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Inculcation, Bias, and Viewpoint Discrimination in Public Schools

Lisa Shaw Roy*

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* Assistant Professor, University of Mississippi School of Law. J.D., University of Southern California; B.A., University of California, Riverside. I gratefully acknowledge the Lamar Order for providing a summer research grant to support this project. I also thank Lanesha Sims (J.D. 2006) for her able research assistance.

I. INTRODUCTION

The First Amendment prohibition on viewpoint discrimination, a particularly invidious species of content discrimination, represents a consistent theme in the Court's free speech clause jurisprudence. Although the Court has never precisely defined the concept of viewpoint discrimination, the idea that the government may not censor certain views and thereby skew public debate – even in a nonpublic forum – is a well-established one.[1]

In the elementary and secondary public school context, the Court has not explicitly applied the doctrinal framework of viewpoint discrimination to a school practice or policy restricting speech. However, in *Tinker v. Des Moines Independent Community School District*,[2] the Court's initial application of the First Amendment to student speech in public secondary schools, the Court stated that schools may not fashion students into "closed-circuit recipients of only that which the State chooses to communicate."[3] In explaining its holding, the Court stressed the fact that the schools apparently sought to prohibit only the wearing of armbands symbolizing opposition to the Vietnam War, and not other politically controversial symbols.[4] In several places in the opinion, the Court came very close to saying that schools may not engage in viewpoint discrimination: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[5] In a controlled environment such as a public elementary or secondary school, unlike a street corner or park, school officials may have legitimate reasons for limiting the expression of particular points of view, such as the need to maintain order and protect students from potentially harmful messages.[6] Hence the standard in *Tinker*, requiring a showing of material and substantial interference with the operation of the school or with the rights of other students, is lower than the Court's near absolute prohibition on viewpoint discrimination in other settings.[7]

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1. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

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

3. *Id.* at 511.

4. *Id.* at 510.

5. *Id.* at 511. The Court also stated:

> 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.

Id. at 509. *See also Perry*, 460 U.S. at 61 (Brennan, J., dissenting) (explaining that *Tinker* can be understood as implicitly prohibiting viewpoint discrimination, regardless of whether the speech occurs in a nonpublic forum).

6. *See Tinker*, 393 U.S. at 513.

7. *See id.* at 511-13.

Interestingly, the Court in *Tinker* seemed to assume that a school's restriction on speech arising from a classroom discussion or interaction would necessarily implicate the marketplace of ideas. The armband protest, on the other hand, while "closely akin to 'pure speech,'" did not fit neatly into the paradigm the Court often uses to justify free speech.[8] Quoting from an earlier case, Justice Fortas noted:

> The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[9]

In applying free speech principles to the armband protest, the Court reasoned that the free speech principle it articulated was "not confined to the supervised and ordained discussion which takes place in the classroom."[10]

Yet the special characteristics of the school environment lead many to argue, persuasively, that a requirement of viewpoint neutrality has little place in the public school setting.[11] The marketplace paradigm may be particularly inappropriate in the classroom setting, given that teachers often limit expression of views to the germane, and routinely judge as correct or incorrect student assertions and responses with reference to a concept of objective truth determined by the teacher, text, or local school board, as the case may be.[12] In any case, the strength of the marketplace model must depend on several factors including the grade level, age, and maturity of the students involved,[13] as evidenced by *Keyishian*, the case quoted in *Tinker*,

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8. *Id.* at 505-06.

9. *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967), which held as unconstitutionally vague a state plan which operated to prevent the appointment or retention of public school employees that advocated or taught the forcible overthrow of government).

10. *Id.* Moreover, the Court stated that it did not "confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom." *Id.* at 513.

11. The public school has at times been characterized as a limited public forum, and at other times, as a nonpublic forum. *See generally* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996).

12. *See, e.g.*, David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497 (1980).

> Throughout the school year, the teacher, after attempting to convey to the students the required version of a particular subject, tests them to see if they have learned the material properly. Answers conforming to the view taught in the class get high marks, while inconsistent views may get low marks. . . . Thus, from one point of view, the public schools embody in all their aspects the denial of [F]irst [A]mendment rights.

Id.

13. Certainly with respect to elementary school education, it would seem utterly self-defeating to

which involved a government attempt to prevent alleged subversives from teaching in state colleges and universities.[14] In fact, the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*,[15] a later case, significantly disappointed the expectations of those who read *Tinker* as providing robust free speech rights for students. In *Hazelwood*, the Court upheld a high school principal's decision to withhold from publication portions of student articles in the school newspaper precisely because of the material discussed in the articles.[16] With no mention (except in Justice Brennan's dissent) of the "marketplace of ideas," the Court held that the newspaper, published as part of a high school journalism class, was a school-sponsored expressive activity over which the school exercised editorial control.[17] *Hazelwood* produced a strikingly different standard than the one in *Tinker*, the former promising to uphold school actions that are "reasonably related to legitimate pedagogical concerns."[18]

If the only theoretical underpinning of a viewpoint discrimination ban in the context of the public schools is the "marketplace of ideas," then the arguments against heightened free speech protection carry some weight. Of course teachers determine content, make value judgments, and limit the expression of views available for acceptance. This implicit qualifier harmonizes the language of *Tinker* with the result in *Hazelwood*, where the Court reasoned that a school acting as a publisher or producer could refuse to disseminate student speech on topics such as "the existence of Santa Claus in an elementary school setting" and "the particulars of teenage sexual activity in a high school setting" to protect students.[19] At best, the public school in general and the classroom in particular is a type of modified marketplace where students may exchange some ideas[20] but school officials ultimately

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maintain an egalitarian environment where all present – students included – possess the requisite knowledge to determine the truth.

14. *See Keyishian*, 385 U.S. at 591-92.

15. 484 U.S. 260 (1988).

16. *Id.* at 263.

17. *Id.* at 273.

18. *Id.* The *Hazelwood* opinion omits any mention of viewpoint discrimination, and lower courts have divided over whether, in cases that otherwise fall within *Hazelwood*'s parameters, courts must engage in a viewpoint discrimination analysis. *Compare* Walz *ex rel.* Walz v. Egg Harbor Township Bd. of Educ., 342 F.3d 271 (3d Cir. 2003) (noting no viewpoint discrimination concerns present when school has not created an open forum for the exchange of views, and upholding restriction on elementary school student from distributing pencils with religious messages), *and* Fleming v. Jefferson County Sch. Dist., 298 F.3d 918 (10th Cir. 2002) (applying *Hazelwood* and not viewpoint neutrality analysis, and upholding school restriction on displaying tiles with religious and other messages created by students and parents following Columbine massacre), *cert. denied*, 537 U.S. 1110 (2003), *and* C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999) (indicating no viewpoint neutrality standard applicable in *Hazelwood* analysis, and upholding teacher's decision to forbid student from reading Biblical story in front of the class), *aff'd on other grounds en banc*, 226 F.3d 198 (3d Cir. 2000), *with* Kincaid v. Gibson, 191 F.3d 719, 727 (6th Cir. 1999) (stating in dicta that only non-viewpoint-based restrictions are permitted under *Hazelwood*, and upholding restriction on material in state university yearbook), *rev'd on other grounds en banc*, 236 F.3d 342 (6th Cir. 2001).

