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Take Your Seats: A Student's Ability to Protest Immigration Reform at Odds with State Truancy and Compulsory Education Laws

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TAKE YOUR SEATS: A STUDENT’S ABILITY TO PROTEST IMMIGRATION REFORM AT ODDS WITH STATE TRUANCY AND COMPULSORY EDUCATION LAWS

*Jason Scronic**

I. INTRODUCTION	185
II. THE HISTORY OF TRUANCY AND COMPULSORY EDUCATION LAWS	187
A. <i>Truancy Laws to Promote Social and Individual Welfare</i>	189
B. <i>Truancy Laws to Discourage Vagrancy and Juvenile Crime</i>	190
III. FIRST AMENDMENT PROTECTION AND ITS LIMITS	191
A. <i>The Overbreadth of Compulsory Education and Truancy Violations</i>	191
B. <i>Content-Neutral Regulations: Truancy and the First Amendment Under O’Brien</i>	193
1. Do Truancy Laws Further An Important Or Substantial Government Interest?	197
2. Is the Government’s Interest in Issuing Truancy Violations Unrelated to the Suppression of Free Speech of Schoolchildren?	198
3. Is the Restriction No Greater than what is Essential to the Furtherance of that State Interest?	198
IV. SUBSEQUENT SCHOOL CONSEQUENCES	201
V. CONCLUSION	205

I. INTRODUCTION

In an ever-growing democratic society, it is every citizen’s right and duty to participate in the democratic process. It is their decision to be an active participant, even if it is simply to vote. However, when

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does this right begin? What is the magic day on which a citizen's voice begins to matter? Does it start only when a citizen is legally old enough to vote? High school students across the country have refused to wait until their eighteenth birthday to participate in the democratic process. These students strive to find appropriate avenues to voice their opinions.

In December of 2005, Congressman Sensenbrenner of Wisconsin submitted the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.¹ The bill was designed to "strengthen enforcement of the immigration laws, to enhance border security, and for other purposes."² As support grew for the bill, the stage was set for millions of Americans and American immigrants to rise up in protest of the bill, which would raise penalties for illegal immigration and classify illegal aliens, as well as anyone who helps them enter or remain in the United States, as felons.³ These protests arose all over the country in the spring of 2006. This paper focuses on student protestors from high schools and middle schools who walked out or skipped classes in order to participate in the marches and protests.

In Los Angeles County alone, roughly 11,000 students either left class or skipped school to protest the Border Protection, Antiterrorism, and Illegal Immigration Control Act.⁴ In response, the Los Angeles County Superintendent of Schools stated that the school district's highest priority was to ensure that these students were attending classes and not skipping school.⁵ The school district then classified any student who was caught leaving campus or who was absent from school during the protests as truant.⁶

As students continued to protest the proposed immigration laws, the state responded. At Westchester High School in Los Angeles, at 9:25 am on March 29, 2006, a number of students got up and walked

1. H.R. REP. NO. 109-345(I) (2006).

2. *Id.*

3. *Id.* at 11.

4. *Police to Crack Down on Student Walkouts: Truants Could Face Fines, Community Service*, KNBC.COM, <http://www.knbc.com/education/8312992/detail.html> (last visited Nov. 27, 2007) [hereinafter *Student Walkouts*]; see also Sherry Saavedra, *Legality of Protest Penalties Disputed*, SAN DIEGO UNION-TRIB., Apr. 22, 2006, at B1, available at http://www.signonsandiego.com/uniontrib/20060422/news_7m22suspend.html; Laura Hensley, *Hearne Students Join in Protests*, THE BRYAN-C. STATION EAGLE, Apr. 4, 2006, available at http://209.189.226.235/stories/040406/schools_20060404007.php; Jacob Adelman, *No Student Walkouts Reported in L.A. After Crackdown on Truancy*, ASSOCIATED PRESS, Mar. 30, 2006, available at <http://www.infoshop.org/inews/article.php?story=20060330145711442>.

5. *Student Walkouts*, *supra* note 4.

6. *Id.*

out of classes to protest.⁷ Roughly 100 students were cited with truancy, while other students were rounded-up, placed on buses, and shipped back to school only thirty-five minutes after leaving.⁸ While the protests were peaceful overall, law enforcement officials stated that they were “tired of student protests.”⁹ These law enforcement officials claimed that the protests were putting a strain on their ability to respond to emergencies.¹⁰ Moreover, Los Angeles students were not alone in being issued truancy violations.¹¹ Students from all areas of California and other Southwestern states were also faced with police intervention when attempting to protest by walking out of school.¹² These students, who were issued truancy violations, now face blemished high school records, criminal records, fines ranging from \$200-\$500, and community service.¹³

This paper addresses the events surrounding the student immigration protests in spring of 2006. Specifically, this paper concentrates on the validity of the state’s issuance of truancy violations and the subsequent school discipline. The history of truancy and compulsory education laws is discussed first, followed by an analysis of whether these laws are facially unconstitutional because of overbreadth. These state statutes will then be examined under the *O’Brien* test.¹⁴ Finally, this paper will address the schools’ response under the *Tinker*¹⁵ analysis.

II. THE HISTORY OF TRUANCY AND COMPULSORY EDUCATION LAWS

Prior to engaging in an analysis of whether these truancy and compulsory education laws are unconstitutional, it is first important to

7. *Police Enforce Truancy Laws To Quell School Student Walkouts: Protesting High School Students Face Discipline* (Mar. 29, 2006) available at <http://www.knbc.com/news/8340584/detail.html> [hereinafter *Police Enforce Truancy Laws*].

8. *Id.*

9. *Student Walkouts*, *supra* note 4 (stating that the marches were mostly peaceful but a few students were arrested for things other than truancy, such as assault).

