Know*, TIME (Feb. 20, 2018), <http://time.com/5167102/march-for-our-lives-parkland-school-shooting-protest/> [<https://perma.cc/N44K-94AU>].

45. Carter, *supra* note 40, at 523.

46. Brenna Kelly, *Lincoln HS Students Take a Knee During the National Anthem to Protest Racial Injustice*, FOX 12 OR. (Oct. 27, 2017), <http://www.kptv.com/story/36706433/lincoln-hs-students-take-a-knee-during-national-anthem-to-protest-racial-injustice> [<https://perma.cc/TQ3T-3VWY>]. A group of more than 60 students, which included football players, at Lincoln High School in Portland, Oregon, kneeled during the national anthem while holding signs that read “Racial Justice Now.” *Id.*; *see also* Gregory Pratt, Dan Shalin & Steve Shering, *As Protests During Anthem Reach High Schools, a ‘Teaching Moment’ for Some Coaches*, CHI. TRI. (Sept. 29, 2017, 9:43 PM), <http://www.chicagotribune.com/news/local/breaking/ct-high-school-anthem-protests-met-20170929-story.html> [<https://perma.cc/AGC5-SS2M>]; Alex Samuels, *The Anthem, the Pledge and the Protests: A National Debate Comes to Texas Schools*, TEX. TRIB. (Nov. 3, 2017, 1:00 PM), <https://www.texastribune.org/2017/11/03/texas-school-kids-join-national-debate-protest-during-anthem->

protests provided students with the opportunity to have a voice on the issues impacting their communities. However, as national anthem protests and other instances of social activism, such as school walkouts, became more prevalent in the K–12 landscape, school authorities struggled to determine the correct response to students’ symbolic expression.<sup>47</sup> School authorities either could discipline students for engaging in national anthem protests or support students’ conduct as an exercise of their First Amendment freedom of expression rights.<sup>48</sup> Either course of action places school administrators at risk of public backlash and criticism from the communities in which they serve due to the sea of controversy surrounding these issues.<sup>49</sup> For example, a Kansas City school’s disciplinary response to student protests was heavily criticized by members of the local community as evidenced by the following quote from a citizen interviewed by the media: “To punish 150 students for standing up for what they believe in respectably and on school property . . . doesn’t seem too just. We protest out of necessity for change, not the novelty of just missing school.”<sup>50</sup> Similar public criticisms were directed toward school officials in Long Island, New York, for disciplinary sanctions issued to students participating in the

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pledge/ [https://perma.cc/DW6L-UQFS] (“As the national debate continues to rage, similar demonstrations are taking place at the grade school level. There have been reports in Texas school districts of students and teachers kneeling during the national anthem or sitting during the pledge—something that, while legal, has stirred controversy.”). High school football players in Oak Park and Evanston schools kneeled during the national anthem to protest social injustice. *Id.*

47. See Blad, *supra* note 22. School administrators had different interpretations regarding whether students kneeling during the national anthem was protected speech or unprotected speech that warranted disciplinary action. *Id.* As a result, some students were disciplined for kneeling during the national anthem, whereas others were permitted to engage in the symbolic conduct. *Id.*

48. *Id.*

49. See, e.g., Jennifer Angiesta, *CNN Poll: Americans Split on Anthem Protests*, CNN POLITICS (Sept. 30, 2017, 2:49 AM), <http://www.cnn.com/2017/09/29/politics/national-anthem-nfl-cnn-poll/index.html> [https://perma.cc/5EJT-M4F7]; see also Sophie Tatum, *Athletes, Activists Spar on Kneeling National Anthem Protests*, CNN POLITICS (Sept. 28, 2017, 4:20 AM), <http://www.cnn.com/2017/09/27/politics/cnn-nfl-kneeling-protests-town-hall-ac360/index.html> [https://perma.cc/SMR4-JY2W].

50. Max Londberg, *Students at This KC School Were Disciplined for Honoring Parkland Victims with Walkout*, KAN. CITY STAR (Mar. 14, 2018, 2:00 PM), <http://www.kansascity.com/news/local/article205246334.html> [https://perma.cc/HAL6-LK9D].

National Walkout Day in protest of gun violence.<sup>51</sup> In this instance, not only did community members express opposition to disciplining students for participating in the school walkout, the Governor of New York, Andrew Cuomo, released a public statement condemning any disciplinary action and urged the state education commissioner to intervene on the students' behalf.<sup>52</sup> The potential public backlash for school administrators' disciplinary actions surrounding controversial issues is even more apparent regarding national anthem protests.<sup>53</sup> It is a well-established American tradition and patriotic ritual for spectators to stand at sporting events during the playing of the national anthem to show respect for the American flag and the soldiers who risked their lives to uphold the freedom the flag represents.<sup>54</sup> Therefore, kneeling—as opposed to standing—during the playing of the national anthem is perceived by many individuals, which includes some school administrators, as offensive and disrespectful.<sup>55</sup> Those in opposition of individuals kneeling during the playing of the national anthem assert that permitting this type of symbolic speech in schools teaches students to be disrespectful, especially regarding honoring the men and women who have served in the military.<sup>56</sup> In contrast, those in support of students' ability to participate in national anthem protests posit that schools should be a training ground for democracy and encourage civic engagement

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51. *National Walkout Day Punishments Met with Backlash*, NEWS 12 LONG ISLAND (Mar. 15, 2018, 2:59 PM), <http://longisland.news12.com/story/37735079/national-walkout-day-punishments-met-with-backlash> [<https://perma.cc/G9HZ-PLHG>] [hereinafter *National Walkout Day*].

52. *Id.*

53. Evie Blad, *Taking a Stand: How Schools Should Respond to National-Anthem Protests*, EDUC. WK. (Oct. 4, 2016), <https://www.edweek.org/ew/articles/2016/10/05/taking-a-stand-how-schools-should-respond.html> [<https://perma.cc/WZ57-U9TT>].

54. See Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 534 (2007) (equating standing for the national anthem with showing “respect for the government.”).

55. *Id.*

56. David B. Larter, *Legendary SEAL Leader: National Anthem Protests Disrespect the Military*, NAVY TIMES (Sept. 9, 2016), <http://www.navytimes.com/news/your-navy/2016/09/09/legendary-seal-leader-national-anthem-protests-disrespect-the-military/> [<https://perma.cc/YP3G-LVBY>].

among students regarding issues impacting their communities such as gun control legislation.<sup>57</sup>

The increased instances of political protests in schools have placed school administrators and students at the heart of the debate regarding the extent of students' freedom-of-expression rights in K–12 schools.<sup>58</sup> School administrators, like the general public, have differing views on the appropriateness of student protests in K–12 schools.<sup>59</sup> Some school authorities not only support but encourage students to engage in social activism to advocate for reform regarding issues impacting their communities,<sup>60</sup> whereas others issue sanctions or implement policies prohibiting the expressive conduct at issue.<sup>61</sup> Additionally, the severity and scope of disciplinary sanctions issued to students have varied immensely among school districts, which raises concerns among stakeholders regarding issues of equity and fairness.<sup>62</sup> For example, several students at a Kansas City school were marked truant for leaving their classrooms without permission

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57. Athena Jones & Tom LoBianco, *Obama: Colin Kaepernick 'Exercising Constitutional Right,'* CNN POLITICS (Sept. 5, 2016, 10:40 AM), <http://www.cnn.com/2016/09/05/politics/barack-obama-colin-kaepernick/> [<https://perma.cc/7N7G-3TYT>]; see also Chris Biderman, *Colin Kaepernick is Exercising His Rights, Whether You Agree or Not,* NINERSWIRE (Aug. 27, 2016, 5:56 PM), <http://ninerswire.usatoday.com/2016/08/27/colin-kaepernick-is-exercising-his-rights-whether-your-agree-or-not/> [<https://perma.cc/VVP3-MMKM>].

58. Eric Russell, *High School Athletes, Officials Confront National Anthem Protests,* PORTLAND PRESS HERALD (Sept. 26, 2017), <http://www.pressherald.com/2017/09/26/high-school-athletes-and-officials-confront-national-anthem-protests/> [<https://perma.cc/S24M-XZ56>] (“High school athletes, coaches and administrators across Maine are grappling with the increasingly bitter debate over whether kneeling during the national anthem is an acceptable form of protest.”); see also Kyle Neddenriep, *Some Indiana High Schools Weigh Pregame Protest Phenomenon,* INDYSTAR (Sept. 28, 2017, 4:31 PM), <https://www.indystar.com/story/sports/high-school/2017/09/28/some-indiana-high-schools-weigh-pregame-protest-phenomenon/712907001/> [<https://perma.cc/6KL3-CYXC>] (“[T]his is as polarizing of an issue as [one local athletic director] has seen in his time as an administrator. ‘I’m afraid of what could happen . . . What happens if adults in the bleachers get mad? You’ve got a bad situation on your hands. It’s an emotional topic.’”).