19. *Hazelwood*, 484 U.S. at 272.

20. Ideas that are deemed vulgar or profane, for example, may be completely restricted by the state. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that a high school student's sexually suggestive remarks at a high school assembly did not merit First Amendment pro-

determine truth. Notwithstanding all of the *Tinker* Court's rhetoric about the classroom and the marketplace, however, this particular justification does not seem to have been the central focus of concern for the Court. Rather, the Court's language in *Tinker* leaves the reader to understand that there is a line between inculcation and indoctrination – and that the Court can, if called upon, readily distinguish between the two.[21]

This article investigates the latter aspect of the Court's jurisprudence – the concept of improper indoctrination. The subject of public schools and indoctrination has generated much scholarly debate in recent years, and I do not intend to join that specific debate here. Rather, this article makes a fairly narrow doctrinal point about how to interpret and apply the Court's free speech doctrine in light of concerns about possible indoctrination. The article reviews key free speech clause precedent to determine whether the Court imposes a type of viewpoint neutrality requirement for school policies that exhibit bias against religious opinions, political opinions, or opinions on matters related to race. The article argues that concerns about indoctrination expressed as a "no-bias" principle can be used to understand what the Court has already done with respect to free speech in public schools. These concepts can also be used to decide the proper outcome of future First Amendment cases.

Part II of the article identifies the type of bias to which the Court's jurisprudence is opposed, highlighting religion, political preference, and race as the most likely targets. Because such matters go to the heart of a child or adolescent's developing identity, Part II argues that the Court's jurisprudence is particularly concerned about shielding these areas from too much state interference. Part III argues that particularly in the case of religion, free speech safeguards permit students to "push back" against official efforts to enforce orthodoxy and can be helpful for students' developing identities. Part III also answers arguments that religious speech in public discourse is unhealthy and that religious speech threatens to undermine Establishment Clause values. Part IV applies the no-bias standard to a sampling of school speech cases.

II. DOCTRINAL BASIS FOR VIEWPOINT DISCRIMINATION CLAIMS IN THE PUBLIC SCHOOL CONTEXT

A. Values Inculcation and the Danger of Indoctrination

The Supreme Court has often stated that the public schools engage in

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tection).

21. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1969).

the "'preparation of individuals for participation as citizens,'" and assume the task of "'inculcating fundamental values necessary to the maintenance of a democratic political system.'"[22] The Court emphasized this idea in *Bethel School District No. 403 v. Fraser*,[23] a case in which school officials disciplined a high school student who delivered a sexually provocative student election speech at an assembly.[24] In *Bethel*, the Court explained that one of the "fundamental values" that schools should inculcate is the maxim that threatening or offensive public discourse is inappropriate.[25] In upholding the restriction on Fraser's speech, the Court reasoned that school officials create an atmosphere in which students learn values:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers – and indeed the older students – demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.[26]

The idea that schools should inculcate values is not without controversy. The inculcation of values from official and unofficial sources, no doubt, is what lead some to avoid public school altogether.[27] Government attempts at assimilation have been equated with indoctrination in some quarters, at least by those who complain that attempted assimilation of students into concepts such as critical rationality and tolerance may conflict with belief systems developed by parents.[28] Others have echoed general fears that government attempts to inculcate values in impressionable young minds risks forfeiting democracy for a sort of totalitarian mind control.[29]

This article uses the term "indoctrination" as something more than the mere attempted assimilation into civic republican values that the Supreme Court has repeatedly suggested is appropriate work for the public schools. Even for those, such as the Court, who approve of the idea of government-

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22. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

23. 478 U.S. 675 (1986).

24. *Id.* at 677-78.

25. *See id.* at 683.

26. *Id.*

27. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting Amish community Free Exercise exemption from requirement of compulsory education beyond the eighth grade to protect Amish community against secular influences).

28. *See, e.g.*, Nomi Maya Stoltzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993) (evaluating the claim of the plaintiffs in *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), who objected to students' exposure to an allegedly secular humanist reading series).

29. *See, e.g.*, Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 66-68 (2002) (advocating an anti-indoctrination model of the First Amendment to combat school attempts to inculcate values outside the context of the curriculum).

disseminated values, a separate danger exists of official interference with sectarian opinions that probably ought to be developed elsewhere.[30] The point at which courts should draw the line between inculcation and indoctrination can be difficult to discern, but a focus on the subject matter of the student's proposed expression can aid the process.[31] When school officials attempt to suppress the expression of an idea opposed to the government's position, particularly in the areas of race, religion and politics, a type of bias is revealed. Vigorous free speech protection will remedy these instances of attempted indoctrination.

In the alternative, some have advanced the desirability of claiming a First Amendment violation based upon the school's attempt to shape opinions, rather than on the school's attempt to suppress student speech.[32] They argue that indoctrination attempts affect more than just the student bringing a lawsuit; therefore, an individual rights approach misses the mark.[33] Nonetheless, values inculcation does not always result in indoctrination; what to one student may constitute religious and political indoctrination may to another student be only useful information that is readily discarded. At a minimum, when a student resists a certain orthodoxy and school officials subsequently attempt to suppress the student's dissent, that student is clearly identified as a possible target of indoctrination.

In the following cases, the Court has sketched the outlines of what could be described as a model of First Amendment jurisprudence based on the evils of improper indoctrination, from which we can distill a no-bias principle.

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30. To indoctrinate is to "imbue with a usually partisan or sectarian opinion, point of view, or principle." Merriam-Webster Online Dictionary, *at* http://www.m-w.com (last visited September 28, 2004).

31. This line-drawing can be difficult in part because, in the context of public school students' individual rights, the Supreme Court's dicta conceives of students not as fully autonomous individuals but as persons over whom the state exercises a quasi-parental role. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (finding constitutional a high school's random drug testing of students involved in extracurricular activities without a showing of individual suspicion). As the Court stated in *Vernonia*:

> [T]he nature of [the State's power over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." . . . [W]e have acknowledged that for many purposes "school authorities act *in loco parentis*," with the power and indeed the duty to "inculcate the habits and manners of civility[.]" Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school.

Id. at 655-56 (citations omitted).

32. *See* Redish & Finnerty, *supra* note 29, at 83 ("When government crosses the constitutional line in the scope of its curricular and non-curricular education, no single individual student is harmed more than any other.").