10. *Student Walkouts*, *supra* note 4.

11. See Saavedra, *supra* note 4; Hensley, *supra* note 4.

12. See Saavedra, *supra* note 4; Hensley, *supra* note 4.

13. *Student Walkouts*, *supra* note 4; Hensley, *supra* note 4; Adelman, *supra* note 4; *Police Enforce Truancy*, *supra* note 7.

14. *United States v. O’Brien*, 391 U.S. 367 (1968) (determining whether the restriction on First Amendment freedom is no greater than necessary to further an important or substantial government interest that is unrelated to the suppression of free expression).

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (finding it unconstitutional to deny students their freedom to express an opinion, at school, absent a showing that the students engaged in conduct that would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school).

discuss a brief history and an understanding of these laws. Compulsory education laws ensure that students attend school, regardless of the manner in which these students acquire their education, up to a certain age.¹⁶ These laws apply only to the time when the student is supposed to be in school and up to the age as set forth in the specific statutes.¹⁷ Generally, the purpose of compulsory education laws is to ensure that children attend school.¹⁸ However, the specific state interests as to why these students need to be attending school are further explained in subsequent paragraphs. Lastly, truancy laws are the vehicle by which the above compulsory education laws are enforced.¹⁹

Compulsory education laws and truancy violations are enforced in a variety of ways, including civil court proceedings or even criminal proceedings.²⁰ Generally, however, when a youth is picked up by a truant officer, the offense is not treated as criminal and the emphasis is not on punishment but rather the correction of the behavior.²¹ As such, a truant officer typically returns the youth to school or to a parent.²²

Truancy laws or compulsory attendance laws have been enacted in all states.²³ The earliest of these laws was enacted in Massachu-

16. BLACK'S LAW DICTIONARY 281 (7th ed. 1999) (defining compulsory-attendance laws); 3 J. RAPP, EDUCATION LAW, § 8.03 (2006) [hereinafter EDUCATION LAW]; 78A C.J.S. *Schools & School Districts* §732 (1995).

17. See 78A C.J.S. *Schools & School Districts* at § 736.

18. *Id.* at § 732.

19. See BLACK'S LAW DICTIONARY 1513 (7th ed. 1999); see also 78A C.J.S. *Schools & School Districts* at § 740.

20. 78A C.J.S. *Schools & School Districts* at § 732.

21. *In re James D.*, 741 P.2d 161, 163 (Cal. 1987).

22. *Id.*; see BLACK'S LAW DICTIONARY 1513 (7th ed. 1999); see also 78A C.J.S. *Schools & School Districts* at § 741 (truant officer is an official who is responsible for enforcing truancy laws; the officer is typically a public official created through the specific state statute).

23. ALA. CODE § 16-28-1 *et seq.*; ALASKA STAT. § 14.30.010 *et seq.*; ARIZ. REV. STAT. ANN. § 15-802; ARK. CODE ANN. § 6-18-201; CAL. EDUC. CODE § 48200 *et seq.*; COLO. REV. STAT. § 22-33-104; CONN. GEN. STAT. ANN. § 10-184; DEL. CODE ANN. tit. 14, § 2702 *et seq.*; D.C. CODE ANN. § 38-202 *et seq.*; FLA. STAT. ANN. § 1003.21 *et seq.*; GA. CODE ANN. § 20-2-690.1; HAWAII REV. STAT. § 302A-1132; IDAHO CODE § 33-202 *et seq.*; 105 ILL. COMP. STAT. 5/26-1 *et seq.*; IND. CODE ANN. § 20-33-2-6 *et seq.*; IOWA CODE ANN. § 299.1 *et seq.*; KAN. STAT. ANN. § 72-1111; KY. REV. STAT. ANN. § 159.010 *et seq.*; LA. REV. STAT. ANN. § 17.221; ME. REV. STAT. ANN. tit. 20(A), § 5001(A); MD. EDUC. CODE ANN. § 7-301; MASS. ANN. LAWS ch. 76, § 1 *et seq.*; MICH. COMP. LAWS § 380.1561; MINN. STAT. ANN. § 120.101; MISS. CODE ANN. § 37-13-91; MO. REV. STAT. § 167.031 *et seq.*; MOT. CODE ANN. § 20-5-102 *et seq.*; NEB. REV. STAT. § 79-201 *et seq.*; NEV. REV. STAT. § 392.040 *et seq.*; N.H. REV. STAT. ANN. § 193:1 *et seq.*; N.J. STAT. ANN. § 8A: 38-25 *et seq.*; N.M. STAT. ANN. §22-1-2.1 *et seq.*; N.Y. EDUC. CODE LAW § 3201 *et seq.*; N.C. GEN. STAT. § 115C-378; N.D. CENT. CODE § 15.1-20.01 *et seq.*; OHIO REV. CODE ANN. § 3321.01 *et seq.*; OKLA. STAT. ANN. tit 70, § 10-105; OR. REV. STAT. § 339.005 *et seq.*; PA. STAT. ANN. tit. 24 § 13-1326 *et seq.*; R.I. GEN LAWS § 16-19-1 *et seq.*; S.C. CODE ANN. § 59-65-10 *et seq.*; S.D. CODIFIED LAWS ANN. § 13-27-1 *et seq.*; TENN. CODE ANN. § 49-6-2001

setts in 1852.²⁴ Since then, all states have adopted truancy or compulsory educational laws for three reasons. The first of these policy reasons was based on a social concern about child labor and employment opportunities.²⁵ The second policy consideration for compulsory education laws is based on the importance of “training school children in good citizenship, patriotism, and loyalty to the state and the nation”²⁶ The last of the legislative reasons focuses on a desire to vagrancy, juvenile crime, and other, and reducing daytime crime.²⁷ While social concern regarding child labor laws may not continue to be the central point of legislative concern, the two policies still carry a lot of weight in why states implement and enforce truancy laws. The second and third legislative concerns are discussed in the following paragraphs to explain why states have a high incentive to compel students to attend school.