59. See Cory Turner & Clare Lombardo, *How School Walkouts Test Student Rights and School Responsibilities,* NPR (Mar. 13, 2018, 6:00 AM), <https://www.npr.org/sections/ed/2018/03/13/591858922/how-school-walkouts-test-student-rights-and-school-responsibilities> [<https://perma.cc/3QEZ-F9V2>].

60. Talia Richman, *Educators Take 'Black Lives Matter' Message into Baltimore Schools,* BALTIMORE SUN (Feb. 8, 2018, 3:55 PM), <http://www.baltimoresun.com/news/maryland/education/bs-md-ci-black-lives-matter-schools-20180206-story.html> [<https://perma.cc/M7N8-HHK9>].

61. Turner & Lombardo, *supra* note 59.

62. *Id.*

to participate in a school walkout in protest of gun violence and the lack of gun control legislation.<sup>63</sup> Whereas, students attending Cobb County high schools in Georgia received a much harsher punishment—a one-day suspension—for participating in the same type of walkout in protest of gun violence.<sup>64</sup> The aforementioned examples of inequity in student disciplinary sanctions help illustrate the need for greater free speech protections for students. Student-athletes who participated in national anthem protests during school athletic events also received varying disciplinary sanctions despite committing the same alleged infraction.<sup>65</sup> For example, Dylan Bruton was placed on a disciplinary contract and suspended from his Nevada high school for kneeling during the anthem.<sup>66</sup> Whereas, another student, a football player at Doherty Memorial High School in Massachusetts, only received a one-game suspension for his national anthem protest.<sup>67</sup> Clearly, suspension from school is a much harsher sanction than a one-game suspension because the suspended child is being deprived of the opportunity to learn for the duration of the suspension.<sup>68</sup> Issuing different disciplinary sanctions to similarly-situated students for the same behavior is unjust and fundamentally unfair.<sup>69</sup> It is a contradiction for school authorities to encourage students to treat all people equally when they do not adhere to those same sentiments.

Despite some of the aforementioned negative responses to student protests, the school leaders in Baltimore Public Schools provide a salient example of how schools that provide a platform for student

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63. Londberg, *supra* note 50.

64. Vanessa McCray, *Some Cobb Students Disciplined for Walking Out*, ATLANTA J.-CONST. (Mar. 21, 2018), <https://www.ajc.com/news/local-education/some-cobb-students-disciplined-for-walking-out/YQEZ188OVxdPCAd3pDCrM/> [<https://perma.cc/5V6Q-BGGQ>].

65. See Blad, *supra* note 53.

66. Saeidi, *supra* note 14.

67. Knowlton, *supra* note 12.

68. See Blad, *supra* note 53; JUSTCHILDREN PROGRAM, *Suspended Progress: The Harms of Suspension & Expulsion*, LEGAL AID JUST. CENT. (May 2016), <https://www.justice4all.org/wp-content/uploads/2016/05/Quotes.pdf> [<https://perma.cc/B6TV-Q6PC>]; *National Walkout Day*, *supra* note 51.

69. U.S. GOV'T ACCOUNTABILITY OFFICE, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018) [hereinafter K-12 EDUCATION REPORT].



activism enable students to freely express themselves and learn how to fully participate in the democratic process without fear of reprimand.<sup>70</sup> In Baltimore, several schools organized an event called Black Lives Matter Week of Action in Schools to affirm the value of black lives within their schools and communities.<sup>71</sup> As part of the initiative, the schools' uniform mandates were waived so students could wear Black Lives Matters t-shirts to support the movement.<sup>72</sup> In a similar show of support, the entire coaching staff at Woodrow Wilson High School in New Jersey kneeled during the national anthem with their football team to show solidarity with Colin Kaepernick and their students' efforts to increase awareness about police brutality.<sup>73</sup> Although the level of support demonstrated by some school officials for student activism is commendable, it is important to acknowledge the potentially harmful effects of school officials participating in students' symbolic expression. Specifically, the act of an entire coaching staff taking part in a student-led national anthem protest may unintentionally cause student athletes in opposition of kneeling during the playing of the national anthem to feel pressured to participate.<sup>74</sup> The coaches' actions may be perceived as an attempt to indoctrinate students into a particular orthodoxy, which is a practice strictly prohibited by the Constitution.<sup>75</sup>

The aforementioned examples of school administrators' responses to student national anthem protests demonstrate the immense disparity in how K–12 school authorities respond to expressive activities, political speech, and symbolic conduct. Currently, students' First Amendment freedom-of-expression rights in K–12 schools are ambiguous and, thus, subject to multiple interpretations by public school officials. It is apparent that the current legal

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70. See Richman, *supra* note 60.

71. *Id.*

72. *Id.*

73. Rachael Davis, *This High School Football Coach Planned to Kneel Alone During National Anthem—Then This Happened*, ESSENCE (Sept. 12, 2016), <http://www.essence.com/2016/09/12/high-school-football-team-knee-support-kaepernick> [<https://perma.cc/Z4XP-SZX7>].

74. *Id.*

75. See *Morse v. Frederick*, 551 U.S. 393, 397–98 (2007).

framework fails to protect students from unwarranted censorship by school authorities.<sup>76</sup> Although the Supreme Court has acknowledged that students are considered persons under the Constitution and, thus, entitled to freedom of expression rights, the Court marginalizes those same rights in subsequent decisions that expand school administrators' abilities to censor student speech.<sup>77</sup> As a result, the Court has failed to adequately safeguard students' constitutional freedoms by leaving the preservation of students' rights to the discretion of overzealous school administrators who utilize their discretionary power to usurp student rights under the guise of school discipline.<sup>78</sup> Schools should provide students with the opportunity to not only learn about their constitutional freedoms but to practice them so they can be civically-engaged adults. Furthermore, it is contrary to fundamental conceptions of fairness to acknowledge that students are afforded constitutional protections yet limit the scope of those very protections. This is especially problematic because the First Amendment is devoid of any age restrictions to exercising those rights. Therefore, students should be afforded the same freedom-of-expression rights as adults. In light of the gross disparities in whether students are disciplined for expressive activities, political speech, or symbolic conduct, it is of paramount importance to address the quandary surrounding the scope of students' freedom-of-expression rights and adopt a substantive legal solution.

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76. Frank D. LoMonte, Symposium, *Shrinking Tinker: Students Are 'Persons' Under Our Constitution—Except When They Aren't*, 58 AM. U.L. REV. 1323, 1339 (2009) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

77. *Id.*

78. Anna Boksenbaum, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 CUNY L. REV. 123, 135 (2005) ("The Court's decision that sexually suggestive speech was unprotected by the First Amendment dealt a serious blow to *Tinker's* liberal approach, as it gave deference to school administrators to decide what kind of speech is permissible in school and gave schools responsibility for inculcating students into community morals and standards of behavior.").

## II. Free Speech jurisprudence in K–12 schools

The First Amendment’s guarantee of free speech is an essential component to promoting and maintaining a democratic society by protecting individuals’ rights to freedom of speech, expression, press, and assembly.<sup>79</sup> At the heart of the First Amendment is the notion that our society should serve as a marketplace of ideas where individuals are encouraged to critically analyze diverse perspectives and solutions to societal issues.<sup>80</sup> Under the marketplace doctrine, the First Amendment “serves as a protector of democracy by promoting the public discussion of competing ideas and by increasing the People’s participation in society . . . .”<sup>81</sup> To this end, civic education in schools plays an important role in inculcating students with the core principles of freedom of speech and expression to enable students to fully participate in formal and informal democratic processes.<sup>82</sup> In a world faced with increasing political, social, and

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79. Lauren E. Tanner, Note, *Rights and Regulations: Academic Freedom and a University’s Right to Regulate the Student Press*, 86 TEX. L. REV. 421, 421 (2007).

80. *Tinker*, 393 U.S. at 512 (discussing the role of schools as a marketplace of ideas and that students’ freedom of expression is essential for the free exchange of ideas); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 602–03 (1967); see also Stephen C. Jacques, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U.L. REV. 1945, 1949–50 (1997) (“Supreme Court Justice Oliver Wendell Holmes posited that the primary goal of the First Amendment is to guarantee a ‘marketplace of ideas,’ where truth and honest debate emerge from a multiplicity of voices. The marketplace doctrine suggests that the First Amendment serves as a protector of democracy by promoting the public discussion of competing ideas and by increasing the People’s participation in society and in their government.”). Although *Keyishian* involved the state’s attempt to remove “subversives” from faculty positions at its institutions, the Court asserted its guiding premise more broadly to public education in general, holding that, “The classroom is peculiarly the ‘marketplace of ideas.’” *Keyishian*, 385 U.S. at 602. The First Amendment therefore “does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Id.* at 603.