33. *See id.*

B. *First Amendment Prohibition Against Indoctrination and Bias*

The Supreme Court's trilogy of *Tinker*, *Bethel* and *Hazelwood* leaves the reader with mixed signals about students' free speech rights in the elementary and secondary school setting.[34] Clearly, students do not enjoy the same rights of expression as adults in other settings. Nonetheless, the Court's language and decision in *Tinker* suggests that school attempts to silence certain messages can approximate indoctrination.[35] *Hazelwood* provides schools with wide latitude to limit expression within the curriculum, but is virtually silent on whether schools can attempt to indoctrinate. Two cases, one preceding *Tinker* and one preceding *Hazelwood*, help to construct the distinction between inculcation and indoctrination in the Court's First Amendment jurisprudence.

1. "[P]olitics, [N]ationalism, [R]eligion, or [O]ther [M]atters of [O]pinion"[36]

A look back at an earlier case, *West Virginia State Board of Education v. Barnette*,[37] may help clarify the core viewpoint discrimination problem perceived by the Court in *Tinker*. In *Barnette*, the Supreme Court held that public school officials may not require unwilling students to recite the Pledge of Allegiance.[38] Justice Jackson concluded the opinion in one of the Court's most memorable pronouncements: "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."[39]

To elucidate this famous passage, one commentator has suggested that the writer of the Court's opinion should have used an "and" in place of the disjunctive "or": The "and" would have made clear that that the harm in *Barnette* was not simply that the government was prescribing orthodoxy, but that it was both prescribing *and* forcing citizens to genuflect.[40] In the case of public schools, this interpretation has some force. Schools, in particular, often dictate "right opinions," so it is difficult to discern precisely what the Court meant except that it was wrong for the schools to attempt to coerce students' behavior in an area that went to identity and not simply preference

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34. One scholar surveyed Supreme Court precedent and lower court decisions since *Tinker* and opined that the majority's position in *Tinker* has been sharply eroded. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Constitutional Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000).

35. *See Tinker*, 393 U.S. at 508-09.

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

37. *Id.* (overruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)).

38. *Id.* The Court also opined that the First Amendment freedom from compelled orthodoxy does not depend on the religious nature of the objection, though the students in *Barnette*, Jehovah's Witnesses, objected to the flag salute on religious grounds. *See id.* at 634-35.

39. *Id.* at 642.

40. *See* Stephen D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 631-32 (2003) (arguing that government often prescribes "right opinions," but the First Amendment should only be concerned with government attempts to coerce conformity to them).

or whim. One could argue that the real proscription in *Barnette* is not based on the lofty constellation of abstract principles, but one based on practical concerns. Put in today's language, we could add an explanatory line in *Barnette* stating that children of Republicans should not come home from school as Democrats, that Muslim children should not come home as Christians,[41] or based on the facts of *Barnette*, that children who are Jehovah's Witnesses should not come home as mainstream Protestants who show their patriotism in a "normal" or acceptable way.[42] The *Tinker* Court arguably picked up on this concern when it stated that students should not be made into "closed-circuit recipients of only that which the State chooses to communicate."[43]

It is significant that the protest element linking *Tinker* to the concerns about compelled orthodoxy in *Barnette* is student speech. The closed-circuit metaphor seems somewhat inappropriate in the context of schools, where school authorities (as opposed to students) control all aspects of instruction. Students share ideas with each other, but they generally do not have a constitutional right to veto curriculum or bring in outside materials to compete on an equal footing with the instruction presented by the school. Rather, the dicta from *Tinker* makes sense in the context of that case, when we consider the possibility that students will try to assert their developing religious or political identity by a variety of methods, many of which we call speech. When schools silence such self-assertion without good reason, it creates what the Court described as "closed-circuit" communication. Thus *Tinker*, like *Barnette*, can arguably be viewed as protecting a student's right to push back against authority for the limited but eminent purpose of maintaining or developing identity free from state interference.

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41. *Cf., e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987). In *Edwards*, the Court invalidated a Louisiana law that required "balanced treatment" of creation and evolution in public schools, holding that the law was a violation of the Establishment Clause. *Id.* at 582. In reaching the decision, the Court noted, "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 584.

42. As a proposed compromise with school officials, the Jehovah's Witnesses in *Barnette* had offered to say the following version of the Pledge of Allegiance that did not specifically venerate the flag, apparently because they believed it to be less offensive to their religious teachings: "I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible." *Barnette*, 319 U.S. at 628 n.4.

43. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). Even more clearly in the case of the school children in *Barnette*, the school's suppression of dissent shielded them from any messages other than the official one.

2. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*[44]

In *Board of Education of Island Trees v. Pico*, the Supreme Court considered whether a local school board's decision to remove certain books deemed "vulgar" and "anti-American" from public junior high and high school libraries constituted a violation of students' First Amendment rights.[45] In a plurality opinion, Justice Brennan explained that the First Amendment would preclude a school board from removing books with the intent to deny access to ideas with which the board disagreed.[46] Thus a school board may not suppress unpopular ideas and thereby "'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[47]

Justice Blackmun defended the plurality's decision in his concurrence, but disagreed on the issue of whether the First Amendment creates in students a "right to receive information."[48] Rather, Blackmun perceived the tension in the case to be between the school's broad power to inculcate students with ideas and the constitutional prohibition on "certain forms of state discrimination *between* ideas."[49] Blackmun proposed to resolve the tension by articulating a rule that the government may not remove books from a school library for the purpose of suppressing ideas because of a distaste for the ideas themselves.[50]

In his dissent in *Pico*, Justice Rehnquist highlighted the inherent selectivity in elementary and secondary education as the critical difference between the government as educator and the government as sovereign:

> When [the government] acts as an educator, at least at the elementary and secondary school level, [it] is engaged in inculcating social values and knowledge in relatively impressionable young people. Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. . . . In the very course of administering the many-faceted operations of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others. The decision to teach a particular subject

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44. 457 U.S. 853 (1982).

45. *See id.* at 857, 859. For example, the school board had removed nine books from the high school library: SLAUGHTER HOUSE FIVE, by Kurt Vonnegut, Jr.; THE NAKED APE, by Desmond Morris; DOWN THESE MEAN STREETS, by Piri Thomas; BEST SHORT STORIES BY NEGRO WRITERS, edited by Langston Hughes; GO ASK ALICE (anonymous); LAUGHING BOY, by Oliver LaFarge; BLACK BOY, by Richard Wright; A HERO AIN'T NOTHIN' BUT A SANDWICH, by Alice Childress; and SOUL ON ICE, by Eldridge Cleaver. *Id.* at 856 n.3.

46. *See id.* at 871. The Court opined that the board could have removed the books on the ground that they deemed the books "pervasively vulgar," or based solely upon the ground of "educational suitability." *Id.*

47. *Id.* at 872 (quoting *Barnette*, 319 U.S. at 642).

48. *Id.* at 876-79 (Blackmun, J., concurring).

49. *Id.* at 878-79 (Blackmun, J., concurring).

50. *See id.* at 879-82 (Blackmun, J., concurring).