A. *Truancy Laws to Promote Social and Individual Welfare*

State legislatures have long justified truancy and compulsory educational laws by citing the social interest in the protection and education of children, thereby ensuring that there is a “continuance upon the healthy, well-rounded growth of young people into full matur[e] citizens”²⁸ This philosophy serves is importance to both the individual and society.²⁹ Thomas Jefferson stated that education is necessary to prepare citizens to work and participate in society and in the American political system.³⁰ It is this participation that ensures that our political system will flourish and “preserve freedom and independence”³¹ so that every child will receive the schooling that is needed to “function in the adult world.”³² Furthermore, Thomas Jefferson claimed that education would prepare the individual to be self-reliant

et seq.; TEX. CODE ANN. § 25.085 *et seq.*; UTAH CODE ANN. § 53A-11-101 *et seq.*; VT. STAT. ANN. tit. 16, § 1121 *et seq.*; VA. CODE § 22.1-245, *et seq.*; WASH. REV. CODE ANN. § 28A.225.010; W. VA. CODE § 18-8-1; WIS. STAT. ANN. § 118.15; WYO. STAT. § 21-4-101 *et seq.*

24. EDUCATION LAW, *supra* note 16 at §8.03(2).
25. *Id.*; Wisconsin v. Yoder, 406 U.S. 205, 227-28 (1972).
26. EDUCATION LAW, *supra* note 16 at § 8.03(2).
27. *Id.*
28. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
29. See In re James D., 741 P.2d at 166-67.
30. Yoder, 406 U.S. at 221.
31. *Id.*
32. In re Julio R., 492 N.Y.S.2d 912, 914 (1985).

and self-sufficient.³³ Courts have echoed this Jeffersonian belief in stating that state truancy and compulsory education laws “prepare citizens to participate effectively and intelligently in our open political system, which is an indispensable prerequisite to the preservation of our democratic republic.”³⁴ These laws are those which “[t]he American people have always regarded . . . of supreme importance which should be diligently promoted.”³⁵ Therefore, state legislatures have been given great deference in the implementation and enforcement of state compulsory attendance and educational laws.

B. *Truancy Laws to Discourage Vagrancy and Juvenile Crime*

Truancy and compulsory educational laws have also functioned to combat juvenile crime. Truancy is a gateway crime.³⁶ Truant behavior at a young age leads to higher drop-out rates and criminal activity.³⁷ In two studies, it was shown that when students are absent from school and detained, roughly fifty-percent of those detained tested positive for drug use.³⁸ Generally, there is a direct correlation between truancy and substance abuse, gang activity, and involvement in other criminal activity such as auto theft, burglary, and vandalism.³⁹

Statistics have shown that truancy is one of the “best indicators of academic failure, suspension, expulsion, and delinquency.”⁴⁰ These problems do not end in adolescence, but continue to escalate into adulthood, including problems such as mental health problems, adult crimes, violence, lower salaries, and poverty.⁴¹ In New York, the use of police to combat truancy is deemed a valid police power of the state.⁴² This was especially seen as a result of the economic and social impact

33. *Yoder*, 406 U.S. at 221; *see also* *Michigan v. DeJonge*, 501 N.W.2d 127, 138 (Mich. 1993).

34. *Michigan v. Bennent*, 501 N.W.2d 106, 124 (Mich. 1993).

35. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

36. Tad A. Delvin, *Education: Truant Students*, 27 PAC. L.J. 703, 704 (1996); *see also* *Truancy: First Step to a Lifetime of Problems*, U.S. Dept. of Justice/Juvenile Justice Bulletin, Oct. 1996, at 1 [hereinafter *First Step to a Lifetime of Problems*].

37. Delvin, *supra* note 36, at 704; Dragan Milovanovic, *Adolescent Subcultures and Delinquency*, 76 CRIM. L. & CRIMINOLOGY 794, 796 (1985).

38. *First Step to a Lifetime of Problems*, *supra* note 36, at 1.

39. *Truancy Reduction: Keeping Students in School*, (U.S. Dept. of Justice/Juvenile Justice Bulletin), Sep. 2001, at 1 [hereinafter *Keeping Students in School*].

40. Lorenzo A. Trujillo, *School Truancy: A Case Study of a Successful Truancy Reduction Model in Public Schools*, 10 U.C. DAVIS J. JUV. L. & POL'Y 69, 70 (2006); *Keeping Students in School*, *supra* note 39, at 1.

41. *Keeping Students in School*, *supra* note 39, at 1.

42. *In re Julio R.*, 492 N.Y.S.2d at 914.

that truancy had in New York City.⁴³ In New York City, more than one-third of the city's youth were consistently absent from school.⁴⁴ Most of these students ended-up becoming unemployable, which led to higher crime rates.⁴⁵ Similar statistics are found around the country.⁴⁶ In response, police have conducted truancy sweeps that have produced dramatic drops in daytime crime rates.⁴⁷ As a result, it is clear that the need for truancy laws to combat juvenile delinquency is still alive today.

III. FIRST AMENDMENT PROTECTION AND ITS LIMITS

Determining whether the state is justified in the issuance of truancy violations and the upholding of compulsory education laws against young adults, in lieu of their rights to free speech, requires in-depth analysis of a variety of constitutional issues. First, the compulsory education and truancy laws are analyzed to determine if the statutes are overbroad and therefore facially unconstitutional. This is followed by an analysis of the statutes under *O'Brien* in determining whether the statutes are content-neutral in light of the events in spring 2006. It becomes apparent through the application of these tests that the state is justified in enforcing compulsory education laws and truancy violations against these young adults despite their right to free speech.