81. Jacques, *supra* note 80, at 1950.

82. Kaye Pepper et al., *Teaching Civic Education in a Democratic Society: A Comparison of Civic Education in Hungary and the United States*, EDUC. FOUND. 29, 30 (2003) (“Education is one of few means at our disposal to inspire voluntary participation of our citizens. The ability to maintain democracy rests upon the success of education for democratic citizenship in schools and in our education of teachers.”); Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1286–87 (2009) (“[B]asic knowledge of history and government is the price of admission to equal participation in American democracy. An individual who does not know that the federal Constitution establishes a series of checks and balances is unlikely to understand contemporary debates about the scope of the Vice President’s power; an individual who does not know that the Bill of Rights guarantees the freedom of speech may be afraid to publicly voice controversial

economic challenges, it is imperative that students are empowered with the skills and knowledge to enable them to foster substantive solutions to issues impacting their communities. To this end, social activism plays an essential role in preparing students to be civically-engaged adults.<sup>83</sup> Therefore, it is important to explore the current legal framework governing students' free speech rights in K–12 schools to identify barriers to student activism.

It is well established in constitutional jurisprudence that students do not shed their constitutional rights at the schoolhouse door.<sup>84</sup> The legal framework for governing students' First Amendment rights in public schools is comprised of a series of Supreme Court decisions that begin with the 1943 landmark decision *West Virginia State Board of Education v. Barnette*.<sup>85</sup> The *Barnette* decision not only solidified students' rights to freedom of expression in schools but forbid school authorities from compelling students to adhere to a particular viewpoint.<sup>86</sup> Although *Barnette* served as the gold standard for assessing students' free speech rights in K–12 schools for more than twenty-five years, the modern legal framework is based on the landmark *Tinker v. Des Moines Independent Community School District* case and the subsequent trilogy of First Amendment cases.<sup>87</sup>

The recent controversy surrounding students' national anthem protests in K–12 schools at school-sponsored sporting events has increased public discourse surrounding free speech jurisprudence in schools.<sup>88</sup> Many school leaders find themselves in a quandary as they

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views."); see generally *The Brave New World of Fear: Public Education*, 15 LEGAL NOTES EDUC. 1 (2003).

83. See Pepper et al., *supra* note 82, at 33.

84. *Tinker*, 393 U.S. at 506, 514.

85. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

86. *Id.* at 642, 644 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

87. Miller, *supra* note 18, at 626.

88. Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K–12 Sports*, 78 LA. L. REV. 145, 185 (2017) ("The insurgence of student national anthem protests at school-sponsored athletic events has raised concerns regarding the effectiveness of existing free speech doctrine in safeguarding students' First Amendment

attempt to strike a balance between protecting students' First Amendment rights and addressing critics who perceive national anthem protests as disrespectful to the military.<sup>89</sup> Despite the bold, speech-inspiring rhetoric in *Tinker*, in which the Court declared, “[S]tate-operated schools may not be enclaves of totalitarianism,” the Court substantially diminished students' free speech rights in a trilogy of cases following *Tinker* by carving out a series of exceptions to the material disruption standard.<sup>90</sup> These exceptions significantly increased school administrators' authority to censor students' speech without violating their constitutional rights.<sup>91</sup> Collectively, *Tinker*, *Bethel School District No. 403 v. Fraser*, *Morse v. Frederick*, and *Hazelwood School District v. Kuhlmeier* establish today's modern legal framework for free-speech jurisprudence in K–12 schools.<sup>92</sup> The following discussion provides an overview of the K–12 freedom of expression legal landscape and highlights the controversy surrounding the post-*Tinker* decisions.

#### A. *Tinker v. Des Moines Independent Community School District: The Gold Standard*

The *Tinker* decision is arguably the most important student freedom-of-expression decision in the past fifty years because it provides the legal framework for students' freedom-of-expression

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rights.”).

89. Sarah B. Boxer, *Ruth Bader Ginsburg on Trump, Kaepernick and Her Lifelong Love of the Law*, YAHOO! NEWS (Oct. 10, 2016), <https://www.yahoo.com/katiecouric/ruth-bader-ginsburg-on-trump-kaepernick-and-her-lifelong-love-of-the-law-132236633.html> [https://perma.cc/B5LE-5KCF]; see also Ryan Wilson, *Esiason on Kaepernick Sitting: 'It's About as Disrespectful as Any Athlete Has Ever Been'*, CBS SPORTS (Aug. 31, 2016), <https://www.cbssports.com/nfl/news/esiason-on-kaepernick-sitting-its-about-as-disrespectful-as-any-athlete-has-ever-been/> [https://perma.cc/Z9DS-5HAP].

90. *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (asserting that student symbolic speech promoting illegal drug use may be limited); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988) (asserting that school authorities may limit school-sponsored activities that are part of the educational curriculum); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (asserting that lewd and offensive student speech during school-sponsored activities may be censored).

91. See Miller, *supra* note 18, at 623.

92. McNeal, *supra* note 88, at 185 (“The legal doctrine established in *Tinker*, *Bethel*, *Morse*, and *Hazelwood* concomitantly creates today's modern legal framework for evaluating students' free speech rights.”).

rights in K–12 schools.<sup>93</sup> This case resonates among many free speech advocates because it sends both a symbolic and substantive message to school leaders that students do not shed their constitutional rights at the schoolhouse door and school authorities may not engage in viewpoint discrimination by preemptively limiting those rights due to apprehension about invoking discomfort or unpleasantness among others.<sup>94</sup> Thus, *Tinker* solidified the notion that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”<sup>95</sup>

The facts in *Tinker* centered around two students’ plans to wear black armbands to school in protest of the Vietnam War.<sup>96</sup> The principals of the schools became aware of the planned protests and preemptively implemented a policy banning the wearing of armbands.<sup>97</sup> Under the new policy, students who wore armbands to school would be asked to remove the armbands or be suspended from school until they returned in compliance with the school policy.<sup>98</sup> The protesting students were aware of the school policy banning armbands, but proceeded with their planned protest and, thus, were all suspended from school.<sup>99</sup> The parents of the petitioners filed a complaint on behalf of the students in district court alleging that the principals’ actions violated the students’ First Amendment freedom-of-expression rights and requested an injunction to stop any school disciplinary action.<sup>100</sup> The district court dismissed the case, finding that the principals’ actions were justifiable to prevent a disruption to the school environment.<sup>101</sup> The district court expressly declined to follow the Fifth Circuit’s ruling in a similar case, which asserted that

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93. *Id.* at 166, 170.

94. *Id.* at 170, 187.

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

96. *Id.* at 504.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Tinker*, 393 U.S. at 504–05.

school leaders may not infringe on students' freedom-of-expression rights unless the students' conduct caused a material and substantial disruption with school discipline and the operation of the school.<sup>102</sup> On appeal, the Eighth Circuit affirmed the district court's decision without an opinion.<sup>103</sup> The parents of the petitioners appealed the lower courts' decisions all the way to the Supreme Court. The Supreme Court granted certiorari and clarified students' freedom-of-expression rights in K–12 public schools.<sup>104</sup>

In a 7–2 decision, the Supreme Court reversed the lower court decision, holding that school leaders may not limit students' freedom-of-expression rights unless the conduct in question materially or substantially disrupts the operation of the school.<sup>105</sup> In the majority opinion, Justice Fortas emphasized that disciplining the students was inappropriate because the students' armband protest did not interfere with the schools' work or the rights of other students.<sup>106</sup> To the contrary, only a few students out of the 18,000-student population participated in the protests, and there were no reported threats or acts of violence.<sup>107</sup> The Court further reasoned that the students' symbolic act constituted pure speech and, thus, was protected under the First Amendment.<sup>108</sup> Therefore, school leaders are prohibited from restricting symbolic speech simply because it expresses an unpopular viewpoint or invokes feelings of “discomfort or unpleasantness” in others.<sup>109</sup> The Court also emphasized that not only did the facts not warrant school authorities to reasonably

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102. *Id.* (quoting *Brunside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (noting that the lower court “expressly declined to follow the Fifth Circuit’s holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it ‘materially and substantially interferes with the requirements of appropriate discipline in the operation of the school!’”); *see also Brunside*, 363 F.2d at 748–49 (holding that “the regulation forbidding the wearing of ‘freedom buttons’ on school grounds is arbitrary and unreasonable, and an unnecessary infringement on the students’ protected right of free expression in the circumstances revealed by the record.”).

103. *Tinker*, 393 U.S. at 504–05.

104. *Id.*

105. *Id.* at 513.

