PIERCING *PEARSON*: IS QUALIFIED IMMUNITY CURBING STUDENTS' RELIGIOUS SPEECH RIGHTS?

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> *Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state.*[1]
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> *The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.*[2]

I. INTRODUCTION

The phrase "separation between church and State" is traditionally invoked to explain the First Amendment's Establishment Clause.[3] In this vein, public school policy is often guided in part by a simple prohibition on religious activity—including speech—on school property. These policies, however, do not

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1. *Van Orden v. Perry*, 545 U.S. 677, 709 (2005) (Stevens, J., concurring in part and dissenting in part).

2. *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting); *see also* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 Mercer L. Rev. 1017, 1069 (1995) (stating that "[t]o base Establishment Clause jurisprudence on Jefferson's wall metaphor ignores the fact that Jefferson himself had little to do with drafting the First Amendment; he was out of the country in 1789 when Congress proposed the Bill of Rights, and his offhand thoughts on the religion clauses' meaning thirteen years after the fact are hardly persuasive evidence of the original meaning of those clauses").

3. As exemplified by Justice Rehnquist's frank dissent, the Constitution does not contemplate a "separation between church and State." *Jaffree*, 472 U.S. at 107. Rather, the First Amendment prohibits Congress from making any "law respecting an establishment of religion." U.S. Const. amend. I.

account for two other clauses exemplified in the First Amendment: the Free Speech Clause and the Free Exercise Clause. Simply removing religion from public schools invokes a wide array of constitutional concerns that are often ignored at the behest of politically correct policymaking and a poorly developed legal framework for student religious speech.

Today's marketplace for public education presents schoolteachers with a monumentally difficult task in preparing America's children to contribute to the society of tomorrow. Teachers are often villainized for their union involvement,[4] lifetime pensions,[5] and employment protectionism.[6] Adding fuel to the fire, media coverage is often narrowly focused on inappropriate conduct and seemingly more frequent sexual relationships between teachers and students.[7]

Accordingly, the average public school teacher has a myriad of countervailing concerns to dispel, all while attempting to help American students catch up to the rest of the developed world.[8] Add to this list the United States Constitution: educators must conform to, among other things, the First Amendment's protection of students' rights to free speech, all the while refraining from showing any hint of partiality to a particular religion in accordance with the First Amendment's Establishment Clause. So what is a school board supposed to do with student speech concerning religion? Many public schools have responded

4. *E.g.* Center for Union Facts, *Teachers Union Exposed*, http://www.teachersunionexposed.com (accessed Nov. 10, 2013); John Stossel, Real Clear Politics, *Teacher Unions Are Killing the Public Schools*, http://www.realclearpolitics.com/Commentary/com-2_15_06_JS.html (Feb. 15, 2006).

5. *E.g.* U-T San Diego Editorial Bd., San Diego Union Trib., *Teacher Pension Costs a Looming Crisis*, http://www.utsandiego.com/news/2011/mar/02/teacher-pension-costs-a-looming-crisis/ (Mar. 2, 2011, 12 a.m. ET).

6. *E.g.* Amity Shlaes, The Financial Times, *Protectionism Does Not Serve U.S. Schools*, (Mar. 8, 2004) (available at http://yaleglobal.yale.edu/content/protectionism-hurts-us-schools).

7. *E.g.* Associated Press, MSNBC.com, *Sexual Misconduct Plagues U.S. Schools*, http://www.msnbc.msn.com/id/21392345/ns/us_news-education/t/ap-sexual-misconduct-plagues-us-schools/ (Oct. 20, 2007, 4:50 p.m. ET) (discussing a survey finding "2,500 incidents over [five] years, across all types of districts").

8. *See* NPR, NPR.org, *Study Confirms U.S. Falling behind in Education*, http://www.npr.org/2010/12/07/131884477/Study-Confirms-U-S-Falling-Behind-In-Education (Dec. 7, 2010, 3 p.m.) (discussing the results of an international standardized test wherein United States students' international ranking in math, science, and reading recently dropped from 15th to 25th).

by simply prohibiting religious exercise on public school property.[9]

In turn, these policies have led to restrictions and punishment for students who engage in religious speech on school grounds. Justifying prohibition of this speech based on Establishment Clause concerns, public schools are rarely questioned on the legality of restricting student speech. In an increasingly litigious society, this development may be of no initial concern; however, the right to free speech and religious exercise are paramount constitutional mainstays. These issues have nonetheless been largely brushed aside in an ever-increasing push to appear neutral in the religious spotlight.

Of additional concern is that students' attempts to vindicate their First Amendment rights are easily dismissed on qualified immunity grounds. When a right is not clearly established, the government's alleged infringement of that right is not cognizable in a suit against the state or a state actor. What makes this hurdle frustratingly difficult to overcome is the Supreme Court's direction to lower courts that a suit may be dismissed on qualified immunity grounds, simply based on the fact that the right is not clearly established, without first determining whether the right exists.

Take for instance an elementary school student who seeks to hand out religious-themed gifts to his or her friends at a class party. While the teachers allow other students to hand out other secular trinkets to their classmates, school policy restricts students from distributing materials with religious messages on school grounds during school hours. Determining whether this restricts a student's right to free speech and free exercise is a messy endeavor, scarcely clarified by Supreme Court jurisprudence, and leaves lower courts with an easy out in the form of qualified immunity dismissal. Without ever addressing whether the student's rights exist under the First Amendment, the school board and its policies can theoretically persist indefinitely under this legal regime. Moreover, the lack of highly visible First Amendment jurisprudence in the lower courts leaves the

9. *See* Sekulow, *supra* n. 2, at 1018 (discussing public schools' efforts to avoid any implication of the Establishment Clause by simply restricting any form of religious speech).

Supreme Court with little fodder for certiorari.[10] This potentially continuous immunity loop works to the detriment of students' rights to free speech and religious exercise. It also allows for the entrenchment of poor school policy and the limitation of thought diversity at the most critical stages of child development. A potential answer to this conundrum lies in clarification of First Amendment jurisprudence, which must occur first and foremost through addressing the constitutional rights at issue without passing on the question simply due to the lack of "clearly established" law.

While free speech is an important issue to all students, this Article focuses specifically on the free speech rights of students when speaking on religion in public schools. To address this important constitutional issue, this Article first covers the qualified immunity legal framework. In light of the Supreme Court's decision in *Pearson v. Callahan*,[11] lower courts need not address a constitutional question before dismissing a suit if the law is not clearly established.[12] The Supreme Court later reiterated, however, that some situations call for courts to address certain types of legal issues.[13] Part II of this Article argues that student religious speech embodies just such a situation and that lower courts need to address whether schools have infringed on students' rights before dismissing their First Amendment claims.

This Article would not be complete, however, without addressing the various complexities involved in student religious speech. Indeed, this issue embraces three facets of the First Amendment, including: (1) regulation of student speech; (2) Establishment Clause jurisprudence; and (3) the presumptive prohibition against viewpoint discrimination. As it stands, courts tend to discount student free speech rights if the plaintiffs have not yet reached high school. Further, while courts acknowledge that viewpoint discrimination is presumptively unconstitutional, many do not acknowledge that it applies to elementary-age students. Interestingly, whether speech is considered school-

10. The Court has not been completely receptive to clarifying student religious speech jurisprudence. *See Nurre v. Whitehead*, 130 S. Ct. 1937, 1937 (2010) (Alito, J., dissenting from denial of certiorari in a case involving a school's decision to prevent students from playing a religious musical piece—without lyrics—at graduation).

11. 555 U.S. 223 (2009).

12. *Id.* at 227.

13. *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011).

sponsored serves as the fulcrum in making sense of these intersecting lines of jurisprudence. To be sure, the government is given more deference in regulating speech that "bear[s] the imprimatur of the school."[14] Accordingly, this speech necessarily invokes Establishment Clause concerns, stepping closer to government religious advocacy. In contrast, private speech does neither, invoking the greatest free speech protection and bearing no relationship to the government's attempt to stay religion-neutral. In this vein, lower courts must recognize individual student religious speech that is not government-sponsored, thereby invoking full First Amendment protection.

In sum, this Article argues that: (1) qualified immunity should not prevent lower courts from establishing First Amendment jurisprudence on student religious speech claims; and (2) in deciding these claims, courts should be more responsive to students' free speech rights in deciding whether speech is school-sponsored. By deciding student speech cases in this manner, courts will protect student speech rights, conform to First Amendment jurisprudence in other areas, and maintain a workable Establishment Clause doctrine.