A. *The Overbreadth of Compulsory Education and Truancy Violations*

The doctrine of overbreadth is concerned with the construction and application of a statute.⁴⁸ A statute, on its face, may appear to be clear in regulating one type of unprotected speech but at the same time sweeps too broadly and regulates protected speech as well.⁴⁹ The Supreme Court has held that if this occurs the statute is overbroad. Due to its overbreadth, the statute can be struck down on its face even if it

43. *Id.*

44. *Id.*

45. *Id.*

46. Trujillo, *supra* note 40, at 73-74.

47. *Id.*

48. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); see also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847 (1970) (overbreadth doctrine seeks to mend the injuries an individual suffers when a statute is over inclusive, as drafted).

49. See *Broadrick*, 413 U.S. at 610.

is applicable to the litigant raising the claim.⁵⁰ Therefore, even if the students, in the spring of 2006, may have been legitimately subject to the compulsory education laws and truancy laws, the students could still raise the constitutional claim of overbreadth. If that claim prevails, the acts of the state in the issuance of truancy violations will be unconstitutional. However, it should be mentioned that the Supreme Court has ruled that declaring a statute unconstitutional because of overbreadth is "manifestly strong medicine" and should be used only in limited circumstances.⁵¹ As such, the students will be faced with a difficult battle in trying to prove the statute is overbroad and unconstitutional on its face.

In determining whether the compulsory education and truancy laws are overbroad, it is important to look at the general rules that the Supreme Court has created in deciding whether a statute or regulation is overbroad.⁵² In a case like this, "where conduct and not merely speech is involved, [the court believed] that the overbreadth of a statute must not only be real, but [must be] substantial as well, [and] judged in relation to the statute's plainly legitimate sweep."⁵³ As such, a statute that deals with both content and speech is given a less rigorous standard of scrutiny when addressing the issue of overbreadth.⁵⁴ In one case where conduct was mixed with speech, the Supreme Court held that statutes that limited political expression of public employees were not overbroad even if it may have created a chilling effect on speech.⁵⁵ The Court reasoned that there were adequate state interests in prohibiting state employees from campaigning, like statutes regulating peace in the community, and therefore the statute was not substantially overbroad because the state interests were compelling.⁵⁶ Therefore, a statute will not be determined to be facially invalid if there are situations where there are valid legitimate state interests that are not substantially overbroad.

The students in the events that occurred in the spring of 2006 were expressing their First Amendment rights by mixing both speech and conduct. As such, a lesser degree of scrutiny will be applied in determining whether the compulsory education and truancy laws are unconstitutional. In determining whether these statutes are unconsti-

50. *Plummer v. City of Columbus*, 414 U.S. 2, 2-3 (1973).

51. *Bigelow v. Virginia*, 421 U.S. 809, 817; *see also Broadrick*, 413 U.S. at 613.

52. *See* 16A AM. JUR. 2D. CONSTITUTIONAL LAW § 413 (2000).

53. *Broadrick*, 413 U.S. at 616.

54. *Id.*

55. *Id.*

56. *See id.*

tutional, the state interests need to be determined. Here, the state has important reasons to enforce truancy and compulsory education laws.⁵⁷ The reasons for the creation of truancy and compulsory education laws are as significant, if not more significant, as the statute that was determined not to be overbroad in *Broadrick v. Oklahoma*. In fact, these statutes seem to be more akin to that of laws that regulate the peace of the community. As a result, the statutes and regulations will be upheld as long as they are not substantially overbroad. In this instance, it cannot be said that the truancy and compulsory education laws are substantially overbroad, because they do not prohibit or regulate substantially more speech than necessary to serve the state's legitimate interests. As mentioned, these laws only apply when school is in session and only affect the conduct of these students while in school. The regulations in no way affect what the students may do in their free time outside of school, nor do they prevent them from bringing up certain issues while they are not in school. Additionally, these compulsory education and truancy laws only compel students to attend school up to a certain age, not indefinitely. Consequently, even if there is a marginal overreaching by the legislature in creating these statutes, that overreaching is not substantial enough to invalidate these statutes on their face. State truancy laws and compulsory education laws are therefore not unconstitutional due to overbreadth.

B. Content-Neutral Regulations: Truancy and the First Amendment Under O'Brien

In *Wisconsin v. Yoder*, the Court held that the state does not have a right to impose mandatory education on children when the imposition interferes with other fundamental rights.⁵⁸ Political speech is one such fundamental right.⁵⁹ "Congress shall make no law . . . abridging the freedom of speech . . ." ⁶⁰ However, the right to free speech is not absolute.⁶¹ The Supreme Court has upheld restrictions made on speech.⁶² However, deciding whether the restriction is based on the content of the speech is important in analyzing whether the restriction

57. See *supra* Part II.

58. *Yoder*, 406 U.S. at 214; see also *DeJonge*, 501 N.W.2d at 139; 68 AM. JUR. 2D SCHOOLS § 253 (2000).

59. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942).

60. U.S. CONST. amend. I; see also *Gitlow v. New York*, 268 U.S. 652 (1925) (holding first amendment protection applied to state's legislation).

61. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

62. *Id.* ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

on speech is constitutional. This is significant because the standard of review that is applied varies based on whether the regulation is based on the content of the speech or whether the restriction is placed on speech regardless of its content, thus making it content-neutral.⁶³ Therefore, the first-step in analyzing a restriction placed on speech is to determine whether the restriction is based on the content of the speech or whether the restriction is placed on speech regardless of its content, thus content-based or content-neutral.