106. *Id.* at 508.

107. *Id.*

108. *Id.*

109. *Tinker*, 393 U.S. at 509.

forecast substantial or material disruption to the school activities but that no such disruptions ever occurred.<sup>110</sup>

Although it has been almost fifty years since the landmark *Tinker* decision, the critiques of the *Tinker* Court's expansive approach to students' freedom-of-expression rights have varied.<sup>111</sup> For example, some scholars support the dissent's sentiments that *Tinker*'s material disruption standard undermines the ability of schools to maintain discipline and order by limiting the ability of school administrators to be in complete control of student conduct and expression.<sup>112</sup> Legal scholars that support this stance reject *Tinker*'s material disruption standard asserting that the authority to ascertain appropriate speech should be determined exclusively by school authorities because constitutional jurisprudence clearly establishes that students do not receive the full protections afforded to adults.<sup>113</sup> This notion is best captured in *Bethel*, in which the Court stated, "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>114</sup> However, another group of scholars takes an entirely different stance, arguing that the material

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110. *Id.* at 514.

111. David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 477 (1981).

112. *Id.* at 495 ("[T]he responsibility for making [judgments regarding factors related to students' rights] should lie with local educational authorities, not the courts.").

113. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1226–27 (10th Cir. 2009) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)) (acknowledging the principle that the student's speech, if given, in a public forum outside of school would have been protected); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 414 (3d Cir. 2003) (suggesting that "at a certain point, a school child is so young that it might reasonably be presumed the First Amendment does not protect the kind of speech at issue here. Where that point falls is subject to reasonable debate"); Christi Cassel, Note, *Keep Out of Myspace!: Protecting Students from Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 651–52 (2007) ("Under the United States Constitution, students are considered persons who possess fundamental rights that the state must respect."); LoMonte, *supra* note 76, at 1339 (quoting *Tinker*, 393 U.S. at 511); Patrick E. McDonough, Note, *Where Good Intentions Go Bad: Redrafting the Massachusetts Cyberbullying Statute to Protect Student Speech*, 46 SUFFOLK U.L. REV. 627, 667 (2013) ("Before proposing changes to section 370, we must recognize the following four truths when determining the scope of school administrators' authority regarding student speech: First, students are considered persons who possess the full panoply of constitutional rights afforded free expression, and students do not check these constitutional rights at the schoolhouse gates."). Although only considered dicta, the Third Circuit noted that "if third graders enjoy rights under *Tinker*, [sic] those rights will necessarily be very limited." *Walker-Serrano ex rel. Walker*, 325 F.3d at 417.

114. *Bethel Sch. Dist. No. 403*, 478 U.S. at 682.



disruption standard fails to adequately protect students' free speech rights by giving too much deference to school authorities.<sup>115</sup> These divergent perspectives regarding the scope of students' free speech rights in K–12 schools illustrate the challenges courts face as they attempt to balance students' rights with deference to school authorities to maintain safe and orderly schools.

B. *Bethel School District No. 403 v. Fraser: Lewd Speech*

The *Bethel* case makes a significant contribution to free speech jurisprudence in K–12 schools by clarifying whether school authorities can censor lewd and offensive speech without violating students' freedom of expression rights.<sup>116</sup> Prior to the *Bethel* decision, there was a great deal of ambiguity among lower courts regarding whether students may be disciplined for speech that does not cause a material disruption but violates a school rule.<sup>117</sup> It is important to note that although *Bethel* did not overturn the *Tinker* decision, it did carve out a narrow exception for allowing school authorities to censor lewd and offensive speech without violating students' freedom of expression rights.<sup>118</sup>

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115. Sean R. Nuttall, Symposium, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1282 (2008) (“[T]his Note argues that *Tinker*, while employing strongly speech-protective rhetoric, nonetheless requires courts to defer to educators' reasonable determinations of what speech may cause a substantial disruption and provides only very modest protection for student speech.”).

116. *Bethel Sch. Dist. No. 403*, 478 U.S. at 686.

117. *Compare* Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1976) (prohibiting suspending students for handing out signs to be used in protests, despite the likelihood of disruption, acknowledging “that school officials may curtail the exercise of First Amendment rights when they can reasonably forecast material interference or substantial disruption . . . [but,] for discipline resulting from the use of pure speech to pass muster under the First Amendment, the school officials have the burden to show justification for their action[;] . . . [a]bsent justification, such as a violation of a statute or school rule, they cannot discipline a student for exercising those rights”), with *Dodd v. Rambis*, 535 F. Supp. 23, 29–30 (S.D. Ind. 1981) (“The First Amendment does not require school officials to forestall action until disruption of the educational system actually occurs . . . [T]he Court concludes that the forecast on the part of the defendant that the distribution of the leaflets by the plaintiffs would result in a substantial disruption of or material interference with the activities of the school unless appropriate action was taken was not unreasonable.”).

118. *Bethel Sch. Dist. No. 403*, 478 U.S. at 686.

In *Bethel*, a high school student, Fraser, was suspended from school for three days for lewd and offensive comments he made during a speech he gave at a school assembly while nominating a classmate for student office.<sup>119</sup> Bethel High School's policy governing inappropriate speech explicitly prohibited any conduct that disrupts the educational learning environment, which included obscene or profane language or gestures.<sup>120</sup> Despite being forewarned by his teachers that he would receive disciplinary action if he delivered his speech without making the necessary changes to comply with the school's offensive speech policy, Fraser chose to deliver the speech as planned.<sup>121</sup> Fraser challenged the three-day suspension he received for violating the school's offensive speech policy through the school district's grievance process.<sup>122</sup> The hearing officer upheld the school's disciplinary action finding that the sexual innuendos in the speech were "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance" and, thus, were in violation of the school policy.<sup>123</sup> Fraser's father filed suit on his son's behalf in the Western District of Washington alleging that the school's disciplinary action for Fraser's speech violated his First Amendment freedom of speech rights.<sup>124</sup> The district court ruled in favor of Fraser asserting that the school district's offensive speech policy was unconstitutionally vague and overbroad and, therefore, violated Fraser's freedom of speech rights.<sup>125</sup> The Ninth Circuit Court of Appeals affirmed the district court's decision and rejected the school district's claim that Fraser's lewd and offensive speech caused a material disruption to the school learning environment and that the censorship was necessary to protect a captive audience of minors from inappropriate speech.<sup>126</sup>

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119. *Id.* at 677–78.

120. *Id.* at 678.

121. *Id.*

122. *Id.*

123. *Id.* at 678–79.

124. *Bethel Sch. Dist. No. 403*, 478 U.S. at 679.

125. *Id.*

126. *Id.* at 679–80.

The Supreme Court, however, disagreed with the lower courts' rulings and held that schools may discipline students for lewd and offensive speech.<sup>127</sup> The Court delineated between the political speech at issue in *Tinker*, which was protected, and the lewd and indecent speech in *Bethel*, which was unrelated to any political viewpoint.<sup>128</sup> The Court reasoned that it is constitutionally permissible for school authorities to censor sexually-explicit speech because it adheres to one of the fundamental purposes of schools, which is to teach students socially-appropriate behavior.<sup>129</sup>

Scholarly critiques of *Bethel* focus on the ambiguity regarding the scope of its reach and the Court's departure from *Tinker*'s speech-protective jurisprudence.<sup>130</sup> Some legal scholars posit that the *Bethel* decision will have a "chilling effect" on students' free speech rights due to the increased deference given to school administrators.<sup>131</sup> Whereas, other scholars applaud the Court's decision for recognizing the importance of affording school authorities the discretionary power to maintain an orderly school learning environment.<sup>132</sup> The divergent views on the Court's stance in *Bethel* are reflective of the endemic challenges courts face as they attempt to strike a balance between preserving students' First Amendment rights and ensuring

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127. *Id.* at 685.

128. *Id.* ("Unlike the sanctions imposed on the students wearing armbands in *Tinker*, [sic] the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

129. *Id.* at 685–86.

130. See Nina Zollo, Case Comment, *Constitutional Law: School Has Broad Discretion to Prohibit Offensive Student Speech*, 39 U. FLA. L. REV. 193, 202–03 (1987).

131. *Id.* at 203 ("By giving schools broad discretion, the instant Court ignores its own warnings of the chilling effects inherent in prohibiting speech offensive to some members of society."); see also Phoebe Graubard, Note, *The Expanded Role of School Administrators and Governing Boards in First Amendment Student Speech Disputes: Bethel School District No. 403 v. Fraser*, 17 GOLDEN GATE U. L. REV. 257, 271 (1987) (highlighting *Bethel Sch. Dist. No. 403*'s departure from *Tinker*'s expansive student free speech rights); Therese Thibodeaux, Note, *Bethel School District No. 403 v. Fraser: The Supreme Court Supports School in Sanctioning Student for Sexual Innuendo in Speech*, 33 LOY. L. REV. 516, 525 (1987) (noting that the *Bethel Sch. Dist. No. 403* decision represents a retreat from the Court's "progressive stance" to the pre-*Tinker* ideology of allowing school authorities unbridled deference supporting the *in loco parentis* role of schools).

132. Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 704–05 (1988).

that school administrators have the authority to maintain a safe and disciplined learning environment. This dichotomy continues in the *Morse v. Frederick* case.<sup>133</sup>

C. *Morse v. Frederick: Deterring Illegal Drug Use*

The *Morse* decision makes another contribution to the Court's attempt to strike a balance between students' First Amendment rights and the authority of schools to limit student speech to maintain a safe and appropriate learning environment.<sup>134</sup> The Court examined whether it is constitutionally permissible for school authorities to discipline students for expression that promotes illegal drug use in violation of a school policy during a school-supervised event.<sup>135</sup> The controversy surrounding this case involved Joseph Frederick, a senior at Juneau-Douglas High School, who was suspended from school for violating an established school policy that strictly prohibited “any assembly or public expression that . . . advocates the use of substances that are illegal to minors.”<sup>136</sup> The incident occurred during a school-sponsored event in which students were permitted to watch the Olympic Torch Relay scheduled to proceed along the street across from the high school.<sup>137</sup> This was a historic event because it was the first time the Olympic Torch Relay had passed through Alaska.<sup>138</sup> The controversy ensued when the plaintiff, Joseph Frederick, and his friends unveiled a fourteen-foot banner, which read “BONG HITS 4 JESUS,” as the torchbearer and media passed in front of them.<sup>139</sup> The school principal demanded that the students take the banner down immediately because it advocated for illegal drug use in violation of an established school policy.<sup>140</sup> All of the

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133. *See generally* *Morse v. Frederick*, 551 U.S. 393 (2007).

134. Piotr Banasiak, *Morse v. Frederick: Why Content-Based Exceptions, Deference, and Confusion Are Swallowing Tinker*, 39 SETON HALL L. REV. 1059, 1059 (2009).

135. *See Morse*, 551 U.S. at 397.

136. *Id.* at 398.

137. *Id.* at 397.

138. *Id.*

139. *Id.*

140. *Id.*

students complied with the principal's orders except for Frederick.<sup>141</sup> The school principal confiscated the banner and suspended Frederick for ten days for violating the school's policy against promoting illegal drug use.<sup>142</sup> Frederick challenged the disciplinary action against him through the school district's appeal process but to no avail.<sup>143</sup>

Frederick filed suit in the District Court of Alaska alleging that the principal's disciplinary actions against Frederick's symbolic speech violated his First Amendment rights.<sup>144</sup> The district court ruled in favor of the principal and school district reasoning that the principal's interpretation of the "BONG HITS 4 JESUS" banner as speech promoting illegal drug use was reasonable.<sup>145</sup> Therefore, based on the district court's assessment, the principal's disciplinary action was warranted because Frederick violated the school's antidrug policy during a school-sponsored event.<sup>146</sup> The Ninth Circuit reversed the district court's decision holding that the suspension violated Frederick's First Amendment rights.<sup>147</sup> In applying *Tinker's* material disruption standard, the circuit court found that Frederick's speech was constitutionally protected because there was no substantial disruption to the school environment.<sup>148</sup> The Supreme Court, however, reached a very different conclusion. In reaching its decision, the Supreme Court emphasized the key role schools play in deterring illegal drug use stating, "[D]eterring drug use by schoolchildren is a valid and terribly important interest" that should be protected.<sup>149</sup> The Court further reasoned that schools should not be required to turn a blind eye to the promotion of illegal drug use under the auspices of First Amendment freedom of expression rights.<sup>150</sup>

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141. *Morse*, 551 U.S. at 397–98.

142. *Id.* at 398.

143. *Id.*

144. *Id.* at 399.

145. *Id.*

146. *Id.*

147. *Morse*, 551 U.S. at 669.

148. *Id.*

149. *Id.* at 407.

150. *Id.* at 410.

The *Morse* decision made a significant impact on free speech jurisprudence by establishing a third exception to *Tinker*'s material disruption standard by allowing school authorities to restrict student speech that promotes illegal drug use.<sup>151</sup> Despite the Court's laudable goal of discouraging drug use, the *Morse* decision continued the disturbing post-*Tinker* trend of eroding students' free speech rights by expanding the state's discretionary power to censor student speech.<sup>152</sup> The retreat from *Tinker*'s expansive free speech protections continued in the *Hazelwood* decision.<sup>153</sup>

*D. Hazelwood School District v. Kuhlmeier: School-Sponsored Speech*

The Court's retreat from *Tinker* is further represented in the *Hazelwood* decision, which carved out another exception to *Tinker*'s material disruption standard.<sup>154</sup> In *Hazelwood*, the Court established that school authorities can exercise editorial control over school-sponsored expressive activities as long as their actions are "related to legitimate pedagogical concerns."<sup>155</sup> The controversy surrounding the *Hazelwood* case involved a group of high school journalism students alleging that school authorities violated their First Amendment rights by censoring articles published in the student newspaper, the *Spectrum*.<sup>156</sup> Students in the school's journalism class were responsible for writing articles for publication in the *Spectrum* newspaper as part of the school's educational curriculum.<sup>157</sup> All student articles had to receive approval from the principal prior to publication to ensure that the content was appropriate for school-age children.<sup>158</sup> The principal reviewed the page proofs and rejected two

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151. Banasiak, *supra* note 134, at 1060.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

156. *Id.*

157. *Id.* at 262.

158. *Id.* at 263.

of the articles for publication.<sup>159</sup> The first article, which discussed divorce and how it impacts students, included a student's criticism of his father for not being around enough and for using disrespectful language towards his mother.<sup>160</sup> The principal reasoned that, to publish the article, they would have to obtain the parents' permission to publish and would also have to give the parents the opportunity to respond to their son's claims.<sup>161</sup> The principal rejected the second article, which discussed teenage pregnancy, due to privacy concerns that the student featured in the article may be identified.<sup>162</sup> To meet the tight publication deadline, the principal allowed the school newspaper to go to print without the two controversial articles.<sup>163</sup> The journalism students filed suit alleging the principal's censorship of the student newspaper violated their First Amendment freedom of expression rights.<sup>164</sup>

This case is significant in the K–12 legal milieu because it is the first time the Supreme Court addressed students' free speech rights in the context of school-sponsored activities.<sup>165</sup> The Court ruled that the principal's censorship of the school newspaper did not violate students' free speech rights.<sup>166</sup> Relying on a public-forum analysis, the Court reasoned that the school newspaper was clearly part of the educational curriculum and, thus, could not be categorized as a public forum for free expression.<sup>167</sup> The Court distinguished the speech at

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159. *Id.* at 264.

160. *Id.* at 263.

161. *Hazelwood Sch. Dist.*, 484 U.S. at 263.

162. *Id.*

163. *Id.* at 264.

164. *Id.*

165. *Id.* at 270–71.

166. *Id.* at 273.

167. *Hazelwood Sch. Dist.*, 484 U.S. at 270; see generally Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 722 (2009) (noting that the traditional public forum doctrine content-based speech restrictions in a designated public forum are subject to strict scrutiny); William M. Howard, Annotation, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction*, 71 A.L.R.6TH 471, 471 (2012). It is well established in constitutional jurisprudence that content-based restrictions that occur in traditional public forums are subject to strict scrutiny. See Howard, *supra*. The government can normally impose only content-neutral time, place, and manner restrictions on speech in a public forum. See *id.* Examples of

issue in this case—school-sponsored speech—from the political speech in *Tinker*.<sup>168</sup> Specifically, the speech in controversy in *Tinker* was a student's individual expression that occurred in the school environment; whereas, in *Hazelwood*, the speech was considered a school-sponsored expressive activity and, thus, could reasonably be perceived as bearing the "imprimatur of the school."<sup>169</sup> For these reasons, the Court held it was constitutionally permissible for educators to censor students' free speech that is part of the educational curriculum to ensure that speech is appropriate for students' particular developmental stage and supports the targeted-learning outcomes.<sup>170</sup>

The Court's decision in *Hazelwood*<sup>171</sup> made a significant change to K–12 free speech jurisprudence through the creation of a new category of student speech: "school-sponsored expressive activities."<sup>172</sup> The *Hazelwood* decision explicitly granted fewer constitutional protections for students by permitting school authorities to exercise extensive editorial control over school-sponsored expressive activities as long as such activities are part of the educational curriculum.<sup>173</sup>

A critique of the existing K–12 free speech jurisprudence reveals two prevailing themes that undermine students' First Amendment rights. First, the current legal framework creates barriers to social activism in schools because the free speech doctrine established in *Tinker*, *Bethel*, *Morse*, and *Hazelwood* is too subjective.<sup>174</sup> Specifically, *Tinker*'s material disruption standard and *Bethel*'s exception for lewd and offensive speech are heavily dependent upon each school official's interpretation of the student's speech.<sup>175</sup> For

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public forums are city parks and sidewalks. See Brownstein, *supra*.