II. QUALIFIED IMMUNITY

Qualified immunity protects government officials from civil liability when their actions could have reasonably been believed to be legally justified.[15] Reasonableness in this context is a fairly low standard; qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[16] Responsibility for this system's efficacy then rests in part on the courts to administer unambiguous precedent so as to "place[ ] the statutory or constitutional question beyond debate."[17] For a plaintiff to surpass this hurdle, he or she must show two things: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[18]

14. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
15. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009).
16. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).
17. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).
18. *Id.* at 2080 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

To show that the law is "clearly established," a plaintiff need not provide binding precedent that is "directly on point";[19] however, a defendant need only rebut that he was not given "fair warning" of the law's strictures.[20] The law must have clearly and unambiguously prohibited the government official's conduct such that any reasonable official would have understood that his or her actions violated the law.[21] Therefore, a plaintiff cannot rely on broad generalizations or indirect analogies to show that the state actor violated "clearly established" law.[22] Further, even when the law is settled in the circuit where the plaintiff brings suit, the law is generally not "clearly established" if a circuit split exists because "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy."[23] It is evident then, that even if a student can show that a public school official infringed on the student's First Amendment rights, it is no easy task to surpass the second prong to show that the law was clearly established, especially in a convoluted arena of First Amendment law that must balance complicated, countervailing interests.[24]

A student's ability to recover becomes even more tenuous when courts are instructed to systematically avoid answering these difficult constitutional questions. Courts currently have discretion to decide the "clearly established" prong of the qualified immunity analysis first, thereby circumventing the first prong—the "constitutional violation."[25] The Supreme Court established this rule in *Pearson v. Callahan*.[26] *Pearson* overruled the Supreme Court's prior qualified immunity standard espoused

19. *al-Kidd*, 131 S. Ct. at 2083.

20. *See e.g. Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (stating that "the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional").

21. *al-Kidd*, 131 S. Ct. at 2083 (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

22. *Id.* at 2084 (citations omitted); *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (reasoning that the clearly established inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition'")).

23. *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

24. *See C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 988 (9th Cir. 2011) (stating that "[t]he Establishment Clause presents especially difficult questions of interpretation and application, and we cannot expect [teachers] to have divined the law without the guidance of any prior case on point") (citation and alterations omitted).

25. *Pearson*, 555 U.S. at 236.

26. *Id.*

in *Saucier v. Katz*.[27] In *Saucier*, the Court required lower courts to reach the qualified immunity prongs in order, first considering whether the plaintiff had established a constitutional violation and, second, addressing whether the constitutional right in question was clearly established.[28] Considering various rationales for this rule, the *Saucier* Court ultimately concluded that the development of constitutional caselaw depended on courts reaching the first prong of the qualified immunity analysis.[29]

Before *Saucier*, the Court gave some discretion to lower courts on whether to address the merits of a constitutional claim yet still suggested that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right."[30] *Pearson* has returned to this discretionary rule but readjusted the scales by generally advocating for dismissal without constitutional discussion when the law is not clearly established.[31]

Allegations of unconstitutional deprivation under the First Amendment's Speech and Establishment Clauses are particularly susceptible to resolution under *Pearson*'s second prong,[32] which leaves a confounding problem in the area of school religious

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27. 533 U.S. at 201. *Pearson* is not without its critics. *See e.g.* Sarah L. Lochner, Student Author, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 Nw. U. L. Rev. 829, 860–868 (2011) (criticizing *Pearson*'s second prong directive in the context of enemy detention and the "global war on terror").

28. 533 U.S. at 201.

29. *Id.*

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.

Id.

30. *Co. of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998).

31. *Pearson*, 555 U.S. at 237–242; *cf. id.* at 242 (stating that "[a]ny misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted," and "[o]ur decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether [the] procedure is worthwhile in particular cases"); *Morgan v. Swanson*, 659 F.3d 359, 384–386 (5th Cir. 2011) (en banc) (explaining the Supreme Court's retreat from analyzing step-one constitutional violations).

32. *Morgan*, 659 F.3d at 371; *C.F. ex rel. Farnan*, 654 F.3d at 978 (declining to address the constitutionality prong where the law was not clearly established that a high school teacher may not disparage religion in his lectures).

speech. As the law has become increasingly confusing and ill-formed in a rapidly changing educational setting, lower courts may indefinitely avoid answering particular constitutional questions, precluding plaintiffs from having an effective remedy against repeated unconstitutional conduct.

A. *Pearson* Deconstructed

While overworked federal courts surely breathed a collective sigh of relief after *Pearson* absolved them of having to answer difficult constitutional questions, these questions need resolution the most. *Pearson*, therefore, should not be a one-size-fits-all directive. In many circumstances, it seems almost farcical to consider the import of *Pearson*'s directive—plaintiffs with meritorious-but-theretofore-unestablished constitutional claims are dismissed at the outset, then subsequent plaintiffs are similarly left with no recompense because the courts have left the questions unanswered.

This is not to imply that qualified immunity does not serve an important purpose. Qualified immunity furthers the efficiency and efficacy of the government by protecting its employees from civil liability when making good-faith discretionary decisions:[33] "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[34]

But *Pearson* has the potential to impose a sea change in the ability to rectify certain types of constitutional violations that have no effective route for precedential development elsewhere. In this way, unconstitutional-yet-murky governmental policies and actions are left in place simply based on the fact that the propriety of the policy has not been addressed—because when faced with the question, the Supreme Court has directed lower courts not to.

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33. *See e.g. Harlow*, 457 U.S. at 807–808 (discussing the importance of protecting officials from harassment through frivolous lawsuits so as to promote the "vigorous exercise" of their authority and discretion).

34. *Pearson*, 555 U.S. at 231.

This problem is hardly novel, and it is exactly the one the *Saucier* Court sought to rectify by implementing its two-step mandate—to support "elaboration from case to case" and to prevent constitutional stagnation.[35] The Court aptly stated that if lower courts do not address the constitutional question at hand, "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the [government employee's] conduct was unlawful in the circumstances of the case."[36]

Judges and scholars, however, quickly criticized *Saucier*'s mandate in light of jurisprudential concerns about "reaching constitutional questions [that] are unnecessary to the disposition of a case."[37] *Pearson*, in turn, highlighted that addressing the constitutional question may result in unnecessary use of judicial resources that "have no effect on the outcome of the case."[38] The Court exemplified this concern in cases in which

> it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.[39]

This reasoning, without more, all but ensures that the second prong substantially directs the qualified immunity analysis whereby the "clearly established" tail wags the constitutional dog.[40] Indeed, student-religious-speech jurisprudence is so poorly

35. *Saucier*, 533 U.S. at 201.

36. *Id.*

37. *E.g. Higazy v. Templeton*, 505 F.3d 161, 179 n. 19 (2d Cir. 2007).

38. 555 U.S. at 236–237.

39. *Id.* at 237.

40. The Court also noted that some cases provide little guidance where the decision is so fact bound as to provide little binding force or where the question will soon be addressed by a higher court. *Id.* at 237–238. These concerns, however, are easily addressed by a discretionary rule like that utilized in *Sacramento*. 523 U.S. at 841. Strange cases frequently occur, but noting idiosyncratic exceptions to establish a rule of great magnitude is hardly pragmatic. The *Pearson* Court was also concerned with unnecessary litigation of constitutional issues that "forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily." 555 U.S. at 237 (internal quotation omitted). This concern is not often warranted. *Pearson* did not change the two-step inquiry; it just altered the order in which *courts* must face the question. Certainly, plaintiffs' burdens are unchanged as they must surpass both hurdles. Moreover, defendants asserting qualified immunity as a defense face little

developed and confusing (involving the intersection of the First Amendment Free Speech Clause, viewpoint discrimination, and the Establishment Clause) that "no federal court of appeals has ever denied qualified immunity to an educator in this area."[41]

B. Qualified Immunity and Student Religious Speech

The educational context is a unique animal in this arena. While *Pearson* did take note of *Saucier*'s concerns about the need to develop constitutional precedent, the Court largely sidestepped the issue.[42] It noted that addressing constitutional claims when qualified immunity is asserted simply to develop the law is unnecessary because the law may be developed in other areas when qualified immunity is not available: for example, in criminal cases, suits for injunctive relief, or cases asserting municipal liability.[43] By and large, the Court was correct to point out that qualified immunity provides only a limited defense in a wide variety of contexts when constitutional law can otherwise be developed and become "clearly established." Some areas of the law, however, are not so amenable to resolution outside of the qualified immunity paradigm. Indeed, criminal cases provide no baseline for constitutional framing in student speech cases. Municipal liability is also of little assistance when the plaintiff sues an individual or when the school district has not instituted a particular policy infringing on the students' First Amendment rights.[44] Moreover, though qualified immunity provides no

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additional litigation costs from a prong that they necessarily should address in order to adequately defend the suit. For an additional rebuke of several of *Pearson*'s concerns with *Saucier*, see Michael T. Kirkpatrick & Joshua Matz, Student Author, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and beyond)*, 80 Fordham L. Rev. 643, 651–653 (2011) (explaining that addressing constitutional questions when qualified immunity is invoked as a defense does not implicate "avoidance," "advisory opinions," or concerns for the development of "bad law").