In *Turner Broadcasting System, Inc. v. F.C.C.*, the Supreme Court held that when a regulation is content-based, a strict level of judicial scrutiny needs to be applied as opposed to when the regulation is content-neutral, which receives an intermediate level of judicial scrutiny.⁶⁴ This distinction is made because with content-based regulations there is a greater risk that the legislature may have improper intentions and are attempting to suppress ideas of speech that are not popular.⁶⁵ This is in contrast with content-neutral regulations which pose substantially less risk. The motivations for these laws are completely unrelated to the speech.⁶⁶ The determination of whether a statute or regulation is content-based or content-neutral, however, is not always easy. The focus rests on "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."⁶⁷ Courts will look to see if one type of speech is favored over another type of speech.⁶⁸ For example, regulations that have been considered content-based are ones that allowed picketing in front of a foreign embassy if the content was based on that country's foreign policy,⁶⁹ or restricting citizens' First Amendment voices to non-political speech around polling places.⁷⁰ This is compared to a content-neutral regulation that controlled posting signs on any type of public property regardless of its message.⁷¹ Therefore, regulations that place burdens and benefits without reference to speech are usually content-neutral.⁷²

63. See *Turner Broad. Sys., Inc. v. Fed. Comm'n Comm'n*, 512 U.S. 622, 642 (1994).

64. *Id.* at 641.

65. *Id.*

66. *Id.*

67. *Id.* at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

68. *Id.* at 643.

69. *Boos v. Barry*, 485 U.S. 312, 318-19 (1988).

70. *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (upholding a content-based restriction on First Amendment speech).

71. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

72. *Turner Broad. Sys.*, 512 U.S. at 643.

While truancy laws have restricted the First Amendment rights of these students, it is apparent that the statutes were created only to keep students in school, with no reference to speech at all. It is apparent that these truancy and compulsory education laws are not selective by allowing the protesting of one issue but prohibiting the protesting of another issue. As such, the compulsory education and truancy laws are content-neutral statutes; an intermediate level of scrutiny is appropriate.

In analyzing content-neutral regulations that impact expression, the Supreme Court has adopted a three-prong test in the *United States v. O'Brien*.⁷³ In *O'Brien*, the Supreme Court could not accept the proposition that whenever people engaged in conduct that they intended to express an idea that they were always protected by the First Amendment Freedom of Speech.⁷⁴ Rather, the Court stated that when there was an action commingled with speech, the government could have a sufficiently important interest in regulating that non-speech element of the conduct.⁷⁵ Therefore, the Court held that

a government regulation is sufficiently justified if it is within the constitutional power of government; if it (1) furthers an important or substantial government interest; (2) if the government interest is unrelated to the suppression of free speech; and (3) the restriction is no greater than what is essential to the furtherance of that [state] interest.⁷⁶

O'Brien is the appropriate analysis here because by walking out of classes and not attending school, the students, like in *O'Brien*, were expressing themselves through an act.⁷⁷ The act was the students' absence from school and the marching. The students showed how important the issue was to a number of students and how many people the immigration reform could affect.⁷⁸ Additionally, the protesting students cost the school districts considerable amount of money in which the school districts received for the attendance of each student.⁷⁹ Therefore, in analyzing truancy and compulsory education laws and its affects on the restriction of free speech, the analysis in *O'Brien* must be applied.

73. *O'Brien*, 391 U.S. at 376.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (*O'Brien's* action of burning a draft card was considered symbolic speech).

78. Hensley, *supra* note 4.

79. *Police to Enforce Truancy*, *supra* note 7 (Los Angeles Unified School District receives \$28 per student per day who attend school).

Truancy and compulsory education laws encompass state interests, as demonstrated above.⁸⁰ The state's interest in providing public schools and ensuring that students become educated is truly at the "apex of the function of the state."⁸¹ However, while the above interests are considered the "apex," these state interests have been fought in court and have been determined not to be absolute.⁸² These cases have focused on the state's right to enforce compulsory educational laws against the First Amendment freedom of religion.⁸³ The courts held that when the First Amendment right of religion is in conflict with state compulsory education, the states' interest may yield to that of religion.⁸⁴ While the First Amendment has taken priority over state truancy and compulsory educational laws, these cases are rare and fact-specific, limiting the exception to those who have a long history of insulated and isolated religious communities.⁸⁵

As such, will the truancy and compulsory educational laws take a back seat to the First Amendment in the context to a student expressing their voice on a political issue such as immigration? Freedom of speech is not absolute even though, as seen from *O'Brien*, political speech is a paramount in our society.⁸⁶ With this in mind, the incidents that occurred in the spring of 2006 are analyzed below under the test set forth in *O'Brien*. *O'Brien* is used to analyze whether the protesting students had their constitutional rights violated when the police issued truancy citations and bussed schoolchildren back to school while protesting immigration reform.

80. See *supra* Part II.

81. *Yoder*, 406 U.S. at 213.

82. See *Yoder*, 406 U.S. 205; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Michigan v. DeJonge*, 501 N.W.2d 127.

83. *Yoder*, 406 U.S. at 234-35 (holding that First and Fourteenth Amendment prevented an Amish child being compelled to go to school under Wisconsin compulsory education laws). The *Yoder* Court held that because the Amish have a rich history of being a successful and self-sufficient segment of American society and as such one or two more years of education could easily be met through vocational training of the Amish community. See also *Pierce*, 268 U.S. at 534-35 (holding that compelling a student to only attend public education unreasonably interfered with liberties of parents and guardians to determine upbringing of their children); *DeJonge*, 501 N.W.2d at 140 (requiring state certificate to teach violated free exercise clause as applied).

84. See *Yoder*, 406 U.S. at 234-35.

85. 78A C.J.S. *Schools & School Districts* at § 736.