168. *Hazelwood Sch. Dist.*, 484 U.S. at 270–71.

169. *Id.* at 271.

170. *Id.* at 273.

171. *Id.*

172. Hafen, *supra* note 132, at 685.

173. Robert R. Verchick, *Engaging the Spectrum: Civic Virtue and the Protection of Student Voice in School-Sponsored Forums*, 24 J. MARSHALL L. REV. 339, 339 (1991).

174. See Nuttall, *supra* note 115, at 1313, 1318.

175. See R. George Wright, Symposium, *Doubtful Threats and the Limits of Student Speech Rights*,



instance, historically, school officials in more conservative areas such as the “Bible Belt” are more likely to perceive language related to a controversial issue as offensive or disruptive than school officials in more geographically-liberal regions such as California.<sup>176</sup> It is this level of subjectivity that undermines social activism in schools because the existing free speech doctrine fails to adequately protect students’ voices from being silenced by school officials in opposition to the message.<sup>177</sup> It is difficult to successfully challenge a school official’s perception of a student’s expressive conduct when there is so much subjectivity embedded within those decisions.<sup>178</sup> Another prevalent theme emerging from existing K–12 free speech jurisprudence is the Court’s restrictive—as opposed to expansive—approach to students’ First Amendment rights.<sup>179</sup> The Court’s stance in *Tinker* and the subsequent free speech decisions all limit—as opposed to expand—students’ free speech rights by giving public school officials more discretionary power to censor student speech by creating exceptions for lewd speech, speech that endorses illegal drug use, and speech related to the education curriculum.<sup>180</sup> The two aforementioned themes illuminate the judiciary’s failure to adequately safeguard students’ free speech rights. Many states pursued a statutory solution to address the Court’s failure to protect students from unwarranted censorship.<sup>181</sup>

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42 U.C. DAVIS L. REV. 679, 691, 708–09 (2009).

176. See Thibodeaux, *supra* note 131, at 525.

177. See Zollo, *supra* note 130, at 198.

178. Wright, *supra* note 173, at 691.

179. *Id.*

180. *Id.* at 707–08.

181. Demi Vitkute, *A Nationwide Movement Protecting the Student Press from Censorship Gains Momentum*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 8, 2017), <https://www.rcfp.org/browse-media-law-resources/news/nationwide-movement-protecting-student-press-censorship-gains-moment> [https://perma.cc/MMZ6-QLEL].

### III. States' Responses to Abridgement of Student Speech: The Birth of Anti-Hazelwood statutes

The Constitution expressly provides that states and the legislative body may not abridge the right to free speech.<sup>182</sup> To this end, the Court established a legal framework, *Tinker's* material disruption standard, to help safeguard students' free speech rights in K–12 schools.<sup>183</sup> However, as previously highlighted, despite *Tinker's* speech-protective rhetoric, in practice the material disruption standard provides students with limited free speech protections due to the series of exceptions imposed by the trilogy of cases following the *Tinker* decision.<sup>184</sup> Collectively, the Court's decisions in *Bethel*, *Hazelwood*, and *Morse* have undermined *Tinker's* expansive approach to safeguarding students' freedom-of-speech rights and afforded school administrators too much discretion in determining when censoring student speech is constitutionally permissible.<sup>185</sup>

The Supreme Court's departure from the lower courts' reliance on *Tinker's* material disruption standard marked a significant shift in K–12 free speech jurisprudence and laid the foundation for states to respond with the passage of anti-*Hazelwood* legislation to safeguard students' free speech rights in K–12 schools.<sup>186</sup> The purpose of anti-*Hazelwood* statutes was to reverse the effects of the *Hazelwood* decision to the greatest extent possible by restoring *Tinker's* broad speech-protective stance to student publications and, in some states, other forms of expression as well.<sup>187</sup> It is well-established

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182. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

183. See Nuttall, *supra* note 115, at 1285.

184. *Id.* at 1282, 1293 (“Scholars view *Tinker v. Des Moines Independent Community School District* as the high-water mark of student speech protection and the Supreme Court’s subsequent decisions, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* (the *Bong Hits* case) as a considerable retreat from this mark.”).

185. *Id.* at 1288–89.

186. Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 168 (2006).

187. Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89, 116 (2013) (“In short, the data demonstrate that anti-Hazelwood statutes are, at least in large part, fulfilling their purpose. The increased criticism of school officials and larger number of controversial editorials in *Tinker* states both indicate the student press is better able to fulfill its watchdog function, develop today’s students into tomorrow’s engaged citizens, and promote the free flow of student ideas when

constitutional jurisprudence that, although states may not restrict one's constitutional rights, they may expand those rights through state legislation, such as anti-*Hazelwood* statutes.<sup>188</sup> Support for states' collective resistance to the *Hazelwood* decision included student journalists and free speech advocates who argued that the *Hazelwood* decision gave school authorities free reign to usurp students' free speech rights and, thus, was contrary to the spirit and purpose of the First Amendment.<sup>189</sup>

Although the number of anti-*Hazelwood* statutes passed has increased over the years, not every state has passed a law.<sup>190</sup> Currently, there are sixteen states that have adopted anti-*Hazelwood* statutes.<sup>191</sup> Other states' attempts to pass student free speech laws have either failed to progress through the political process or after a gubernatorial veto.<sup>192</sup> The majority of states with anti-*Hazelwood* statutes have modeled their statutes after the California Student Free Press Freedom Act.<sup>193</sup> The California-style laws empower students with the right to decide what content merits publication and restore *Tinker's* expansive approach to protecting any form of free speech that does not cause a material disruption to the school learning environment.<sup>194</sup> Section 48950 of the California Student Free Press Freedom Act provides:

(a) A school district operating one or more high schools, a charter school, or a private secondary school shall not make or enforce a rule subjecting a high school pupil to

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protected from administrative censorship.”).

188. Bruce L. Plopper, *A Synthesis Model for Passing State Student Press Legislation*, 51 JOURNALISM & MASS COMM. EDUCATOR 61, 61 (1996).

189. *Id.*

190. *Id.*

191. See Arkansas Student Publications Act, ARK. CODE ANN. §§ 6-18-1201 to -1204 (West 2018); CAL. EDUC. CODE §§ 48907, 48950, 66301, 94367 (West 2018) (prohibiting administrators within the University of California system from disciplining students solely on the basis of their speech); COLO. REV. STAT. ANN. § 22-1-120 (West 2018); IOWA CODE § 280.22 (West 2018); KAN. STAT. ANN. §§ 72-1504 to -1506 (West 2018); MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2018).

192. Plopper, *supra* note 186, at 63–64.

193. Sanders, *supra* note 184, at 174.

194. *Id.*

disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.

(b) A pupil who is enrolled in a school at the time that the school has made or enforced a rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.<sup>195</sup>

This Act attempts not only to protect students' free speech rights but also to shield them from disciplinary action by school authorities who disapprove of their speech.<sup>196</sup> Additionally, the Act serves to deter unlawful violations of students' freedom-of-expression rights by explicitly providing students with legal redress for any harm or injury caused.<sup>197</sup> Although most states model their anti-*Hazelwood* legislation after California's Student Free Press Freedom Act, it is important to note that these types of statutes are not universal and, thus, vary from state to state.<sup>198</sup> Some statutes provide protections to student expression in general, whereas others are narrowly tailored to apply only to student journalists.<sup>199</sup> For example, the Massachusetts statute applies *Tinker's* broad protective stance to all forms of students' freedom of expression.<sup>200</sup> It provides: "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any

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195. See CAL. EDUC. CODE §§ 48907, 48950.

196. CAL. EDUC. CODE §§ 48907, 48950.

197. CAL. EDUC. CODE § 48950.

198. Sanders, *supra* note 191, at 174.

199. *Id.* at 175.