> may preclude the possibility of teaching another subject. A decision to replace a teacher because of ineffectiveness may by implication be seen as a disparagement of the subject matter taught. In each of these instances, however, the book or the exposure to the subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library.[51]

Rehnquist conceded that a politically motivated Democratic school board could not remove all books written by or in favor of Republicans, and that a racially motivated all-white school board could not remove all books authored by blacks or in favor of racial equality,[52] but believed that rarely would such "extreme examples" occur in real life.[53] Thus, notwithstanding the distinction between a school's suppression of students' individual expression and a school district's decision to remove books from a school library,[54] the plurality and dissent apparently agreed on the impropriety of schools attempting, through suppression, to shape racial or political opinions. They disagreed on whether such suppression had been or could be demonstrated on the facts in *Pico*.

Together, *Tinker*, *Barnette*, and *Pico* suggest three areas in which the Court is concerned about attempts to control student thought and expression: politics, religion, and race. Applying this principle, Part IV of this article uses a no-bias approach to a sampling of First Amendment cases in these areas. In Part III, however, it is necessary to first answer particular concerns about religious speech in the context of the public schools.

III. SPECIAL CONCERNS ABOUT RELIGIOUS SPEECH

A. Establishment Clause Issues Raised by Student Speech

Free speech claims involving religious speech are more complicated than other speech claims because of the potential intersection with the First Amendment's prohibition against a government establishment of religion. To determine whether a particular policy or practice violates the Establishment Clause, the Supreme Court has asked whether a particular practice sat-

51. *Id.* at 909-10 (1982) (Rehnquist, J., dissenting).

52. *Id.* at 907 (Rehnquist, J., dissenting) (citation omitted).

53. *Id.* (Rehnquist, J., dissenting).

54. *Id.* at 886 (Burger, C.J., dissenting) (highlighting the difference between a student's individual expression and a school district's choice of whether to make books available in the school library).

isfies the three prongs of *Lemon v. Kurtzman*,[55] whether a practice constitutes an endorsement of religion,[56] or whether the practice coerces others into participation.[57] In most cases involving religious speech, the critical issue is whether the speech constitutes the private speech of the individual student or the official speech of the school.[58]

1. Speech That Occurs as Part of a Classroom Assignment

In cases involving classroom speech, whether the student's speech is sponsored by the school cannot be assumed, but must be determined by analyzing the facts.[59] In the case of a classroom assignment containing religious material, it would seem that the issue is whether the activity in question coerces students into participation, or whether a reasonable (student) observer would deem the assignment to be an endorsement of religion.[60] A written assignment such as a research paper or essay containing religious themes would seem to pose the smallest risk of establishment. There would be no possibility of coercion, and presumably no one but the student author and the teacher would read the content of the paper. Neither would the student writing the paper believe that the school, acting through the teacher who merely accepted the assignment, intended to endorse religion. Though other students may hear about the topic from the student author, it still seems unlikely that those students will attribute the author's message to the school.

The oral assignment presents a more difficult case. Examples include an elementary school student who selected a story based on the Bible to read in front of the class,[61] and a second grade student who desired to present during show and tell a video of herself singing an evangelical song in a church service.[62] In these situations, it is possible for young students to assume that the teacher at least approves of the student's message, even if the school has no independent agenda to promote religion. To avoid violations of the Establishment Clause, a teacher should make clear that students speak for themselves on topics of their own choosing, and that the teacher has no in-

55. 403 U.S. 602 (1971). As noted by the Court in *Lemon*, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

56. Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 16-17 (2004).

57. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (citations omitted).

58. *See, e.g.*, Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990).

59. *Compare* Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147 (2002) (characterizing classroom speech as "grey area speech" that is part public and part private), *with* Duran v. Nitsche, 780 F. Supp. 1048, 1054 n.8 (E.D. Pa. 1991) (classifying student's proposed classroom speech in an oral report as the "school itself" rather than school sponsored speech).

60. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772-83 (1995) (O'Connor, J., concurring in part and concurring in judgment).

61. C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 169 (3d Cir. 1999).

62. *See* DeNooyer v. Livonia Public Schs., 799 F. Supp. 744, 746 (E.D. Mich. 1992), *aff'd in an unpublished opinion*, 1993 U.S. App. LEXIS 20606.

terest in either promoting or suppressing religious messages. In some cases, however, the religious message may be so pervasive that it will be impossible for a school to separate itself from the message. For example, a teacher could not permit a student to lead the class in an act of worship or to use class time to attempt to convert other students to his or her faith.[63]

In cases involving classroom assignments, courts typically have avoided the Establishment Clause question, instead applying free speech doctrine and *Hazelwood*.[64] Nevertheless, a *Hazelwood* analysis can address many Establishment Clause concerns.[65] When a student's attempt to fulfill an assignment subverts the activity or skill that the assignment was designed to teach, it is more likely that other students will interpret the presentation as going beyond the bounds of pedagogy and into the domain of religious endorsement.[66] So, for example, in the case of a student's story based on a Biblical theme, if the purpose of the assignment is to showcase good readers and the parameters of the assignment permit any text, then the student's choice should be permissible.[67] A lengthy reading directly from the Bible or the Koran, on the other hand, would probably be viewed as devotional and out of place. In the case of the student's video, the parameters of the assignment would also be critical. If, for example, the assignment did not permit students to engage in acts constituting entertainment, the student's video would seem odd and out of place, again giving the impression that perhaps the school specifically approved the message and thus decided to include a presentation that was otherwise inappropriate.[68]

The problem with this use of the *Hazelwood* analysis, however, is that often school officials do not provide clear guidelines at the outset, and it is

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63. The distinction between "proselytizing" and "non-proselytizing" is a tempting one in such cases, though it tends to be filtered through the lens of the individual applying the term. Nonetheless, the Court has repeatedly rejected the suggestion that proselytizing speech should be afforded less protection. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 125-27 (2001) (Scalia, J., concurring).

64. *See, e.g.*, *Duran*, 780 F. Supp. at 1052.

65. In *Hazelwood*, the Court stated that educators should have greater control over material deemed to bear the "imprimatur" of the school so that students would learn the lesson the activity was designed to teach, to protect readers and listeners from inappropriate material, and so that listeners would not mistakenly attribute the views of the speaker to the school. *See* Hazelwood v. Kuhlmeier, 484 U.S. 260, 271 (1988).

66. Brady, *supra* note 59, at 1224-25. *See, e.g.*, *DeNooyer*, 799 F. Supp. at 750.

67. *Contra* C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 174-75 (3d Cir. 1999) (upholding elementary school teacher's refusal to permit first grade student to read in front of the class a story loosely based on the Bible due to concerns about religious endorsement and impressionability).