86. *O'Brien*, 391 U.S. at 376.

1. Do Truancy Laws Further An Important Or Substantial Government Interest?

States have a substantial state interest in requiring students to attend school.⁸⁷ The question that arises is how the state furthers its objective of promoting citizenry of its youth while at the same time quelling juvenile crime rates, another important state interest. In *O'Brien*, the Supreme Court held that the government had a substantial interest in raising and supporting a national army.⁸⁸ It reasoned that a system is needed to be in place for the mandatory registration of individuals in order to support that army.⁸⁹ Therefore, the draft system furthered an important governmental interest.⁹⁰ Here, the state interests of enforcing truancy laws is to ensure children are in class so they can become mature, well-rounded, productive citizens along with a secondary interest in quelling daytime crime rates and ensuring that young adults do not fall into a criminal pattern.⁹¹

Requiring students to attend class is an obvious way to further the first government interest. If a student is not in class he or she will not have the privilege to be a part of the educational process. In dicta, the Supreme Court stated that the "education of the young is only possible in schools conducted by especially qualified persons who devote themselves [to the teaching of the young]."⁹² As a result, to further the state's interest in educating well-rounded, mature, productive citizens, some sort of education needs to be provided. If a student is not in school, they cannot receive that education. Therefore, by compelling students to attend class the government furthers its interest.

The second government interest of quelling juvenile crime can also be furthered using truancy and compulsory educational laws. "If a [child is] not in school, they're going to be on the streets – and they're going to learn all the wrong things."⁹³ When the police have decided to strictly enforce truancy laws by, for example, having "crack downs," dramatic results have followed.⁹⁴ In Minnesota, when police started

87. See *supra* Part II.

88. *O'Brien*, 391 U.S. at 377.

89. *Id.*

90. *Id.*

91. *Prince*, 321 U.S. at 168 (1944); see Delvin, *supra* note 36, at 704; *First Step to a Lifetime of Problems*, *supra* note 36, at 1.

92. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

93. Alison Fee, *Forbidding States from Providing Essential Social Services to Illegal Immigrants: The Constitutionality of Recent Federal Action*, 7 B.U. PUB. INT. L. J. 93, 112 (1998).

94. Trujillo, *supra* note 40, at 73-74.

enforcing truancy laws, daytime crime rate fell sixty-eight percent.⁹⁵ With these dramatic results, it is clearly seen that by issuing truancy violations the state has combated crime problems. As such, truancy laws further the governmental state interests of ensuring that children will be well-rounded productive citizens and of lowering crime rates.

2. Is the Government's Interest in Issuing Truancy Violations Unrelated to the Suppression of Free Speech of Schoolchildren?

In *Michigan State AFL-CIO v. Miller* the Federal Court of Appeals for the Third Circuit analyzed, by applying the *O'Brien* test, whether the government's interest was unrelated to the suppression of free speech by inquiring if the statute limited what was said, who could say it, how much could be said and finally if the statute restricted the speech at all.⁹⁶ Truancy laws, as seen above, were premised to further important state interests.⁹⁷ These statutes only regulate class attendance. In no way do these statutes limit what can be said because they do not address speech. This prong of the *O'Brien* analysis is met.

3. Is the Restriction No Greater than what is Essential to the Furtherance of that State Interest?

Courts, in determining whether the state's action is no greater than necessary, inquire into the legislature's ends and the means chosen to accomplish those ends. In *O'Brien*, the Supreme Court held that while the burning of a draft card is a way in which a person may protest the war, there are alternatives available to a person who wishes to protest the war that do not go against a substantial state interest.⁹⁸ This fit does not need to be perfect but reasonable.⁹⁹ To be reasonable, the scope of the statute needs to be proportional to the interests that are served.¹⁰⁰ Essentially, this means that the statute must be no greater than is necessary to protect the government interest and leave open ample communication alternatives.¹⁰¹ Here, the truancy laws were created to serve the government's interest of promoting active cit-

95. *Id.* at 73.

96. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (1997).

97. *See supra* Part II.

98. *See O'Brien*, 391 U.S. at 377.

99. *See Hill v. Colorado*, 530 U.S. 703, 725-26 (2000); *see generally O'Brien*, 391 U.S. at 377.

100. *Id.*

101. *Id.*

izens and limiting criminal activity. However, the authorities did not restrict the young adults' freedom of speech more than what was essential to that state interest. Therefore, their speech was not improperly regulated by the state when they were compelled to return to school or issued truancy violations.

While the other two prongs of *O'Brien* are easily met, the third prong appears to be more problematic. Here, mostly high school students were cited and compelled to return to school when they were protesting immigration laws. The state's interests are outlined below to determine if the truancy laws have been restricted no further than necessary to serve its interest without violating the schoolchildren's rights while still leaving ample opportunities to convey their message.

The first state interest, ensuring that the state educates youth to become active, upstanding, well-rounded citizens, may seem to be at odds with the incidents that occurred in spring 2006. Thomas Jefferson once said that while education was a necessity in creating an upstanding citizen, he limited his view to the belief that the state only had an interest in the educating children in the basics of the "three R's."¹⁰² Jefferson's emphasis on educating the young centered on teaching schoolchildren the necessity of fighting against tyranny.¹⁰³ Here, these students believed strongly against the immigration laws that were being brought in front of Congress. Since the students were minors, they were unable to vote. The students, therefore, used the only forum that they had. They took their voices to the streets and to the pockets of the school districts.¹⁰⁴ These students were not missing days upon days of school or dropping out of school. They were voicing their views on a single issue – immigration. If the state's interests were truly to form minds that can act and participate in the democratic process, would not quelling their voice be counterintuitive? If the state truly wanted to teach the students about the democratic process, it will need to recognize that students need to have the ability to raise their voices and opinions.