200. *Id.*

disruption or disorder within the school.”<sup>201</sup> Likewise, Vermont’s anti-*Hazelwood* statute ensures “free speech and free press protections for both public school students and students at public institutions of higher education in this [s]tate in order to encourage students to become educated, informed, and responsible members of society.”<sup>202</sup> However, the Arkansas Student Publications Act only applies to student publications.<sup>203</sup> It provides that the following are unauthorized publications:

- (1) Publications that are obscene as to minors, as defined by state law;
- (2) Publications that are libelous or slanderous, as defined by state law;
- (3) Publications that constitute an unwarranted invasion of privacy, as defined by state law; or
- (4) Publications that so incite students as to create:
  - (A) A clear and present danger of the commission of unlawful acts on school premises;
  - (B) The violation of lawful school regulations; or
  - (C) The material and substantial disruption of the orderly operation of the school.<sup>204</sup>

Similarly, Maryland’s Student New Voices Act only expands student free speech protections to cover school-sponsored student publications.<sup>205</sup> It states, “A student journalist may exercise freedom of speech and freedom of the press in school-sponsored media.”<sup>206</sup>

Although anti-*Hazelwood* statutes vary regarding the level and type of protections afforded to students, they all share the underlying premise, which is to shield students from unlawful infringements of

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201. MASS. GEN. LAWS ANN. ch. 71, § 82 (West 2018).

202. VT. STAT. ANN. tit. 16, § 180 (West 2018).

203. Arkansas Student Publications Act, ARK. CODE ANN. § 6-18-1204 (West 2018).

204. *Id.*

205. *Id.*

206. MD. CODE ANN., EDUC. § 7-121 (West 2018).

their free speech rights.<sup>207</sup> Anti-*Hazelwood* statutes, such as the one enacted in Massachusetts that reinstates *Tinker's* broad protective stance, provide the best statutory protections for unlawful censorship of students' expressive activities, political speech, and symbolic speech because they minimize the discretionary power of school officials.<sup>208</sup> However, restrictive anti-*Hazelwood* statutes, like those enacted in Arkansas and Maryland, fail to adequately protect students due to their limited approach, which only expands students' free speech rights regarding school-sponsored student publications.<sup>209</sup> All other forms of student expression may be subject to censorship.<sup>210</sup> Thus, students who attend public schools in states with restrictive anti-*Hazelwood* statutes leave the fate of their free speech protections to the whims of capricious school officials.<sup>211</sup> Despite the aforementioned shortcomings of some of the narrower anti-*Hazelwood* statutes, the evolution of this innovative statutory solution to expanding students' free speech rights provides a substantive path to addressing the current wave of unlawful censorship experienced by students attempting to engage in social activism in K–12 schools.

#### *IV. A Statutory Solution to Safeguarding Students' Free Speech Rights*

The current K–12 free speech jurisprudence established in *Tinker*, *Bethel*, *Morse*, and *Hazelwood* fails to adequately protect students' First Amendment freedom-of-expression rights to engage in political speech, expressive activities, and symbolic conduct. First, *Tinker's* material disruption standard is too subjective because what one school authority may deem as disruptive, another may categorize as simply child's play.<sup>212</sup> The unbridled discretionary power wielded by

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207. Sanders, *supra* note 191, at 168.

208. *Id.* at 160–62.

209. *Id.* at 165.

210. *Id.*

211. *Id.* at 162, 165.

212. Nuttal, *supra* note 115, at 1319.

school authorities to interpret what constitutes a material disruption has served as a catalyst for inequitable disciplinary practices throughout K–12 schools.<sup>213</sup> For example, a recent Oklahoma School District discipline audit revealed grave discrepancies regarding disciplinary sanctions within its school system.<sup>214</sup> The audit found that the average length of suspensions varied widely among schools for the same offense.<sup>215</sup>

Additionally, the audit found that certain schools were more likely to issue alternative education program referrals than others for the same infraction.<sup>216</sup> The results of the Oklahoma School District discipline audit are not an anomaly but rather reflect the larger issue of gross disparities in disciplinary sanctions in school districts across the country.<sup>217</sup> A national report released by the U.S. Government Accountability Office found that disciplinary disparities were widespread and persistent regardless of the type of public school attended, level of school poverty, or type of school property.<sup>218</sup> Abuses of discretionary authority by school administrators due to the high subjectivity in determining what qualifies as a material disruption is perpetuating an inequitable disciplinary system that subjects students to arbitrary and capricious actions.<sup>219</sup>

Another harmful consequence of the establishment of a subjective—as opposed to objective—standard for *Tinker*'s material disruption standard is the increased likelihood of students' free speech rights being violated due to viewpoint discrimination.<sup>220</sup> The rise in instances of viewpoint discrimination in response to social activism in schools is highly problematic because viewpoint

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213. See generally Tim Willert, *Oklahoma City School District Audit Finds Widespread Discrepancies*, NEWSOK (Apr. 20, 2015), <https://newsok.com/article/5412087/oklahoma-city-school-district-discipline-audit-finds-widespread-discrepancies> [<https://perma.cc/RNU3-YEW2>].

214. *Id.*

215. *Id.*

216. *Id.*

217. K–12 EDUCATION REPORT, *supra* note 69.

218. *Id.*

219. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); K–12 EDUCATION REPORT, *supra* note 69.

220. John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 603 (2009).

neutrality is one of the core principles of First Amendment protections.<sup>221</sup> The Court recognizes the important role viewpoint neutrality plays in preserving free speech protections. This is evident by the Court's application of strict scrutiny in evaluating viewpoint discrimination, as opposed to one of the lower standards of review. The significant role *Tinker's* material disruption standard plays in creating an environment conducive to viewpoint discrimination must be addressed. It is evident by the inconsistency among school authorities' responses to student activism in schools—that some school leaders are limiting students' symbolic speech simply because they disagree with the content. For example, in Michigan a student who wore a shirt with the phrase “international terrorist” and a picture of President Bush in the background was forced to turn his shirt inside-out, even though the symbolic speech did not cause a material disruption.<sup>222</sup> Similarly, a New York student was forced to remove a Palestinian flag pin from his shirt or be subjected to disciplinary sanctions, despite the fact that the symbolic expression did not cause any level of disruption to the educational environment.<sup>223</sup> This type of censorship based on the viewpoints of school authorities demonstrates that school administrators are not immune from allowing their moral convictions to influence their disciplinary actions. This type of viewpoint discrimination undermines one of the fundamental purposes of the First Amendment, which is to promote the uninhibited exchange of ideas.<sup>224</sup> This notion was clearly expressed by the Court's opinion in

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221. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 702 (2011) (“Although there is very little agreement about the core ‘purpose’ of the First Amendment, there is near unanimity that *one* such purpose—and certainly a core function—is to protect private viewpoints from government regulation.”).

222. Tamar Lewin, *High School Tells Student to Remove Antiwar Shirt*, N.Y. TIMES (Feb. 26, 2003), <https://www.nytimes.com/2003/02/26/us/high-school-tells-student-to-remove-antiwar-shirt.html> [<https://perma.cc/JK4V-C3DL>]. A federal judge subsequently ruled that the student could wear the T-shirt. Associated Press, *Student May Wear Bush ‘Terrorist’ Shirt*, FOXNEWS.COM (Oct. 2, 2003), <http://www.foxnews.com/story/2003/10/02/student-may-wear-bush-terrorist-shirt.html> [<https://perma.cc/WS39-CC7P>].

223. Lewin, *supra* note 220.

224. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately



*Shelton v. Tucker* that proclaimed, “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>225</sup> Therefore, schools should be a quintessential marketplace of ideas where students are trained on how to actively participate in democracy by creating an environment where the robust exchange of ideas that challenge and critique existing ideologies are not only welcomed but encouraged.

Furthermore, *Hazelwood*, *Bethel*, and *Morse* do not provide adequate constitutional protections for students who engage in symbolic conduct, political speech, and expressive activities. In all three cases, the Supreme Court carved out narrow exceptions that permit school authorities to censor student speech, none of which are applicable to the type of speech at issue in national anthem protests and school walkouts.<sup>226</sup> For example, the performance of students who play on school-sponsored sports teams are not part of the educational curriculum because their athletic performance is not used to assess their academic achievement.<sup>227</sup> Likewise, the *Bethel* exception for lewd and indecent speech is not applicable to school walkouts or national anthem protests because the speech is not lewd or indecent but rather political speech intended to communicate the need for controlling access to guns and addressing police brutality.<sup>228</sup> Lastly, the *Morse* standard, which established that school authorities may regulate student speech that promotes illegal drug use, is distinct from the symbolic speech conveyed through national anthem protests and school walkouts, which are completely unrelated to drug use.<sup>229</sup>

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prevail . . .”).

225. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

226. See *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

227. McNeal, *supra* note 88, at 186.

228. *Id.* at 174–75.

229. *Id.* at 185–85.