68. In addition to concerns about the religious nature of the video, the second grade teacher in *DeNooyer* argued that the show and tell presentations were designed to develop students' self esteem and oral presentation skills, and that merely showing a video would defeat the purpose of the exercise. *See DeNooyer*, 799 F. Supp. at 747. She also maintained that she wanted to prevent other students from attempting to bring in videos, as the screening process would be too time consuming, and showing videos would change the focus of the exercise. *See id.*

not until more information is discovered through the process of give and take between teacher and student that the teacher decides not to permit the proposed religious speech. In *Duran v. Nitsche*,[69] for example, a fifth grade teacher gave a research assignment to her "Academically Talented Program" class.[70] The teacher directed students to choose a topic by filling in the blank at the end of the sentence, "The Power of _____," and ultimately give an oral report to the class based on their research over the course of several weeks.[71] Dana Duran chose the topic, "The Power of God," which was initially approved by her teacher.[72] As the semester continued, however, Duran failed to turn in the entirety of her research materials to her teacher for review, and the teacher was only aware of a survey Duran had collected from peers regarding their belief in God, as well as six rhetorical questions Duran prepared regarding the power of God.[73] Though she initially permitted the topic, Duran's teacher ultimately forbade her from giving her presentation in front of the class, and instead listened to Duran's presentation in the library outside the presence of other students.[74] The teacher reasoned that she could not be sure that what appeared to be an explicitly religious message would be appropriate for her fifth grade class, and she worried that students would attribute Duran's views to her.[75]

Duran's proposed speech never appeared to be outside the bounds of any particular criteria for the assignment, yet the teacher ultimately decided to restrict the speech on the ground of age-appropriateness.[76] It is difficult to imagine a presentation on "The Power of God" that would not have been religious in nature, yet apparently somewhere along the way Duran's teacher determined that what could have been an appropriate presentation ultimately might turn out to be something very different. Duran did not provide her teacher with a sufficient review of her research materials and work leading up to the presentation so that her teacher could direct the presentation toward a more appropriate format.[77] On the facts accepted by the district court, it seems that Duran's teacher's approach was sensitive to both Establishment Clause and pedagogical values, and that perhaps her restriction was attributable as much to Duran's lack of candor and preparedness as to the teacher's fear of an overtly religious message.[78]

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69. *Duran*, 780 F. Supp. at 1048.

70. *Id.* at 1049-50.

71. *Id.*

72. *Id.*

73. *Id.* at 1050-51. The questions were: (1) "What kind of power does God have?"; (2) "How is God's love power?"; (3) "What has God done with [H]is power?"; (4) "How powerful is God?"; (5) "How can you see God's power through [H]is work?"; (6) "What can God's power do?" *Id.* at 1051.

74. *Id.* at 1049-51.

75. *Id.* at 1055.

76. *Id.* at 1051.

77. *Id.* at 1050-51.

78. *But see* Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) In *Settle*, a middle school teacher gave a student a zero on a research paper entitled, "A Scientific and Historical Approach to the Life of Jesus Christ" on the grounds, *inter alia*, that a religious student could not approach the assignment objectively and that religion was not an appropriate subject for discussion in public school. *Id.* at 153-55.

As demonstrated by the facts of *Duran*, protecting speech while preserving Establishment Clause values can take considerable effort. Teachers, in particular, may have to set clear guidelines, revise those guidelines according to student progress, work with students toward an acceptable final product, and in some cases even disclaim aspects of the student's work to disassociate the school from the message.[79] It is no wonder that teachers and school officials often prefer a blanket prohibition on religious speech as the easiest solution. Such a ban does little to protect student speech, and tends to send a message that religious speech is somehow less favored than other forms of student speech. In making blanket prohibitions, teachers tend to overlook the fact that students desiring to incorporate religious themes into classwork can be "captive speakers," in the same way that their peers are a captive audience.[80] This is not to say, however, that students who propose religious speech should be permitted to flout the requirements of an assignment. Teachers should enforce all curricular requirements with rigor and demand that students learn the skill or activity the assignment is designed to teach. Where necessary to protect other students, teachers may even foreclose the speech altogether. But a blanket prohibition serves little pedagogical purpose, and precludes the opportunity for student and teacher to work together in a process that rewards students for participating by permitting them to engage in their chosen form of speech. The response that such an approach is burdensome and time consuming for school officials tends to overlook the reality that litigation in this area shows no signs of abating. Thus, from a practical perspective, it is probably better to choose an approach that burdens teachers with teaching rather than one that has consistently burdened them with defending lawsuits.

2. School Sponsored Speech Outside of the Classroom[81]

In the context of school sponsored speech outside of the classroom, on the other hand, it seems more likely that a court could find a violation of the Establishment Clause. As stated above, courts often forego an Establish-

79. *See* Brady, *supra* note 59, at 1178-84.

80. *See, e.g.*, Chad Allred, *Guarding the Treasure: Protection of Student Religious Speech in the Classroom*, 22 SEATTLE U. L. REV. 741 (1999).

> Unlike the speakers in the traditional "captive audience" cases, in the classroom, the speakers are also compelled to be there. Whereas the phone salesman, the pastor, and the protester have thousands of people to whom they can express themselves, the student speaker, compelled to be in school six to eight hours a day, does not have that option.

Id. at 758.

81. In this article I do not discuss Establishment Clause issues posed by student-initiated prayer at events such as graduations and football games. Though lower courts have divided on the application of the Court's doctrine, current Supreme Court precedent is fairly clear that many instances of such speech violate the Establishment Clause. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992).

ment Clause analysis and instead decide such cases on free speech grounds, but the fact that an activity is sponsored by the school and held out to the public can increase the possibility of perceived endorsement.

A case involving religious speech in a non-curricular school project open to students and certain members of the public provides an example of a school sponsored activity which raises Establishment Clause concerns. In *Fleming v. Jefferson County School District R-1*,[82] the Tenth Circuit evaluated a high school's prohibition of ceramic tiles with religious themes from an art project displayed in the hallways and throughout the high school. Columbine High School officials invited students, parents, and other members of the community to paint tiles to be displayed in the school as a response to the massacre that had occurred at the school months earlier.[83] Students and parents who painted tiles with religious messages challenged the school's restriction on free speech grounds.[84] The court applied *Hazelwood* and held that the tile project was a school sponsored activity over which the school properly exercised control.[85] Thus, the school needed only a valid pedagogical reason for restricting speech, and the school's desire to avoid making school property the site of religious controversy provided a sufficient justification.[86] Though the court in *Fleming* did not evaluate the possibility of an Establishment Clause violation, one can make a credible argument that the tiles, a permanent part of the school, would have communicated to the reasonable observer the school's intent to promote religion. Unless the school could have made clear that it did not promote the religious message contained in the tiles, the Establishment Clause may have provided an additional reason for the school to refuse the tiles.

Aside from the Establishment Clause, however, scholars have raised other concerns about the propriety of religious speech in the public schools.