41. *Morgan*, 659 F.3d at 371 (stating that "[w]e decline the plaintiffs' request to become the first").

42. *Pearson*, 555 U.S. at 242–243.

43. *Id.*

44. *Monell* liability generally does not apply to actions by state employees. *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978) (explaining that a city cannot be held liable under Section 1983 on a respondeat superior theory). In order to prevail under *Monell*, a plaintiff must prove that a city policy has been effected, that the policy is so deliberately indifferent to citizens' rights that the city can be held culpable, and that there is

defense against injunctions, most plaintiffs in a school setting have no incentive to seek an injunction against teacher conduct when the student moves on to another classroom at the end of the school year and more than likely will move to a different school by the time litigation is completed. In these instances, injunctive relief will be unavailable as moot and thus an entirely ineffective remedy,[45] while a damages remedy is alive and well past graduation or matriculation to a different school.[46] Compensation for First Amendment violations against young students is therefore often limited to Section 1983 actions against the teachers and administrators[47] who allegedly infringed on student rights.[48]

This is not to imply that the *Pearson* Court provided no room to address the constitutional question at issue. *Pearson* noted the rare case in which coming to a decision on the "clearly established" prong would take such effort that defining the constitutional right at issue would be essentially necessary.[49] This recognition was mostly limited to the fact that judicial resources will not always be conserved by such a rule because some cases involve facts that require such an involved explanation of the relevant law to show that there is no "clearly established" right

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"sufficient causation between the specific policy decision and the resulting constitutional injury." *Brown v. Bryan Co., Okla.*, 219 F.3d 450, 457 (5th Cir. 2000).

45. *See e.g. Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 218 (3d Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355, 364–365 (4th Cir. 2003) (stating that students' "claims for declaratory and injunctive relief generally become moot when they graduate"); *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026 (6th Cir. 1995); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000) (stating that "[i]t is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory [or] injunctive relief against a school's action or policy").

46. *See e.g. Donovan*, 336 F.3d at 218; *Cole*, 228 F.3d at 1099 (holding that although plaintiff's graduation rendered her claims for declaratory and injunctive relief moot, her damages and attorneys' fees claims constituted a live controversy); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc); *Curry ex rel. Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723, 743–744 (E.D. Mich. 2006).

47. In this context, these parties are likely not policymakers for the purposes of municipal liability as that designation generally falls on school district supervisors. *See e.g. City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (explaining that only officials with "final policymaking authority" may subject the government to Section 1983 liability pursuant to *Monell*, 436 U.S. 658).

48. *See Camreta*, 131 S. Ct. at 2031 n. 5 (noting that "some kinds of constitutional questions do not often come up in the[ ] alternative settings" listed by *Pearson*: "a suit to enjoin future conduct, . . . an action against a municipality, or . . . a suppression motion in a criminal proceeding").

49. 555 U.S. at 236.

that addressing the "constitutional violation" prong comes at little cost to the courts' efficiency.[50]

Further, while the *Pearson* Court retreated from the *Saucier* rule to impart discretion on lower courts' abilities to address either qualified immunity prong, it did so with at least partial neutrality as to when a court should address the constitutional question at issue.[51] Since *Pearson*, however, recent decisions have reiterated significant departure from the constitutional prong, explaining that lower courts should only address the second prong in most circumstances. For example, the *Ashcroft v. al-Kidd*[52] Court warned that "courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'"[53] The most recent Supreme Court decision on this issue, however, explicitly addressed the problem presented by this Article, indicating that certain circumstances and types of cases should be addressed headfirst, with the constitutional inquiry followed by the "clearly established" second step. In *Camreta v. Greene*,[54] the Court explained the problem:

> If prior case law has not clearly settled the right, and so given officials fair notice of it, the court can simply dismiss the claim for money damages. The court need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit.
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> And indeed, our usual adjudicatory rules suggest that a court *should* forbear resolving this issue. After all, a "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." In this category of qualified immunity cases, a court can enter judgment without ever ruling on the (perhaps difficult) constitutional claim the

50. *Id.* at 236–237.

51. "Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case." *Id.* at 242.

52. 131 S. Ct. 2074.

53. *Id.* at 2080 (quoting *Pearson*, 555 U.S. at 236–237).

54. 131 S. Ct. 2020.

> plaintiff has raised. Small wonder, then, that a court might leave that issue for another day.
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> But we have long recognized that this day may never come—that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo. Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.
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> For this reason, we have permitted lower courts to avoid avoidance—that is, to determine whether a right exists before examining whether it was clearly established.[55]

This eloquent explanation of the problem pays homage to the Court's awareness of *Pearson*'s potential blind spot and acknowledgement that *Pearson* is not appropriate in certain areas of the law. Because the law is unlikely to be developed through injunction suits, municipal liability, or criminal cases, students' First Amendment rights will flounder if courts do not address the constitutionality of government restriction of religious speech. Lower courts, therefore, must tackle this complicated area of law to provide a clear standard that gives government officials "fair warning" as to the boundaries of students' First Amendment rights.[56]

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55. *Id.* at 2031 (internal citations omitted).

56. *Pearson*'s admonishment to lower courts to be wary of addressing a constitutional question at the pleading stage provides a steep hurdle for many courts addressing these First Amendment questions. Indeed, this declaration could potentially foreclose many student speech challenges from the outset. *See e.g. Pearson*, 555 U.S. at 239 (explaining that deciding the constitutional prong of a qualified immunity question may "'depend on a kaleidoscope of facts not yet fully developed'") (quoting *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 70 (1st Cir. 2002)); *Morgan*, 659 F.3d at 385 (evaluating an interlocutory

Just as states are laboratories for democracy, the United States Courts of Appeals often act as laboratories for development of constitutional jurisprudence.[57] Stunting the growth of student religious speech law thwarts students' rights to participate in the market of ideas and engage in the free exercise of their religion. It similarly binds the hands of teachers, administrators, and school districts in their good-faith attempts to implement legal and ethical policies. Directing lower courts to act on these claims will also provide fodder for cert-worthy decisions that will enable the Supreme Court to establish the law of the land and direct schools on the bounds of the First Amendment. The next Part will provide direction as to how the courts may address the First Amendment questions that student religious speech presents.

III. THE FIRST AMENDMENT: THE INTERSECTION OF SPEECH AND RELIGION

Unraveling First Amendment student religious speech jurisprudence "requires recourse to a complicated body of law that seeks, often clumsily, to balance a number of competing First Amendment imperatives."[58] The aforementioned qualified immunity discussion illuminates the application of First Amendment caselaw to the extent that lower courts can, and should, address the merits of students' rights to religious speech. On one hand, dismissal on qualified immunity grounds provides an enticing avenue for resolution of these cases due to their complexity, conflicting constitutional interpretations, and the scarce judicial resources available to lower federal courts. However, in an effort to provide school districts and administrators with clearly established First Amendment boundaries, it is crucial that lower

appeal from district court's denial of a motion to dismiss on qualified immunity grounds); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (highlighting that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; . . . [thus] it is effectively lost if a case is erroneously permitted to go to trial").

57. *Cf. New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (stating that "[t]o stay experimentation in things social and economic is a grave responsibility[;] [d]enial of the right to experiment may be fraught with serious consequences to the nation[, and it] is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory") (Brandeis, J., dissenting).

58. *Morgan*, 659 F.3d at 364.

courts address the first *Pearson* prong in order to protect students' constitutional rights.[59]

A. First Amendment Jurisprudence

Public school students' First Amendment rights to speak on religious matters are not easily definable; the First Amendment is an unwieldy subject matter, and answering the school-religious-speech question involves the intersection of various constitutional doctrines that place public schools at the center of an unwelcome controversy. This jurisprudence has been aptly recognized as "the thorniest of constitutional thickets[:] . . . the tangled vines of public school curricula and student freedom of expression."[60]

This Part will attempt to unravel the thicket through a discussion of the relevant confines of student speech, an examination of the government's often-used justification for limiting student religious speech (Establishment Clause avoidance), and a brief analysis of the government's limited ability to engage in viewpoint discrimination.

1. Student Speech

Tinker v. Des Moines Independent Community School District,[61] the "high water mark" of student speech rights,[62] frames the analysis of the First Amendment's Free Speech Clause as it relates to students within the "schoolhouse gate."[63] *Tinker* serves as a baseline for student speech rights, creating the "substantial disruption" standard.[64] More specifically, the Court held that public schools may regulate student speech only if that speech

59. *See Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 638 (S.D. Tex. 2010) (noting "[t]he many cases and the large body of literature on this set of issues" do little to provide "adequate guidance" for courts going forward).