*A. A Legislative Solution to Safeguarding Students' Free Speech Rights*

The current legal framework governing free speech rights in K–12 schools fails to protect students' symbolic conduct, political speech, and expressive activities in K–12 schools. The state should not be permitted to censor or prohibit students' speech to avoid the discomfort or unpleasantness that is often associated with an unpopular viewpoint.<sup>230</sup> This article argues that anti-*Hazelwood* statutes should be amended to include protections for students' free speech rights in K–12 schools. Because not all fifty states have passed anti-*Hazelwood* statutes,<sup>231</sup> it is imperative that states without anti-*Hazelwood* statutes pass this important legislation to safeguard students' free speech rights. The proposed legislative solution will fully restore *Tinker's* broad free speech protections to students in K–12 schools and address the current inconsistency in how school authorities interpret students' free speech rights. Under the proposed legislative solution, it is imperative that the suggested amendments explicitly prohibit viewpoint discrimination. The state can affirm students' rights to freedom of expression without having to endorse any particular viewpoint.<sup>232</sup> It is also imperative that amended statutes include disciplinary action for disruptive speech and provide students with legal redress for any harm or injury resulting from unlawful censorship. Lastly, the proposed amendments to anti-*Hazelwood* statutes should apply to *all* forms of student expression, not just school-sponsored media (i.e., school walkouts and national anthem protests). The proposed model anti-*Hazelwood* statute reads as follows:

The General Assembly finds that freedom of expression and freedom of the press are fundamental principles in our democratic

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230. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (“In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it 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.”).

231. Sanders, *supra* note 184, at 168.

232. *Id.* at 166–67.

society granted to every citizen of the nation by the First Amendment to the U.S. Constitution and to every resident of this State. These freedoms provide all citizens, including students, with the right to engage in robust and uninhibited discussion of issues.

(a) The right of students to freedom of expression in the public schools within this state shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include, without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech, symbols, and conduct; (b) to write, publish, and disseminate their views; and (c) to assemble peaceably on school property for the purpose of expressing their opinions.

(b) A school district operating one or more high schools, a charter school, or a private secondary school shall not make or enforce a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or state Constitution.

(c) A pupil who is enrolled in a school at the time that the school has made or enforced a rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.

(d) This section does not apply to a private secondary school that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization.

(e) This section does not prohibit the imposition of

discipline for harassment, threats, or intimidation, unless constitutionally protected.

The proposed amendment to anti-*Hazelwood* statutes should be implemented because students should be free to exercise their rights without interference from the state. Schools certainly can educate, but they cannot indoctrinate based upon a prescribed orthodoxy. As Justice Fortas eloquently stated in *Tinker*:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.<sup>233</sup>

The proposed legislative solution helps solidify the key role schools play in protecting and advancing the values of the First Amendment by sending a symbolic and substantive message to school authorities that students do not shed their free speech rights at the schoolhouse door. Ideally, schools should teach students how to become civically-engaged citizens by affording them the opportunity to transcend their individual understanding of controversial issues such as gun control by exchanging ideas and perspectives with a diverse spectrum of voices within their schools and communities.<sup>234</sup> According to Henry Giroux and Peter McLaren, school environments must encourage critical evaluation and creative reasoning to equip students with the knowledge and skills to actively participate in

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233. *Tinker*, 393 U.S. at 506.

234. Verchick, *supra* note 171, at 341.

democracy.<sup>235</sup> To this end, anti-*Hazelwood* statutes support civic education by ensuring that students will be afforded the opportunity to not only learn about their freedom-of-expression rights but apply that knowledge in an encouraging environment.<sup>236</sup>

It is important to acknowledge that some legal scholars posit that we should pursue a judicial solution—the Supreme Court’s explicit prohibition of viewpoint discrimination—as opposed to a legislative approach to protecting students’ free speech rights in relation to school-sponsored speech.<sup>237</sup> The reasoning behind this approach is that eliminating viewpoint discrimination will indirectly shield students from infringements on their freedom-of-expression rights by school authorities who hold opposing views.<sup>238</sup> However, as one scholar illustrated, a judicial solution is not the most efficient path to protecting students from viewpoint discrimination considering that the Supreme Court has agreed to hear only four student free speech cases in the past forty years.<sup>239</sup> In light of the widespread student activism permeating K–12 schools and the inconsistency with which school authorities are protecting students’ free speech rights, we cannot afford to remain idle in hopes that the Court will choose to intervene by issuing a writ of certiorari in the near future. Each day that passes without a substantive legal solution in place to safeguard students’ freedom-of-expression rights leaves students susceptible to unlawful censorship by school authorities.<sup>240</sup> Therefore, the proposed legislative solution is better than a judicial solution because it offers the most expeditious path toward protecting students’ free speech rights.

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235. *Id.* at 362.

236. *Id.*

237. Evan Mayor, Note, *The “Bong Hits” Case and Viewpoint Discrimination: A State Law Answer to Protecting Unpopular Student Viewpoints*, 77 GEO. WASH. L. REV. 799, 816 (2009).

238. *Id.* at 812–13.

239. *Id.* at 816.

240. *Id.* at 817.

B. *Limitations of Proposed Solution*

Despite all of the potential benefits of the proposed amendment to existing anti-*Hazelwood* statutes, it is important to acknowledge the limitations and negative outcomes that may result. First, nearly all of the anti-*Hazelwood* statutes lack independent enforcement mechanisms to help ensure compliance.<sup>241</sup> Only one state's statute, Oregon, contains a penalty for violating the statute.<sup>242</sup> The penalty provisions allow students to pursue a direct cause of action that arises solely from the anti-*Hazelwood* statute.<sup>243</sup> The absence of an independent enforcement mechanism may send a symbolic and substantive message to school authorities that impermissible infringements on students' free speech rights will not be taken seriously. Second, this approach will not protect all students' free speech rights because not all fifty states currently have anti-*Hazelwood* statutes to enact the proposed amendments, and even those states with existing statutes may not be interested in making any additional changes.<sup>244</sup> Furthermore, those states in which free speech advocates attempt to garner the support to pass the proposed legislation will likely experience a great deal of challenges due to the current tumultuous political climate.<sup>245</sup>

Despite the aforementioned challenges, amending existing anti-*Hazelwood* statutes offers the best path toward safeguarding students' free speech rights. The existing practice of turning a blind eye to the inconsistent application of students' First Amendment rights is harmful to students and reduces them to second-class citizens.<sup>246</sup> We have a moral and ethical responsibility to ensure that students' rights to engage in symbolic conduct, political speech, and other expressive activities are not restricted by the state.

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241. Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89, 116 (2013).

242. *Id.* at 117.

243. *Id.*

244. *Id.* at 114–15.

245. Angiesta, *supra* note 49.

246. Mayor, *supra* note 235, at 817.

CONCLUSION

Ideally, public schools should prepare children on how to live and fully participate in a democratic society. According to a well-known education theorist, one of the primary purposes of education is to promote democratic equality, and therefore, schools should be designed to prepare students for political roles and active citizenry.<sup>247</sup> This notion is further captured in a statement by Justice Brennan in *Keyishian v. Board of Regents of the University of New York*:

[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” . . . “No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”<sup>248</sup>

Regardless of whether one agrees with President Trump’s ideology, American citizens, which includes students, should not be bullied out of their constitutional freedoms nor should they be denied future opportunities for expressing an idea in a way that is unpopular or offensive to others. School authorities have a moral and ethical responsibility to stand in support of students’ right to expression even if opposed to students’ views on any particular issue. Any form of discipline for students’ expressive activities, such as kneeling during the national anthem, constitutes viewpoint discrimination, which is strictly prohibited by the Constitution.<sup>249</sup> It is imperative that school authorities empower—as opposed to oppress—students’ political speech, symbolic conduct, and expressive activities. We cannot continue to allow school authorities to circumvent students’

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247. David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J. 39, 42 (1997).

248. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

249. Blocher, *supra* note 219, at 702.

substantive freedom-of-expression rights under the guise of neutrality when they are clear instances of viewpoint discrimination.<sup>250</sup>

One of the essential tenets for freedom of expression jurisprudence is the promotion of a marketplace of ideas that encourages freedom of expression from diverse perspectives.<sup>251</sup> Therefore, any attempts to undermine or minimize individuals' efforts to express their diverse perspectives makes a mockery of the First Amendment, which is arguably one of our most cherished constitutional rights.<sup>252</sup> This notion is best captured in the following quote by Justice Fortas:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>253</sup>

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250. Cedric Merlin Powell, *Critiquing Neutrality: Critical Perspectives on Schools, the First Amendment, and Affirmative Action in a "Post-Racial" World*, 52 U. LOUISVILLE L. REV. 105, 109 (2013) ("Neutrality functions in much the same way under the First Amendment. Like the school decisions discussed above, the emphasis is on process values rather than substantive rights. The Court's First Amendment jurisprudence exhibits a pronounced distaste for the regulation of the content of speech . . .").

251. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

252. *See id.* at 508–09.

253. *Id.*