However, this could lead to a slippery slope. School children may simply latch onto hot topics. For this reason, an observer needs to determine whether the statute excessively restricted speech in furtherance of that state interest. The statutes must not be overly restrictive. The interests of promoting welfare and building an upstanding citizen cannot crush the rights of the young adults by restricting these young

102. *Yoder*, 406 U.S. at 226 n.14.

103. *Id.* at 225.

104. *Police Enforce Truancy*, *supra* note 7.

adult's rights to free speech while not allowing for any alternatives. Therefore, states, under *O'Brien*, need only protect a government interest while leaving ample room to communicate ideas.¹⁰⁵ These compulsory education laws do just this. These laws are designed to ensure that students are in school during school hours.¹⁰⁶ The compulsory education laws do not extend to the home life of these young adults. Generally, these compulsory education laws and truancy violations only affect a student's voice during school hours. Students can practice their constitutional duties that they learned while in school after school, while the state can further its interest of teaching these students the "three R's" and citizenry. As such, compelling attendance is no greater than necessary to further the first state interest.

While the second state interest of reducing daytime crime, juvenile crime, and vagrancy is a substantial state interest, which is furthered by the statutes, and is unrelated to speech, the compulsory education and truancy laws still cannot be excessively restrictive. Here, the same analysis is used as above except here the state interest in reducing crime may be more substantial. As a result, the state has created statutes that are no greater than necessary to protect the government interest of preventing crime, while leaving open ample alternatives for students to voice their opinion. The state in no way has forbidden these students from protesting, marching, or generally voicing their opinions outside of school hours. As such, there are alternatives for these students to raise their rights under the First Amendment.

Generally, like *O'Brien*, there are alternatives for these young adults to voice their opinion regarding the immigrations laws, such as protesting before or after school or writing letters to their Congressmen. The impact of not being in school may have been more dramatic or may have influenced the school district financially; however these affects are directly against well-established state interests. The state has an interest in furthering those state interests especially when the statutes, which were created to enforce these state interests, did not trample on any one particular type of speech. While the students in the wake of the police action in the spring of 2006 may have faced unfortunate consequences, these were a result of the state properly enforcing its police powers. These young adult's First Amendment rights have not been unconstitutionally restricted.

105. See *Hill*, 530 U.S. at 725-26 (2000); see generally *O'Brien*, 391 U.S. at 377.

106. See *supra* Part II.

IV. SUBSEQUENT SCHOOL CONSEQUENCES

While the state has an interest in compelling students to attend school and has the right to issue truancy violations when students break these compulsory education laws, this does not give carte blanche to the schools to completely control and quell the student's voice while they are attending school. This is clearly expressed in monumental case of *Tinker v. Des Moines Independent Community School District*, where the Supreme Court stated "[it] can be hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁰⁷ While this right in *Tinker* is not absolute, it is analyzed below to determine whether the school districts had a right to subsequently punish students for the events occurring in the spring of 2006 by suspending, issuing detentions, or otherwise punishing these students for being truant. The *Tinker* analysis is applied to this situation to show that the students should not be subsequently punished by the schools for expressing their voice.

First, it is important to revisit the facts surrounding the incidents in the spring of 2006. The events arising in spring of 2006 centered on students either not attending schools or blatantly defying school officials by getting up out of their seats and walking out of class.¹⁰⁸ In San Diego, California, the San Diego Unified School District suspended over one-hundred students involved in the student protests.¹⁰⁹ Additionally, in nearby Oceanside Unified School District, one-hundred-fifty students were suspended when they walked out of school.¹¹⁰ It is crucial to note that in both school districts, some students, while walking off-campus, did participate in activities that involved banging on classroom doors, throwing objects, and destroying a schoolhouse gate in an attempt to leave campus.¹¹¹ These suspensions are not unique to these school districts; they occurred in other school districts as well.¹¹² Los Angeles Unified School District even went so far as to call students at their homes warning students to attend class or face consequences.¹¹³ While the state's interest, as seen above, is valid in compelling students to attend school, and while tru-

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

108. Saavedra, *supra* note 4; *Police Enforce Truancy Laws*, *supra* note 7.

109. Saavedra, *supra* note 4.

110. *Id.*

111. *Id.*

112. *See id.*; Hensley, *supra* note 4; *Student Walkouts*, *supra* note 4.

113. Adelman, *supra* note 4.

ancy violations further this interest, the question now is whether students should be punished by the schools after receiving truancy violations from the state in protesting the immigration reforms.

In *Tinker*, three students – a fifteen year old, a sixteen year old, and a thirteen year old – were suspended for wearing black armbands to school in protest of the Vietnam War.¹¹⁴ The school, after deciding days before to prohibit such conduct, suspended these students until they removed the armbands.¹¹⁵ The Supreme Court held that there was no finding and no showing that engaging in the forbidden conduct, the act of wearing black armbands, would materially and substantially interfere with the requirements of the appropriate discipline in the course of the operation of the school.¹¹⁶ As such, the prohibition on the wearing of armbands could not be sustained.¹¹⁷ The Court reasoned that schools could not be “enclaves of totalitarianism.”¹¹⁸ Therefore, absent the showing of specific valid constitutional reasons to regulate the speech, students are entitled to their views.¹¹⁹ This furthers the nation’s interest in exposing its future leaders to a wide array of intellectual ideas.¹²⁰ Therefore, the Court ruled that students may express opinions, even on controversial topics, if they do so without materially and substantially interfering with the requirements of appropriate school discipline and the rights of other students.¹²¹

While some students simply skipped school, others walked out of their classes.¹²² While the students who skipped school altogether were never on campus, the administrators believed that there was a direct impact on the school day because the students deprived the school of income and deprived other students of the opportunity of their presence in class.¹²³ As such, while the act of missing school did not occur on campus, like the children wearing armbands in *Tinker*, the analysis is still appropriate because it affected the school and the school ultimately decided to punish these students subsequent to being

114. *Tinker*, 393 U.S. at 504.