60. *Peck v. Baldwinsville C. Sch. Dist.*, 426 F.3d 617, 620 (2d Cir. 2005).

61. 393 U.S. 503 (1969).

62. *E.g.* Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 Lewis & Clark L. Rev. 201, 229 (2006); Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. Va. L. Rev. 187, 201 (2007).

63. 393 U.S. at 506.

64. *Id.* at 514.

would reasonably cause a "substantial disruption of or material interference with school activities."[65]

Though *Tinker* did not involve religious speech—this Article's paramount concern—that case is the starting point for any student speech discussion.[66] In *Tinker*, the plaintiff students wore black armbands to school to publicize their objections to the Vietnam War.[67] School authorities suspended the students who wore the armbands in protest.[68] The Court highlighted that despite the school's overarching concern for orderliness, student speech rights apply in schools and the speech at issue was not accompanied by "any disorder or disturbance," or "interference . . . with the schools' work or of collision with the rights of other students to be secure and to be let alone."[69] The Court further explained that in order for a school to prohibit

> a particular expression of opinion, [the school must show that its restriction] was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. [Unless there is a] showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[70]

Tinker bears substantial similarities to students speaking on religious topics. Much like students protesting the Vietnam War by wearing certain clothing, a student giving a religious pamphlet to a friend or telling classmates about Jesus does little to disrupt the operation of the school or infringe on classmates' rights. Today's politically correct dogma may render religious speech in schools taboo, but as the Supreme Court touted in *Tinker*, potentially unpopular speech deserves no less protection than the majority view so long as it does not disrupt school function.

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65. *Id.*; *see also id.* at 513 (stating that student activities must "materially and substantially disrupt the work and discipline of the school").

66. Bowman, *supra* n. 62, at 201.

67. 393 U.S. at 504.

68. *Id.*

69. *Id.* at 507–508.

70. *Id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

Tinker, however, is not the end of the story. Almost twenty years later, in *Hazelwood School District v. Kuhlmeier*,[71] the Court carved out a significant exception to *Tinker*'s speech rubric.[72] Rather than simply limiting government regulation to disruptive speech, the Court allowed schools to regulate school-sponsored speech—in other words, student expression "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[73] In this situation, schools only need to proffer a justification "reasonably related to legitimate pedagogical concerns,"[74] a standard that starkly contrasts with *Tinker*'s "substantial disruption" standard.[75]

Though the *Hazelwood* Court did not outline precise parameters for what speech bears school imprimatur, the facts in *Hazelwood* illuminate the point. The plaintiffs in that case were three high school students who formerly staffed the school newspaper.[76] They sued after the school deleted two pages of articles from a particular issue.[77] Those articles concerned students' perspectives on teen pregnancy and the impact of divorce on students.[78] Important to the school-sponsored nature of that speech, the newspaper was funded by the Board of Education, supervised by faculty members and staff, and distributed to students and school personnel as well as to the community.[79]

The Court conceded that *Tinker* expressly recognized students' speech rights in school, but it nonetheless explained that when the speech bears the imprimatur of the school, the determination of its appropriateness "'properly rests with the

71. 484 U.S. 260 (1988).

72. *Id.* at 272–273; Richard S. Vacca & H.C. Hudgins Jr., *Student Speech and the First Amendment: The Courts Operationalize the Notion of Assaultive Speech*, 89 Educ. Law Rep. 1, 7 (1994).

73. *Hazelwood*, 484 U.S. at 271.

74. *Id.* at 273.

75. *E.g.* Perry A. Zirkel, *The Supreme Court Speaks on Student Expression: A Revised Map*, 221 Educ. Law Rep. 485, 485 (2007) (comparing *Tinker*'s "substantial disruption" standard to the "compelling justification generally needed for overriding individual constitutional rights").

76. *Hazelwood*, 484 U.S. at 262.

77. *Id.*

78. *Id.* at 263.

79. *Id.* at 262–263.

school board.'"[80] In the realm of curricular school-sponsored speech, the Court thus deferred to school authorities, teachers, and administrators to reasonably regulate student speech.[81] The Court was nonetheless very careful to distinguish *Tinker*—whether a school must "tolerate particular student speech"—from the facts at hand—"whether the First Amendment requires a school affirmatively to promote particular student speech."[82] As the Court explained,

> [t]he former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.[83]

The Court therefore recognized the significant divide between school-sponsored and private student speech, stating that school-sponsored "activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting," with the only requirements being "they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[84] Based on this delineation, the Court held that educators were entitled to exercise more control over the student newspaper than they would over purely private student speech, as was at issue in *Tinker*.[85]

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80. *Id.* at 266–267 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

81. *Id.* at 274–276.

82. *Id.* at 270–271.

83. *Id.* at 271.

84. *Id.*

85. *Id.* at 271–272. *Hazelwood* also clarified the basis for the Court's prior opinion in *Fraser*, 478 U.S. at 685–686, a case in which the Court authorized school authorities' censorship of a student who made a sexually suggestive speech at a high school assembly. *See also Morse v. Frederick*, 551 U.S. 393, 404 (2007) (stating that "[t]he mode of analysis employed in *Fraser* is not entirely clear"). Though not central to the question here, *Fraser* upholds schools' ability to censor conduct that is detrimental to the "'habits and manners of civility' essential to a democratic society"—specifically, "the use of vulgar and offensive terms in public discourse." 478 U.S. at 681, 683. Since then, the Supreme Court has added additional carve-outs to *Tinker*'s strong student speech protections. In *Morse*, the Court blurred *Hazelwood*'s school-sponsorship test by holding that the First Amendment does not prohibit school administrators from "restrict[ing] student speech at a school event,

a. Private Student Speech v. School-Sponsored Speech

To reiterate, Supreme Court jurisprudence has often been explained by setting *Tinker* as the student speech benchmark (restricting only student speech that interferes with school operation) while carving out a significant exception in the form of school-sponsored speech (allowing the government to reasonably restrict the speech it promotes).[86] This distinction forms the lynchpin of the determination of what type of student religious speech must be afforded significant First Amendment protection.[87]

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when that speech is reasonably viewed as promoting illegal drug use." 551 U.S. at 403. Though the speech occurred at a school event, there was no question that the expression involved, a student banner displaying "Bong Hits 4 Jesus," was not school-sponsored. *Id.* at 398, 400–401. Though both *Fraser* and *Morse* are necessary to a general understanding of the Free Speech Clause as it applies in schools, neither case is generally applicable to student religious speech. To be clear, this Article attempts to clarify the confines of student religious speech that is clearly not vulgar or indecent, does not promote illegal drug use, or anything of similar ilk.

86. *Morse*, 551 U.S. at 409–410 (declining to extend First Amendment protection to school speech advocating drug use); *Hazelwood*, 484 U.S. at 273; *Fraser*, 478 U.S. at 683 (allowing schools to restrict "lewd, indecent, or offensive speech").

87. *See e.g. Morgan*, 659 F.3d at 374–375 (noting that the court must look to the Supreme Court's general school-speech precedents in *Tinker* and *Hazelwood* due to the fact there are "no specific and factually analogous precedent guides" to determine the case at hand). Though generally important to most speech analyses, public forum doctrine is not critical to this student speech framework; indeed, *Tinker* did not even address forum doctrine. On the other hand, *Hazelwood* addressed forum doctrine only to say that the school did not explicitly open the school forum to the public. 484 U.S. at 269–270. This distinction is largely unclear, though it may be intuited that *Tinker* operates outside the realm of traditional nonpublic forum analysis, limiting the state's ability to regulate student speech even though it has not opened the forum to the public. Under this framework, a court must first ask whether the school has opened the forum to the public, in which case a different set of speech-restriction rules applies—namely strict scrutiny. *See e.g. Peck*, 426 F.3d at 625 (performing first an analysis on the type of forum in which the student speech occurred); *Henerey v. City of St. Charles*, 200 F.3d 1128, 1132 (8th Cir. 1999) (explaining that "[t]he nature of the forum affects the degree of protection . . . afford[ed] to expressive activity, even within the public school setting"). Even if the school has not opened its doors to the public, however, courts must next analyze the type of speech at issue. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (finding the speech occurred in a nonpublic forum, and moving next to the determination of the type of speech at issue). If the speech is the student's and not school-sponsored, the school must apply *Tinker* despite the closed forum in which the speech occurred. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 384–385 (1993) (applying public forum doctrine when school property was not allowed to be used by a church group); *Bd. of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990) (using public forum analysis when the school prohibited religious groups from meeting at the school but allowed others to meet there); *see Peck*, 426 F.3d at 627; *Henerey*, 200 F.3d at 1132; *see also* Sekulow, *supra* n. 2, at 1031 (noting "forum analysis should not apply in cases, such as *Tinker*, involving student speech among students entitled (indeed, required) to be on

The importance of this distinction is unassailable. *Tinker* sets a high bar, preventing schools from limiting student religious speech that does not infringe on the school's ability to provide proper instruction "or impinge upon the rights of other students."[88] On the other hand, if *Hazelwood* applies, the government may reasonably regulate speech that is school-sponsored and is perceived to "bear the imprimatur of the school."[89] Educators that limit speech under the *Hazelwood* regime do not infringe on the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns."[90]

Thus, the ultimate inquiry in the case of student religious speech is whether *Hazelwood*'s more deferential speech-limiting doctrine applies because the speech is school-sponsored or whether *Tinker* applies by default (to private student speech), allowing schools to limit student speech only in very limited circumstances.