B. Religious Speech in the Public Square

In *Capitol Square Review & Advisory Board v. Pinette*,[87] the Court famously stated that a free speech clause doctrine excluding religious speech would be "Hamlet without the prince."[88] For some time the Court has been committed to the protection of religious speech under the free speech clause,[89] including proselytizing and even worship.[90] In terms of religion's place in the hierarchy of speech, it is roughly equal to political speech and other speech that is not considered to be of low value. This idea of equality of religious speech with other speech means that it can be neither favored

82. 298 F.3d 918 (10th Cir. 2002).
83. *Id.* at 920-21.
84. *Id.* at 922.
85. *Id.* at 923, 929-30.
86. *Id.* at 925, 931-32.
87. 515 U.S. 753 (1995).
88. *Id.* at 760.
89. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).
90. *See id.*

nor disfavored under the free speech clause – it either is or is not entitled to protection. Nonetheless, some have questioned whether a free speech paradigm is the best way to protect religious practice that includes speech elements.[91] To be sure, treating religious speech like nonreligious speech under the Free Speech Clause is a move that is not likely to be eroded,[92] but it is important to consider the arguments of scholars who suggest that equality in this context is misguided.

Many scholars who have joined the debate regarding the role of religion in the public square argue that religion poses special dangers for democracy.[93] Thus even where the Establishment Clause would not prohibit religious speech, such speech should be curtailed to protect democratic institutions and preserve the civil order.[94] They argue that religion is inconsistent with the essential aspects of democracy, because, unlike democracy, religion "relies on unquestioning faith rather than logic, . . . seeks to identify absolute and everlasting truth rather than accommodate itself to the fluid, preliminary, and temporary reconciliation of fundamentally inconsistent values, . . . [and] locates the primary source of authority over individual behavior outside" of human authority.[95] The asserted result is an intense civil divisiveness that precludes the democratic resolution of conflicts.[96] These arguments have led to different but related proscriptions. Some critics of religious speech in the public square maintain that religious adherents should frame public argument in purely secular terms so that the arguments will be accessible to all members of society.[97] Others contend that religionists should not even advance secular arguments unless those arguments represent the real reasons for their advocacy.[98] Some appear to argue that these reasons support expanding the scope of the Establishment Clause to include more student speech.[99]

The general response to these arguments has been that a truly democratic system cannot simply exclude certain arguments as out of bounds.[100]

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91. *See, e.g.*, Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119 (2002).

92. *See, e.g.*, Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 797 (1996) ("The Court has repeatedly rejected the claim that the Establishment Clause somehow limits the constitutional protection of religious speech by private persons speaking in their private capacity.").

93. *See, e.g.*, Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379 (2000).

94. *Id.* at 451-59.

95. *Id.* at 382.

96. *Id.* at 451-59.

97. *See, e.g.*, KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

98. *See, e.g.*, Robert Audi, *The Place for Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993).

99. *See* Gey, *supra* note 93, at 395.

100. Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should*

Further, given religion's prominent place in the First Amendment, it is somewhat untenable to suggest that religious speech, in particular, should be singled out for exclusion.[101] In terms of divisiveness, disagreement regarding secular convictions can be just as acrimonious as disagreement on religious matters.[102] But a more important distinction exists in the case of religious speech in the public school context.

1. The Value of Defensive Speech in the Case of Religion

Claims about religious divisiveness and the democratic process tend to fall flat when asserted in the context of religious speech in public schools. While one can make the rather shaky case that religious speech in an oral classroom assignment, for example, would tend to foment interminable conflict among students and prevent them from working together productively, these are not the type of concerns that schools and students usually face. Public school classrooms may be the incubators of democratic principles, but students rarely attempt to promote religious messages for political reasons.[103]

Student speech concerns are better understood in the context of cases like *Barnette*.[104] With *Barnette* in mind, it is easier to understand why religious speech in particular is entitled to First Amendment protection, and why concerns short of an actual Establishment Clause violation should not trump students' rights. The context of the elementary and secondary school raises issues of self-development and identity, where platitudes about civil strife, reason, and protecting democracy seem uniquely out of place. Students are compelled by law to attend school, and thus in public school, the alternative offered by the state, the danger of indoctrination is fairly high. Student religious speech can protect students' developing religious identities, preserving an area that the state is not permitted to invade. The seventh-grader passing out religious literature or turning in a report with a religious theme does not usually intend to persuade his peers to vote "no" on the issue of school uniforms. A little later in life, however, when the same student is old enough to participate in more consequential elections, we would hope that he can vote based on interests and priorities that have developed securely in the cocoon of the person, and not based on messages (implicitly or explicitly) sent by school officials.[105]

Be Excluded from Democratic Deliberation, 1999 UTAH L. REV. 639 (1999); *see also* Laycock, *supra* note 92, at 799 ("We simply do not have democratic self-government if we take seriously the notion that there is something suspect about arguments that motivate two-thirds of the people and that might appeal to ninety-five percent of them.").

101. *See* McConnell, *supra* note 100, at 645-46.

102. *See id.* at 648.

103. A recent case presents a notable exception. *See* Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643 (N.D. Miss. 2003). In *Phillips*, a seventh grade student alleged a First Amendment violation based on school officials' prohibition of an election poster containing a picture of the Madonna and child and bearing the slogan: "He chose Mary . . . You should, too." *Id.* at 645.

104. 319 U.S. 624 (1943).

105. *Cf.* Redish & Finnerty, *supra* note 29, at 65 ("It is naïve to believe that the content of stu-

2. Defensive Speech as a Safety Valve for Failed Establishment Clause Claims

Defensive speech is no doubt useful in cases involving issues of politics and race, but it can play a particularly important role in mitigating the impact of quasi-religious activities that do not rise to the level of an Establishment Clause violation. In cases involving public school activities that are not clearly religious in nature, challenging students generally lose, even if they are able to posit that the activities or curricula conflict with some of their core religious beliefs.[106] As an alternative, students could respond to the activity or curricula with speech about why the activity is offensive rather than attempting to foreclose it altogether. For example, in the case involving a student challenge to the rhetoric and ceremony surrounding a high school's celebration of Earth Day,[107] a possible response may have been for objecting students to attempt to obtain a segment of the official program to air their own beliefs,[108] or perhaps to wear a tee shirt or human poster with a conflicting message. An even more constructive response, from a pedagogical perspective, would be to write a report about why Earth Day activities assertedly promote religious belief. In this way the First Amendment could protect students who wish to preserve their dissent from the official message, even if the students cannot (and probably should not) prevail in silencing the overall message.

In fact, defensive speech may be more important in cases where the official theme or orthodoxy in question is not overtly religious. Adolescents and children are more vulnerable to indoctrination than mature adults, but even the young are likely to recognize overtly religious appeals, especially

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dents' education will have little or no effect on the perspectives those students will bring to their choices as citizens within the democratic framework."); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L. J. 1647, 1648-49 (1986) (arguing that courts' failure to recognize students' individual rights may hinder public schools' ability to inculcate democratic values).