115. *Id.*

116. *Id.* at 509.

117. *Id.*

118. *Id.* at 511.

119. *Id.*

120. *Id.* at 512.

121. *Id.* at 513; see also *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (holding that it is the appropriate function of the school to prohibit the use of vulgar and lewd speech at school). The Supreme Court reasoned in *Bethel* that there is an interest protecting minors from exposure to vulgar and offensive language. *Id.*

122. *Police to Enforce Truancy*, *supra* note 7.

123. *Id.*

issued truancy violations. Both groups of student protesters faced school consequences.

Like *Tinker*, the specific content of the First Amendment speech was at issue when the schools were punishing the students.¹²⁴ While the state compulsory education and truancy laws were created and enforced regardless of the reason of the student for skipping school, the school districts appear to be punishing these students based on the content of the speech.¹²⁵ This is apparent because, in some schools, the school called individual students to warn them if they did not attend class that there were going to be consequences.¹²⁶ The school did not call daily to inform students that playing hooky or simply skipping school would result in consequences, rather the school called these students when it knew that students might protest in opposition to the proposed immigration laws. As a result, the situation arising out of these events parallels that of what occurred in *Tinker* and therefore the analysis in *Tinker* is appropriate.

The analysis of whether these students should be disciplined in school for their behavior is centered directly on whether these students substantially interfered in the operation of the school, and in doing so, interfered with the rights of the other students in obtaining an education. First in this analysis, it needs to be determined what exactly the First Amendment speech at issue is. Here, two different types of speech were used by the students, which are very similar. The first was simply not going to school and the second was the act of attending school and then the silent protest of getting up and leaving school. The question turns to whether leaving school, or not attending school substantially interfered in the operation of school and interfered with other student rights.

Here, the analysis comes to a fork in the road. This divergence in the analysis occurs because the facts in each individual school differ. At this point, it is important to analyze the facts on a case-by-case basis separating the students who got up and left their seats quietly as compared to those students who may have been disruptive when getting up out of their seats by yelling and pounding on doors.¹²⁷

The students who quietly arose up out of their seats and proceeded to leave the classroom had little affect on the operation of the school or any disruptive effect on the students. There is no evidence

124. *Tinker*, 393 U.S. at 504 (noting that school decided the day before to prohibit the wearing of armbands).

125. See *supra* Part III.B.

126. Adelman, *supra* note 4.

127. See Saavedra, *supra* note 4.

that any school operations were affected in a manner what so ever. There is no showing that the schools stopped teaching the remaining students or that there was any other affect on the proper administration of the schools. Additionally, while the students may have gotten glances from other students who may have wondered what was going on, and the teacher may have stopped class for a brief moment to ask the student where he or she was going, this could not have materially affected the rights of other students. This is further evidenced by looking at *Tinker*. In *Tinker*, the Supreme Court held that the minor disruptions of classes being briefly disturbed or other students chastising the students did not rise to the level being materially disruptive.¹²⁸ It was clear that the wearing of black armbands was a "silent, passive expression of opinion, unaccompanied by any disorder of disturbance on the part [of the students]."¹²⁹ Therefore, the schools action in suspending these students from expressing their opinion by walking out or skipping school, absent any disturbance, was improper. These students should not be further punished.

In comparison, the students that were engaging in disruptive behavior such as banging on classroom doors, chatting, yelling, or any other disruptive conduct were properly held to a different standard. This is the exact freedom of speech that falls outside of the *Tinker* protection. These students, in leaving directly and materially, affected the rights of other students to receive a quality education. Therefore, the school has every right in punishing these students.

It is important to reiterate that students may express their opinions while in school, even on controversial topics, if they do so without materially and substantially interfering with the requirements of appropriate discipline in operation of school and without colliding with the rights of other students.¹³⁰ As seen above, this analysis is dependent on case-by-case analysis to determine whether in leaving, the students materially affected the operation of school or the rights of other students. The act of simply getting up and walking out of class is a peaceful passive protest and as such, these students should

128. See *Tinker*, 393 U.S. at 508-09 ("Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. 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. Bur our constitution says we must take this risk." As such, "[i]n 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. . . .").

129. *Id.* at 509.

130. *Id.*

have the right to voice their beliefs without the fear of consequences of the school. However, once the peaceful and passive conduct crosses into the zone of interfering materially with other students, then the school not only has the right to take action but also has the obligation.

V. CONCLUSION

Truancy laws and compulsory education laws are designed to require young adults to attend school.¹³¹ The state enacted these statutes in order to further a legitimate and substantial state interest.¹³² These state interests are to ensure that there is a continuance of well-rounded, upstanding citizens¹³³ that can combat tyranny while at the same time lower the amount of crime that is experienced in communities.¹³⁴ While the state should promote youth to rise up and voice their concerns about matters such as immigration, the state has a valid justification in quelling this voice during the hours in which students are attending class. Therefore, the state acted properly in the issuing of truancy citations, and it acted properly when it picked up students who were protesting immigration laws and compelled them to return to school. State compulsory education statutes are constitutional. However, students do not shed their First Amendment rights to free speech at the schoolhouse gate.¹³⁵ If these students express their opinion in a matter that is neither disruptive to the educational process nor interferes with other students' rights, then these students cannot be subsequently punished for walking out of classes and skipping classes when voicing their first amendment right to free speech.¹³⁶

131. *See supra* Part II.

132. *Id.*

133. *Id.*

134. *Id.*

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

136. *Id.* at 509.