Circuit courts have offered a variety of factors that influence whether speech falls under *Hazelwood*'s deferential approach. Some courts have started with a basic dictionary definition of "imprimatur," noting that the question begins with whether the speech is "sanctioned" or "approved" by the school.[91] Others have highlighted the location and timing of the speech, emphasizing whether it was made during school hours or on school property.[92] Further, some courts have focused on whether speech conducted

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school grounds"); *cf. Fraser*, 478 U.S. 675 (creating an exception to *Tinker* without applying limited public forum analysis based on the vulgar nature of the student's speech); *Widmar v. Vincent*, 454 U.S. 263 (1981) (applying public forum analysis to a university's attempt to bar student groups from using school facilities for religious activities); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 48 (1986) (explaining that "public forum analysis is irrelevant when access is not at issue" as in *Tinker*).

88. *Tinker*, 393 U.S. at 509. Though it takes little imagination to envision religious speech that harasses other students or infringes on schools' educational missions, the focus of this Article is to outline a framework to protect benign religious speech, not *all* religious speech. Thus, it goes without saying that the hypothetical religious speech envisioned by this argument would be constitutionally protected under the *Tinker* framework.

89. *Hazelwood*, 484 U.S. at 271.

90. *Id.* at 273.

91. *Morgan*, 659 F.3d at 376.

92. *Cf. Fleming v. Jefferson Co. Sch. Dist.*, 298 F.3d 918, 925 (10th Cir. 2002) (stating that "[e]xpressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings") (citing *Good News Club v. Milford C. Sch.*, 533 U.S. 98 (2001)).

during school activities occurs during events under school supervision and in accordance with school guidelines.[93]

With alarming frequency, lower court decisions have inexplicably extended *Hazelwood* to all things school-related. Significant to the private-religious-speech question here, one court applied *Hazelwood* to speech occurring at elementary school parties because a teacher organized them.[94] The court in *Walz* dealt with a school that restricted an elementary student from giving classmates pencils inscribed with the slogan "Jesus [Loves] The Little Children" and candy canes with an attached religious story.[95] The school held seasonal, in-class parties regularly.[96] The parties were organized by students' parents and teachers, and they consisted of snacks, activities, and an exchange of small gifts.[97] The court applied *Hazelwood* based on the conclusion that the parties were held "in the context of an organized curricular activity" and that school-sponsorship is more pervasive in an elementary school than in secondary school.[98] Finally, because the parties were meant to "teach social skills and respect for others in a festive setting," there was the necessary educational component to employ a lower burden for school sponsorship.[99] The court therefore deferred to school administrators in "[d]etermining the appropriate boundaries of student expression."[100]

Walz is troubling; concluding that classroom parties organized by teachers and parents with no grading, teaching, or lesson plan are part of the school curriculum is a far cry from *Hazelwood*'s guidance. Such ad hoc reasoning further ignores *Tinker*, allowing schools to justify any speech restriction by contending that the student spoke at a time when the school meant to teach students about social interaction—e.g., during class breaks, at lunch, or during recess.

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93. *Peck*, 426 F.3d at 628–629 (posters made by students for a school project); *Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271, 279 (3d Cir. 2003) (school holiday parties); *Fleming*, 298 F.3d at 930–931 (tiles created by students and attached to school walls); *Bannon v. Sch. Dist. of Palm Beach Co.*, 387 F.3d 1208, 1214–1215 (11th Cir. 2004) (murals created by students).

94. *Walz*, 342 F.3d at 279.

95. *Id.* at 273.

96. *Id.*

97. *Id.*

98. *Id.* at 277–278.

99. *Id.* at 279.

100. *Id.* at 277.

Other courts offer similarly troubling interpretations. Though the criteria used sometimes encompass student speech that does, indeed, bear the imprimatur of the school, these criteria also inappropriately categorize the cases that do not. For instance, whether the speech is "approved" by the school is largely overemphasized. Schools must "approve" any speech that is protected by the First Amendment; using school policy to dictate the confines of the Constitution is a questionable practice. If the school does not "approve" or "sanction" the speech, then this factor weighs in favor of applying *Tinker*. While this holds true in the negative, because the speech must then necessarily be private, a school's approval is not always indicative of sponsorship. For example, a school's approval of individual, noncurricular student religious speech is appropriate. In such a scenario, the school should "approve" the given speech without giving the speech the mark of government sponsorship. On the other hand, student speech that is part of the school curriculum, supervised by the administration, and bears hallmarks of school authorization is school-sponsored and governed by *Hazelwood*. Both types of speech, individual and school-sponsored, therefore can be described as "approved" by the school. This standard, therefore, applied indiscriminately, offers little comfort to students and educators attempting to abide by the First Amendment.

Similarly, the fact that speech occurs during school hours or at a school event is of little import when *Tinker* makes clear that student speech bears strong First Amendment protection even when conducted at school.[101] Questioning whether speech happens at school or during school hours makes an exception that swallows the rule, weighing the scales against student speech rights simply because the speech occurs on government

101. *Tinker*, 393 U.S. at 506 (stating that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *Adler v. Duval Co. Sch. Bd.*, 206 F.3d 1070, 1080 (11th Cir. 2000). The *Adler* court stated that:

> Even if we accept that [the school board] exerted overwhelming control over the graduation ceremony in terms of the event's sequence, venue, dress, and facilities, it is clear that it did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place.

206 F.3d at 1080.

property.[102] Further, the simple act of "supervision" without teacher involvement in the speech is a spurious consideration. Indeed, one would hope that students are always being supervised by school officials while on school property. If a school was allowed to inhibit speech simply because students were speaking at school, under the supervision of school officials, and during school hours, then *Tinker* would be a dead letter.[103]

Hazelwood was not so far-reaching. It was simply meant to stand in contrast to *Tinker*, giving schools the ability to limit speech produced in articles that bore the school's name and were produced with the school's funding, support, guidance, and approval. Like many facets of the First Amendment, student speech lies on a spectrum, with *Tinker* on one end and *Hazelwood* on the other. To properly determine which speech standard to apply, courts must implement more precise balancing factors. Undoubtedly, there will always be fringe cases; however, rather than haphazardly applying random school-sponsorship tests, courts must be consistent to clearly establish student speech law.

Initially, lower courts would be more in accord with the First Amendment, and logic, to pay closer heed to the direction *Hazelwood* actually provided. To be sure, *Hazelwood* denoted a framework for what speech should be considered school-sponsored through various examples, including involvement in school papers and theatrical productions.[104] The Court also clarified why these types of activities may reasonably be interpreted to bear the imprimatur of the school: because faculty members are involved in the dissemination, and the speech is "designed to impart

102. *Adler*, 206 F.3d at 1071 (reasoning that a school's policy of allowing students to control the content of graduation messages—including those containing religious messages—did not affront the Establishment Clause because "[t]o conclude otherwise would come perilously close to announcing an absolute rule that would excise *all* private religious expression from a public graduation ceremony, no matter how neutral the process of selecting the speaker may be, nor how autonomous the speaker may be in crafting her message"); *see also Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) (stating that "school property may not be declared off limits for expressive activity by students").

103. *See Adler*, 206 F.3d at 1081 (stating that "a *per se* rule that all speech on a state-controlled platform is state speech, raises core free expression concerns and would likely run afoul of the Free Exercise and Free Speech clauses").

104. *Hazelwood*, 484 U.S. at 271; *see Axson-Flynn*, 356 F.3d at 1285–1286 (concluding that speech made as part of a school-sanctioned theater program was school-sponsored).

particular knowledge or skills to student participants and audiences"—traditional curricular functions.[105]

In this light, certain factors have substantial probative value and strike at the heart of school-sponsored speech. For instance, whether the student speech was directed to a "captive audience."[106] Likewise, the permanence of the speech and its perceived attachment to the school may indicate government sponsorship.[107] Similarly, when the speech is intended to impart knowledge and teach the students, the speech is more likely to come from the school.[108] Further, whether the student speaker or the school controls the speech is an important factor in determining the context of the speech.[109] The ultimate question should always be whether the school contributed to the dissemination of the speech.[110] This has been lost on many courts that apply *Hazelwood* despite the individual speaking role and circumstances of the student speech.[111]

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105. *Hazelwood*, 484 U.S. at 271.