106. *See, e.g.*, Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 77-79 (2d Cir. 2001) (holding celebration of Earth Day at public high school did not endorse Gaia religion); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1383 (9th Cir. 1994) (rejecting plaintiffs' challenge to "Impressions" reading series alleging, *inter alia*, that certain activities approximated witchcraft).

107. *See Altman*, 245 F.3d at 58-59.

108. *Cf., e.g.*, Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780, 800-03 (E.D. Mich. 2003) (finding a First Amendment violation based on school's exclusion of particular viewpoint urged by student from a Homosexuality and Religion panel presented during Diversity Week, and based on school's censorship of student's assembly speech "What Diversity Means to Me" proposed as a response to themes presented by the school during Diversity Week), discussed *infra* at notes 125-32. Of course, the school in *Hansen*, by presenting a panel made up entirely of clergy who discussed the proper interpretation of the Bible and other religious documents, necessarily violated the Establishment Clause. *See id.* at 804-06. One can imagine, however, a similar challenge to a secular panel asserting that the panel conflicts with certain religious doctrine and therefore violates the Establishment Clause.

when those messages are incongruent with the views to which they have been exposed at home and elsewhere. On the other hand, students are probably less likely to recognize subtle themes that do not have an obvious religious connotation. Students are therefore more vulnerable to assimilating these seemingly neutral ideas. A vigorous First Amendment in this context would support the efforts of students who successfully resist indoctrination, and signal to other students that the school's message is at least somewhat controversial. Students could then discuss the issues with teachers and administrators, or perhaps even better, raise questions at home.

I have argued elsewhere that the Establishment Clause should not be interpreted to prevent mere exposure to offensive messages.[109] But to then prevent students from asserting, in the same context, a non-disruptive contrary message surely subverts any reasonable anti-indoctrination or anti-coercion principle.[110]

3. "Offensive" Rather than "Defensive" Uses of Religious Speech

In this discussion it is important to recognize that not all student religious speech can be characterized as defensive. With defensive speech, students attempt to express themselves in ways that preserve their developing ideas from the fashioning hand of official orthodoxy. Much of students' religious speech, on the other hand, can easily be characterized as functionally offensive.[111] Evangelical or proselytizing speech fits into this latter category because such speech generally aims to win converts to a particular belief or point of view. Offensive speech also tends to occur spontaneously rather than in response to some official statement or orthodoxy about religious matters.

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109. Roy, *supra* note 56, at 1. One proposed approach to student religious speech appears to apply an exposure test. *See* Gey, *supra* note 93, at 437-43. Thus if students would be required to opt-out of the presentation or activity to avoid exposure to a religious message, then the presentation violates the Establishment Clause. *See id.* at 437-38.

110. Another safety valve is exit, but free exercise claims in cases in which school officials refuse to accommodate objecting students have not been particularly successful. *See, e.g.*, Mozert v. Hawkins, 827 F.2d 1058 (6th Cir. 1987) (denying free exercise challenge to the "Holt" reading series on the ground that the series contained themes antithetical to students' fundamentalist Christian beliefs). Total exit is another possibility for students whose families have the financial means to send them to private school. Nonetheless, it is important for students who wish to remain in public school to have the ability to offer pertinent speech that incorporates their own religious values. *Cf., e.g.*, Brady, *supra* note 59, at 1191-1205. In a similar vein, Brady characterizes religious speech in classroom assignments, for example, as "grey area" speech that serves a distinct function in mitigating values conflicts:

> If, for instance, the children in *Mozert* were permitted to bring their perspectives into classroom activities and other instructional settings, they would be able to reaffirm and defend their own values against the imposition of majoritarian norms by the school. Furthermore, by sharing their views with others in school-sponsored settings, minority students like the Mozerts can contribute alternative perspectives to the larger school community.

Id. at 1200.

111. *See, e.g.*, Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 104-06 (D. Mass. 2003) (noting that students passed out candy canes with an evangelical message of salvation).

Religious speech that is functionally offensive admittedly does not fit within the free speech framework discussed above, as the speech itself does not appear to preserve student values or identity. Such speech could perhaps be justified by free exercise values, particularly for student believers who regard proselytizing and evangelism at school as religious duties. Nonetheless, offensive speech is not necessary to protect students from official orthodoxy, and some may argue that such speech creates the danger of coercion and alienation of other students.[112] In the case of functionally offensive speech that does not implicate the school in the message, such arguments about harm to other students are probably misplaced. As suggested above, proselytizing speech rarely serves as a proportional response to mild attempts by school officials to prescribe orthodoxy. But proselytizing speech may be an appropriate response to the types of messages that other students often convey in public schools. Public school students swim in a sea of competing messages, and most of the messages proselytize to one or another dogma, activity, or association. Religious proselytizing adds yet one more message for students to accept or reject, but ordinarily creates no special danger that is more worrisome than say, students who proselytize others students to lie, take drugs, defy authority, demean other students, or vandalize property. It is true that such messages, unlike solicitations to religious clubs or activities, never appear on fliers, banners or posters that would be tolerated by school officials. But students generally have and use other effective means to convey such themes during school hours and on public school property.

IV. APPLYING A NO-BIAS STANDARD IN SCHOOL SPEECH CASES

Having argued that the Court's free speech doctrine in the context of the public schools incorporates an implicit no-bias standard, it is still left to determine how to apply this principle in free speech cases. The application, like the principle, is fairly simple, and does not require anything in the way of new doctrine. In many cases, whether a court applies the no-bias standard will depend upon the court's choice between *Tinker* or *Hazelwood*, but the standard should aid courts in making that choice. In cases involving the alleged suppression of racial, religious or political speech, courts should rely

112. *See, e.g.*, Gey, *supra* note 93, at 429-33; Susannah Barton Tobin, Note, *Divining* Hazelwood: *The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 251 (2004), stating:

> Admittedly, the Establishment Clause may not prohibit the expression of religious speech by public school students in the same way it prohibits the endorsement of religious speech by school officials. However, the provision of school space during school hours to students proselytizing to other students about Christianity can be argued to be a kind of school endorsement amounting to an unacceptable endorsement by the government.

Id.

upon the viewpoint discrimination principles implicit in *Tinker*. Even if a student's speech claim arises in the context of the classroom or curriculum, there is little reason to afford *Hazelwood* deference if the student's speech does not bear the "imprimatur" of the school. And in cases in which *Hazelwood* is appropriate, courts should nonetheless ensure that the reasons given by school officials for restrictions on speech are not "sham" reasons concealing a desire to suppress a political, religious or racial viewpoint.[113] A sampling of cases involving political, racial, and religious speech provide worthwhile vehicles to evaluate the no-bias principle.