106. *Fleming*, 298 F.3d at 925 (stating that "[e]xpressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings"); *see also* Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 Fla. L. Rev 63, 114 (2008) (recounting a decision where a court employed the "captive audience" language).

107. *See Fleming*, 298 F.3d at 925 (stating that "expressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school").

108. *Bannon*, 387 F.3d at 1215 (applying *Hazelwood* when a project was designed to impart knowledge—specifically the creation and appreciation of artwork); *see Axson-Flynn*, 356 F.3d at 1286 (applying *Hazelwood* when the speech at issue was part of a script to be used for a school-sanctioned theatrical program).

109. *See e.g. Adler*, 206 F.3d at 1077 (concluding, in an Establishment Clause analysis, that a student's graduation speech that includes a religious message would not be reasonably considered to come from the school when the student was given complete autonomy and the school expressed no approval of the message); *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (stating that "[t]he principal method [to avoid government imprimatur] is for administrators to avoid endorsing religious views by their own words or deeds; a prudent administrator also might disclaim endorsement of private views expressed in the schools").

110. *See* Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. Rev. 605, 627 (2008) (highlighting five relevant factors for determining the appropriate speaker in First Amendment cases: "(1) Who is the literal speaker?[;] (2) Who controls the message?[;] (3) Who pays for the message?[;] (4) What is the context of the speech (particularly the speech goals of the program in which the speech appears)?[; and] (5) To whom would a reasonable person attribute the speech?").

111. *See e.g. Peck*, 426 F.3d at 628–629 (concluding that a student's poster was school-sponsored expression because the poster was prepared for a school assignment and the school set parameters for the posters); *Walz*, 342 F.3d at 279 (holding that speech

Several examples illuminate the usefulness of these factors. For instance, student speech expressed through classroom artwork is speech expressed through a school project—arguably curricular.[112] That being said, personal artwork is created by the student, is not expressed to a captive audience, and is not under the school's control. So long as the artwork is not affixed to school property it should not be considered school-sponsored. Unlike a school newspaper or theatrical production, this speech is much closer to private expression as the common observer would hardly attribute it to bear the imprimatur of the school.[113]

A different example may lie in an after-school talent show in which the student attempts to express a religious viewpoint while otherwise following the activity's guidelines.[114] A talent show is created with the help and supervision of the school, is performed to a captive audience, is extended to the public, and is controlled and funded by the government. The views expressed therein may be reasonably considered to bear the imprimatur of the school.

Another common refrain occurs through expression articulated in a student's gift to fellow classmates.[115] In contrast to the reasoning offered by the *Walz* court, however, gifts extended during school parties are not part of the school curriculum, are not made to a captive audience, are not produced with the aid of the school, and undoubtedly bear the individual expression of the

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occurring at school holiday parties was curricular because teachers planned and supervised the parties); *Henerey*, 200 F.3d at 1133 (concluding that a student's expressive actions during a school election campaign bore the imprimatur of the school because the election regulations were set by the school and supervised by a school administrator); *Bannon*, 387 F.3d at 1214–1215 (holding that murals made by students were curricular because faculty members supervised their construction).

112. *See e.g. Peck*, 426 F.3d at 628–629 (concluding that *Hazelwood* applied in order to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school") (citing *Hazelwood*, 484 U.S. at 271); *Settle v. Dickson Co. Sch. Bd.*, 53 F.3d 152, 155–156 (6th Cir. 1995) (stating that "[w]here learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum").

113. *But see Bannon*, 387 F.3d at 1215 (concluding that murals produced by students were governed by *Hazelwood* because there was teacher supervision and the painting occurred at school—even though the project was not a class requirement, there was a fee to participate, the students made the murals on a Saturday, and they received no grade or extra credit).

114. *O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 376–377 (D.N.J. 2006).

115. *E.g. Morgan*, 659 F.3d at 366.

student. These test cases exemplify the difficult question involved and why the speech spectrum needs to be clarified to clearly establish the law in this field. Unfortunately, lower courts have inappropriately applied factors that have expanded *Hazelwood* and eroded *Tinker* to an unacceptable point.[116] *Tinker*'s guidance should not be so arbitrarily limited.

The above-mentioned factors are also better aligned with Supreme Court Establishment Clause jurisprudence, which interprets what government action constitutes state endorsement of religion.[117] In that arena, endorsement occurs if the government's overarching purpose is religious,[118] if a reasonable person would conclude that the government is endorsing religion,[119] or if the government policy is biased toward religion and instead fosters excessive entanglement with religion.[120] This reasonableness inquiry seems utterly lost in the opinions that adopt reasoning that essentially allows restriction of any religious speech occurring on school property under teacher supervision.

To illustrate the discrepancy, a neutral-government policy allowing children to distribute gifts with religious messages in the same manner as other students distributing nonreligious gifts does not run afoul of the Establishment Clause.[121] According to

116. *Cf. Walz*, 342 F.3d at 280 (explaining that "[w]here a student speaks to his classmates during snack time, he does so as an individual[, but] absent disruption, this is fundamentally different from a student who controverts the rules of a structured classroom activity with the intention of promoting an unsolicited message"). This reasoning essentially allows the school to dictate when a student has the right to communicate a personal message through its structure of school policy—naming a class party a "school activity" and thereafter restricting student speech. This is fundamentally different from speech properly governed by *Hazelwood*; for instance, a student completely ignoring a class project in order to proselytize.

117. *See e.g. Adler*, 206 F.3d at 1075–1079 (outlining the extent of government involvement necessary to constitute speech that is reasonably attributable to the school).

118. *McCreary Co. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (explaining that "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality").

119. *Id.* at 866.

120. *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971).

121. *See C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 212 (3d Cir. 2000) (en banc) (Alito, J., dissenting on other grounds) (stating that "a reasonable observer would not have viewed [a religious-themed] Thanksgiving poster along with the secular posters of . . . classmates as an effort by the school to endorse religion in general or Christianity in particular[, and a]n art display that includes works of religious art is not generally interpreted as an expression of religious belief by the entity responsible for the display"); *Curry*, 452 F. Supp. 2d at 740 (concluding that a reasonable person would not conclude that the government endorsed a religious message when a student distributed candy canes bearing a religious message as part of a school project).

the *Walz* court, however, this speech is school-sponsored—thus logically invoking Establishment Clause concerns. This is an important non sequitur because, as discussed in more detail below, the Establishment and Free Speech Clauses are mutually exclusive when taking into account student speech; private speech garners extensive Free Speech protection and does not invoke Establishment Clause concerns while government speech must account for the Establishment Clause and provides more discretion for regulation of speech.[122] It thus makes little sense to apply different principles for "school-sponsorship" in the free speech context than for "government-endorsement" in the Establishment Clause context.[123]

The crux of the free speech inquiry thus lies in cleanly separating school-sponsored speech from that individually expressed student speech. To do so demarcates the level of scrutiny a court must apply to a school's justifications for limiting a student's religious expression. Several factors are imperative in ferreting out the source of the speech, including context, extent of school influence and control, whether the speech was made to a captive audience, and whether it is part of the school curriculum. In contrast, whether the speech was authorized, or took place during a school activity or during school hours, bears little semblance to whether the speech was school-sponsored and can rationally be attributed to bear the imprimatur of the state.[124]

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122. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (stating that "[t]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (internal citation and quotation marks omitted); *id.* at 770 (stating that "[r]eligious expression cannot violate the Establishment Clause where it[:] (1) is purely private[;] and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms").

123. One court explained plainly that a school may discharge its duty to remain neutral in the face of student religious speech simply by refraining from expressing views on the subject matter and by disclaiming any adoption of religious viewpoints. *Hedges*, 9 F.3d at 1299.

124. It is also worth pointing out that the way the speech is portrayed is only relevant to the extent it substantially interferes with the school's educational mission—thereby violating *Tinker*. The point being that religious "speech" and "worship" should be given equal protection; moreover, proselytizing speech is also protected so long as it does not interfere with other students' education or reach the point of harassment. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (agreeing with litigant's choice not to dispute the applicability of First Amendment freedoms to "the oral and written dissemination of . . . religious views and doctrines"); Sekulow, *supra* n. 2, at 1023.

b. Student Age

As if this doctrinal area were not confusing enough, many post-*Tinker* cases have inferred that student speech rights are not necessarily coterminous with those of adults[125] and that *Tinker* only applies to high-school-age students.[126] Though *Tinker* made no such distinction and had no occasion to differentiate based on student age, several lower courts have specifically questioned whether elementary-age students have First Amendment rights at all.[127]

At the heart of this constitutional limitation lies the near-sighted reasoning that the First Amendment has less application to elementary-age children.[128] Some courts have justified speech restrictions on children by reasoning that "the contribution that kids can make to the marketplace of ideas and opinions is modest," which thus provides educators with authority to limit children's speech rights.[129] For example, the Third and Seventh Circuits have significantly circumscribed the First Amendment rights of elementary school students, noting that "at a certain

125. *Fraser*, 478 U.S. at 682 (citing *N.J. v. T.L.O.*, 469 U.S. 325, 340–342 (1985)); *see also Morgan*, 659 F.3d at 375 (stating that "[p]ut differently, when minors speak in public schools, the Supreme Court has held that what is good for the goose is not invariably good for the gander").

126. *See Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539–1540 (7th Cir. 1996) (contending that special considerations in an elementary school setting may call for a different standard). The court in *Muller* did not rely on this distinction, however, concluding that even if *Tinker* applies to "children in public elementary schools, an elementary school's nonpublic forum status remains, and we apply the most recent standard elaborated by the Supreme Court in *Hazelwood*, that of 'reasonableness.'" *Id.* The Seventh Circuit, therefore, essentially abandoned *Tinker* because the speech took place in a nonpublic forum. This attempt to sidestep the issue is troublesome; indeed, *Tinker* expressed no view on the nature of the forum at issue because that framework operates independent of the nature of the forum.

127. *See e.g. S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 423 (3d Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) (stating that "a school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting"). This runs directly afoul of the Supreme Court's long adherence to doctrine protecting a "robust exchange of ideas" in education, "which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted); *cf.* Brian Richards, Student Author, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. Pa. J. Lab. & Empl. L. 745, 782 (1998) (arguing that with regard to government employees, the government may only limit employees' religious speech in the workplace to the extent that the speech is made by supervisors or managers).

128. *E.g. Sayreville*, 333 F.3d at 423; *Muller*, 98 F.3d at 1538.

129. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011); *Muller*, 98 F.3d at 1532–1533.

point, a school child is so young that it might reasonably be presumed the First Amendment does not protect the kind of speech at issue here."[130]

These justifications are unsupportable.[131] Restricting a student's speech because that speech has little value to others is a lamentable state of constitutional affairs.[132] On one hand, it is true that courts have long garnered some discretion in deciding what types of speech should be given full constitutional protection. For example, there is little doubt that schools have the right to curb inflammatory speech.[133] Similarly, commercial-speech doctrine significantly restricts companies' ability to disseminate deceptive or untruthful advertising.[134] The government may also limit speech that has the potential to incite dangerous activity or activity that may be harmful to others.[135] Nowhere in this long line of precedent, however, is any doctrinal justification for limiting nonharmful student speech because it does not benefit others to some indefinable extent. This outcome also discounts the Supreme Court's protection of student rights in similar First Amendment contexts. For example, in *West Virginia State Board of Education v. Barnette*,[136] the Court recognized that

130. *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003); *see e.g. Muller*, 98 F.3d at 1538–1539 (citation omitted) (stating that "it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students"); *see also Zamecnik*, 636 F.3d at 876 (opining that "the younger the children, the more latitude the school authorities have in limiting expression" (citing *Muller*, 98 F.3d at 1538–1539)); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 673 (7th Cir. 2008) (explaining that when children are "very young . . . the school has a pretty free hand").

131. Several courts have expressly applied *Tinker* to elementary school students' speech. *See e.g. Morgan*, 659 F.3d at 386; *Jeglin ex rel. Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461 (C.D. Cal. 1993); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575, 580 (M.D. Fla. 1994).

132. *See* Corbin, *supra* n. 110, at 613 (highlighting that the marketplace for free speech is one of ideas that flows between both speakers and listeners, "unhindered by government regulation"); *cf. City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (explaining that the free speech "interest at stake is as much the public's interest in receiving informed opinion as it is the [speaker's] own right to disseminate it").

133. *See e.g. Tinker*, 393 U.S. at 513.

134. *See e.g. C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, n. 9 (1980) (stating that the "Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way").

135. *See e.g. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

136. 319 U.S. 624 (1943).

the government may not compel speech from elementary students.[137] Removing elementary school students from *Tinker*'s protections is an irrational extension of precedent, especially considering the myriad of other First Amendment applications that provide so little added value to the "marketplace of ideas" and yet receive full constitutional protection.[138]

The additional justification that "'a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics'"[139] is largely irrelevant to the question of whether *Tinker* applies to elementary-school-age student speech.[140] It is unquestionably true that a government speaker has the right to limit the speech he or she sees fit to disseminate. But this is only relevant as a justification for why *Hazelwood* provides a lower hurdle for government restriction of school-sponsored speech; it has no import in determining whether a young child should benefit from the Constitution's speech protections when the government is not the speaker.[141] Indeed, *Tinker* provided that outlet in its test. A school's interest in the "emotional maturity" of students subjected to religious speech is only relevant to the extent that the speech is harassing or materially interferes with the school's ability to educate.

Ultimately, these courts, acting as final arbiters over the societal contribution of children's speech, have lowered the government's burden to show substantial justification for First Amendment restriction (by applying the *Hazelwood* standard) simply because children's ideas do not contribute to society in the

137. *Id.* at 625–626, 642.

138. For instance, erotic dancing is provided some protection under the First Amendment. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (stating that nude dancing "might be entitled to First and Fourteenth Amendment protection").

139. *Morgan*, 659 F.3d at 378 (quoting *Hazelwood*, 484 U.S. at 272).

140. *See also* Sekulow, *supra* n. 2, at 1072 (stating that "*Tinker* itself dealt with the speech rights of high school and junior high school students," and "[these] proposed guidelines extend the *Tinker* standard to elementary schools").

141. Courts, however, have employed age as a justification in itself for why schools have leeway in regulating nondisruptive speech. *See e.g. Walz*, 342 F.3d at 276–281. In *Walz*, the court stated that "the elementary school classroom . . . is not a place for student advocacy. To require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control." *Id.* at 277. The court therefore went on to apply the *Hazelwood* framework because of its stated concern with child advocacy. *Id.* at 276–281. This reasoning is conclusory at best; the court essentially avers that a lower standard for speech restriction should apply because elementary-age students are not permitted to advocate their beliefs at school.

same manner as adult speech does.[142] Without lingering over the discriminatory nature of this regime, it is worth pointing not only to the benefit religious speech has on the diversity of ideas but also to the power speech restrictions have on shaping young children's views—young children are excessively impressionable, look to their educators for guidance, and spend several hours a day under educator supervision.[143] The First Amendment is not the tool by which the government is given carte blanche power to restrict the expression of our youth.[144] Under such a regime, children speaking on religion, politics, or simply anything that falls under government disdain could be extensively censored simply because children are not sufficiently developed to speak with a loud enough voice.[145] Yet what is a child who looks up to his or her teachers supposed to think when he or she is censored because he or she talks about God, war, the environment, or race?[146] If children are our future, the First Amendment should not serve to place that future into a one-size-fits-all politically correct mold simply because "children are just beginning to

142. It is also worth mentioning that there is no clear delineation to determine when a child becomes an adult, fully able to contribute ideas to society; therefore, providing less First Amendment protection to younger students requires courts to arbitrarily create a distinguishing line based on students' perceived emotional and intellectual maturity. *See Planned Parenthood of C. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (stating that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority").

143. *See Tinker*, 393 U.S. at 512 (stating that "[t]he classroom is peculiarly the 'marketplace of ideas,'" and "[t]he 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'") (internal quotations and citation omitted).

144. *See id.* at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution[, and] . . . [i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.")

145. *But see id.* at 506–507 (highlighting Supreme Court precedent that "prevents States from forbidding the teaching of a foreign language to young students" on the ground that such restrictions "interfere with the liberty of teacher, student, and parent").

146. *See Hedges*, 9 F.3d at 1299 (discussing the possible effect of censorship on schoolchildren). In response to religious speech concerns,

> [the city] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson [it] proposes to teach its students! Far better to teach them about the [F]irst [A]mendment, about the difference between private and public action, about why we tolerate divergent views. . . . The school's proper response is to educate the audience rather than squelch the speaker.

Id.

acquire the means of expression."[147] Finally, without recourse to analogy or policy arguments, the fact remains that textually, "nothing in the [F]irst [A]mendment postpones the right of religious speech until high school."[148]

2. The Establishment Clause

In addition to the aforementioned speech-censorship rationales, several courts have upheld student religious speech restrictions on the government's cited justification that avoiding an Establishment Clause violation allows administrators to suppress religious speech. This reasoning, however, is only viable in the event that the Establishment Clause may plausibly be invaded by the speech involved; axiomatic to this justification is that the Establishment Clause is of no concern to private student speech and is patently irrelevant when a court must apply the *Tinker* framework.[149] Therefore, following the analysis outlined in the previous Part, when speech is not school-sponsored, the government can find no solace in restricting religious speech in schools because it seeks to avoid violating the Establishment Clause.