In *Barber ex rel. Barber v. Dearborn Public Schools*,[114] a high school student wore a tee shirt with a picture of the President and the words "International Terrorist" on the front in protest to the impending war with Iraq.[115] During lunch, school officials asked the student to remove the shirt or call his father; the student refused to remove the tee shirt and shortly thereafter left school for the day.[116] In granting the student's request for a preliminary injunction on the free speech issue, the court held that school officials had not shown a likelihood of material and substantial disruption, notwithstanding that a significant number of the student population were likely to be of Iraqi descent, and school officials opined that Iraqi students might react strongly to the tee shirt's implicit message.[117] Treating the case as a modern day *Tinker*, the court reasoned that school officials' fear of an unpleasant response did not justify the limitation on student speech.[118] The outcome in *Barber* seems appropriate, but not simply because the tee shirt, like the armbands in *Tinker*, amounts to "pure speech." Barber's message, though potentially quite offensive, expressed a political view with which the school could not interfere without good reason. In Barber's case, good reason meant more than just the potential for a negative reaction.[119]

A similar case with a different result is *Baxter v. Vigo County School Corp.*,[120] in which an elementary school student attempted to protest alleged racism and unfairness by wearing tee shirts that stated, "Unfair Grades," "Racism," and "I Hate Lost Creek."[121] In granting the school official's request for qualified immunity, the court reasoned that the rule in *Tinker* did not apply at the elementary school level, and that the continuing validity of

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113. *Cf., e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1292-93 (10th Cir. 2004) (reversing summary judgment for defendant university in a compelled speech case based upon the university's requirement that drama students use offensive language during mandatory exercises). "Although we do not second-guess the *pedagogical* wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was *pretextual*." *Id.* (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

114. 286 F. Supp. 2d 847 (E.D. Mich. 2003).

115. *Id.* at 849.

116. *See id.* at 850.

117. *Id.* at 856-57.

118. *Id.* at 857-58.

119. *Id.* at 857.

120. 26 F.3d 728 (7th Cir. 1994).

121. *Id.* at 730.

the rule itself was doubtful in light of *Bethel* and *Hazelwood*.[122] In focusing on the student's age, the court completely discounted the school's potential motivation in suppressing the student's protest.[123] The subject matter of the student's protest, even an elementary school student's protest, should have alerted the court to analyze the school's proffered reasons for limiting the message. On the facts in the opinion, the school made no showing of potential disruption or interference with the operation of the school.[124] Nor did school officials argue that there were general rules forbidding tee shirts with messages. The nature of the student's shirt, an apparent protest based on the student's (and more likely, the parents') perception of unfair treatment based on race, deserved the First Amendment protection afforded by the *Tinker* standard.

Finally, *Hansen v. Ann Arbor Public Schools*[125] illustrates that courts can apply a no-bias principle even under a *Hazelwood* analysis. In *Hansen*, the district court found a violation of free speech based upon the school's exclusion of a student's particular viewpoint from a "Homosexuality and Religion" panel, and by the school's censorship of the student's proposed speech at an assembly.[126] As a part of "Diversity Week," the high school permitted students and student organizations to develop and present panels on topics related to race, religion, and sexual orientation.[127] The plaintiff in *Hansen*, a member of a Christian club, informed school officials that she desired to submit proposed speakers to appear on the "Homosexuality and Religion" panel to advance a message of religious disapproval of homosexuality.[128] After some vacillation, school officials decided to proceed with the panel without permitting Hansen's proposed view.[129] Later that week, when Hansen proposed to explain in a speech at an assembly her reaction to some of the views expressed during Diversity Week, school officials directed Hansen to change her speech to eliminate content officials deemed inappropriate and offensive.[130] In evaluating the propriety of the school's actions in

122. *Id.* at 737-38.

123. *See generally* id. at 728.

124. *See generally* id.

125. 293 F. Supp. 2d 780 (E.D. Mich. 2003).

126. *Id.* at 782-83.

127. *Id.* at 784.

128. *Id.* at 784-88.

129. *Id.* at 790. At one point school officials cited a procedural reason for refusing Hansen's request, claiming that she failed to attend a mandatory meeting that was a prerequisite for participation. *Id.* School officials testified, however, that they believed that Hansen's proposed viewpoint would interfere with and/or dilute the impact of the panel's message about homosexuality. *See id.*

130. *Id.* at 791. The controversial portion of Hansen's proposed speech outlined her views on religion and homosexuality:

> One thing I don't like about Diversity Week is the way that racial diversity, religious diversity, and sexual diversity are lumped together and compared as if they are the same things. Race is not strictly an idea. It is something you are born with; something that

light of the First Amendment, the district court, applying a viewpoint discrimination standard under *Hazelwood*, observed that school officials were motivated by their apparent disagreement with Hansen's message, notwithstanding that school officials had offered several pedagogical reasons for their actions.[131] The viewpoint discrimination was not the sort that would merely limit the views available in the marketplace; rather, the court opined that the school's asserted reasons for limiting speech were not pedagogical, but "political, cultural or religious, or all three."[132] *Hansen* exemplifies many of the dangers associated with indoctrination, and provides a prime example of the type of case in which the no-bias principle should be applied.

V. CONCLUSION

In evaluating the Supreme Court's jurisprudence in the area of public elementary and secondary schools, scholars have wrestled with whether *Tinker* or *Hazelwood* provides the appropriate standard. Some have offered pragmatic reasons for the apparent shift in the Court's doctrine from the speech protective standard in *Tinker* to the deferential approach of *Hazelwood*.[133] *Hazelwood* does represent a shift from libertarian to authoritarian concerns, but it does not leave behind the essence of *Tinker*. *Hazelwood* apparently rejects the marketplace of ideas, at least in the context of school sponsored activities, but there is more to support *Tinker* than the metaphor of the marketplace. *Tinker*'s concerns about indoctrination in the public schools can be expressed as a no-bias principle that is important in the instances of student political, religious, and racial speech. Students' attempts at expression in these areas can be a particularly important means of developing and preserving identity. Particularly in the case of religion, a type of defensive speech can be an effective response to perceived attempts by the school to enforce orthodoxy. A no-bias concept, whether applied under *Tinker* or *Hazelwood*, reflects the principle that school officials should not attempt to interfere with a student's overall development in critical areas that should be left to parents, religious or cultural communities, and other institutions that are not a part of the state.

> doesn't change throughout your life. . . . On the other hand, your religion is your choice. Sexuality implies an action, and there are people who have been straight, then gay, then straight again. I completely and whole-heartedly support racial diversity, but I can't accept religious and sexual ideas or actions that are wrong.

Id. at 791-92.

131. *Id.* at 800-802. School officials stated such reasons as "teaching students to stay on topic, making students aware of minority points of view, [and] creating a safe and supportive environment for gay and lesbian students." *Id.* at 800.

132. *Id.* at 802.

133. *See, e.g.*, Chemerinsky, *supra* note 34, at 527-28 (noting that *Tinker* was a product of the Warren Court and *Hazelwood* a product of the more conservative Burger Court); *see also* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 193 (1996).