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147. *Muller*, 98 F.3d at 1538 (footnote omitted).

148. *Hedges*, 9 F.3d at 1298; *see* David Moshman, *Children's Intellectual Rights: A First Amendment Analysis*, in *Children's Intellectual Rights* 25, 31 (David Moshman ed., 1986); Sekulow, *supra* n. 2, at 1018 (discussing differing views on what is required of schools with regard to student religious speech, noting that "[m]any officials are still under the misguided assumption that the Establishment Clause requires schools to stifle student religious speech"); *but see* Jennifer L. Specht, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 Cornell L. Rev. 1313, 1324–1325 (2006) (advocating for treating younger students differently under the First Amendment).

149. *See* Sekulow, *supra* n. 2, at 1018 (stating that "the Establishment Clause provides no excuse for restricting private religious speech simply because it is religious"). Of further interest is an example of the entanglement between Establishment and Free Speech Clauses out of the Fourth Circuit. *See Peck v. Upshur Co. Bd. of Educ.*, 155 F.3d 274, 288 (4th Cir. 1998). In *Upshur*, a school board allowed groups to distribute bibles in schools during school hours, but the school specifically disavowed any affiliation with the table displays and prevented any advertising of the giveaway with school resources. *Id.* at 275–276. Nonetheless, the court struck the school board's policy because school-age children are not clearly capable of making the distinction between school-sponsored and private speech, the central issue to neutrality imperative to the Establishment Clause's prohibition against government endorsement of religion. *Id.* at 288. Axiomatic to this discussion is the argument that the Establishment Clause would have been of no relevance had the bibles been distributed by students (not outside groups) and properly considered private student—not school-sponsored—speech; to reiterate, the crux of the inquiry in all facets hinges on the nature of the speaker.

The well-recognized *Lemon* test, adopted in *Lemon v. Kurtzman*,[150] is generally applied to Establishment Clause analyses[151]—especially in school-speech cases.[152] Under this test, the government policy or action must have a secular purpose; its "principal or primary effect must be one that neither advances nor inhibits religion"; and the policy or action "must not foster 'an excessive government entanglement with religion.'"[153]

The *Lemon* test, however, is not always mandatory,[154] and the Supreme Court has thereby outlined other factors that govern Establishment Clause jurisprudence in this area, including whether a reasonable observer would conclude that official activity "sends a message to nonadherents that they are outsiders,"[155] the extent to which "the community would feel coercive pressure to engage in the . . . activit[y]";[156] and the fact that young children (especially elementary-age children) may be more impressionable than adults.[157]

Establishment Clause application in the public school arena could undoubtedly provide fodder for an entire article, but speaking in generalities, this Article will briefly outline the Establishment Clause framework to provide the necessary foundation to deconstruct the often-stated government justification for censoring student religious speech in schools. First, a policy protecting *private* freedom of expression generally evinces a secular purpose.[158] To be sure, a school policy permitting reli-

150. 403 U.S. 602 (1971).

151. *Id.* at 612–613.

152. *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985).

153. *Lemon*, 403 U.S. at 612–613 (citations omitted); *see also McCreary Co., Ky.*, 545 at 869 (stating that "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'"); *Good News Club*, 533 U.S. at 114 (highlighting the need for government neutrality toward religion).

154. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (stating that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area").

155. *Id.* at 688 (O'Connor, J., concurring).

156. *Good News Club*, 533 U.S. at 115.

157. *Id.*

158. *See e.g. Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 760 (stating that "[o]ur precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"); *Peck*, 426 F.3d at 634 (concluding that a school's prohibition against a student's artwork containing religious themes evoked a secular purpose because the artwork did not follow the assignment's instructions and it was not the student's own work); *Adler*, 206 F.3d at 1085 (stating that a "School Board's policy also evinces an important and long accepted

gious speech on the same terms as all other speech promotes students' rights to free speech, an "undeniably secular" purpose.[159] Further, "[t]he Supreme Court has also rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech."[160] This statement clearly aligns with the second *Lemon* factor, which precludes the state from advancing policy with the principal effect of inhibiting religion.

As to the last *Lemon* factor, the government may not advance laws that create excessive entanglement with religion.[161] On its face, this factor seems problematic when dealing with religious speech in schools; however, the Supreme Court dealt with this issue in *Widmar*, noting that a neutral "policy, including nondiscrimination against religious speech . . . avoid[s] entanglement with religion."[162]

As it relates to school policy protecting private student expression, the *Lemon* test thus provides little support for speech suppression on the basis of Establishment Clause avoidance.[163] Worthy of additional discussion, however, are two realms of thought that attempt to give credence to schools' Establishment Clause justifications. Both are based on perception—that of the public and of students. The reasoning goes: first, the public's limited ability to separate the religious speech from the school justifies suppression of religious speech; and second, a student is more impressionable and less able to differentiate between private and government messages at a younger age, also justifying restricted speech. Neither is supportable.

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secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form").

159. *See e.g. Mergens*, 496 U.S. at 249 (stating that an "avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular"); *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1389 (11th Cir. 1993) (stating that neutral treatment of religious speech promotes secularity).

160. *Muller*, 98 F.3d at 1544 (citing *Lamb's Chapel*, 508 U.S. at 394; *Mergens*, 496 U.S. at 247–252; *Widmar*, 454 U.S. at 271–273)).

161. 403 U.S. at 613.

162. 454 U.S. at 271–272 (footnotes omitted); *see also Lamb's Chapel*, 508 U.S. at 393–395 (finding that the showing of a film with a religious standpoint by a governmental actor "[did] not foster an excessive entanglement with religion").

163. *See* Sekulow, *supra* n. 2, at 1061–1066 (examining the *Lemon* test's application to private religious speech at schools).

Initially, reasonable people (and students) would not consider a child's private speech—distributing religious materials,[164] creating artwork with religious symbolism,[165] or speaking privately on religious themes—to bear the government's flag. Likewise, the government's neutrality to such speech does not send any message of political favor to a group of religious adherents.[166] Ultimately, this reasoning just obfuscates the nature of the Establishment Clause question; policies that apply equally to religious and nonreligious speech give credence to free speech and free exercise concerns while simultaneously skirting Establishment Clause issues by maintaining appropriate neutrality.

Moreover, decisions questioning children's ability to differentiate between government and private speech read into the Establishment Clause something that is not there; these opinions discount government neutrality while assuming that children cannot intuit the source of the religious information.[167] On the one hand, these decisions apparently fear that children will understand the religious statements made yet not understand where the speech comes from or a school's explicit neutrality.[168] The Supreme Court identified this problem, and rejected it, in *Good News Club*, stating that "we cannot say the danger that children would misperceive the endorsement of religion is any

164. *See e.g. Curry*, 452 F. Supp. 2d at 740 (concluding that a reasonable person would not conclude that the government endorsed a religious message when a student distributed candy canes bearing a religious message as part of a school project).

165. *See e.g. C.H. ex rel. Z.H.*, 226 F.3d at 212 (Alito, J., dissenting) (stating that "a reasonable observer would not have viewed [a religious-themed] Thanksgiving poster along with the secular posters of . . . classmates as an effort by the school to endorse religion in general or Christianity in particular," and "[a]n art display that includes works of religious art is not generally interpreted as an expression of religious belief by the entity responsible for the display").

166. *See Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) ("recognizing that the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage'" (quoting *Co. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989))).

167. *See e.g. Walz*, 342 F.3d at 277 (contrasting elementary school students with high school students in their ability to differentiate between government and private speech); *Ball*, 473 U.S. at 390 (emphasizing that the analysis "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years").

168. *But see Mergens*, 496 U.S. at 250 (stating "that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis" and that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated").

greater than the danger that they would perceive a hostility toward the religious viewpoint if the [speaker] were" prohibited from expressing the religious viewpoint.[169] "We cannot operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding . . . religious activity."[170]

Returning to the First Amendment's basic instructions, the Establishment Clause only applies to the government; it is patently inapplicable to private speech.[171] Many courts' blind deference to the government's fear of what people will understand to be government speech abdicates the judiciary's responsibility to interpret the Constitution and is frankly of little import when considering the interplay of this principle with the previously discussed student speech doctrines—i.e., *Tinker* and *Hazelwood*.[172]

The Free Speech and Establishment Clause discussions fit together nicely; just as private speech is subject to more First Amendment protection, it also provides no justification for government avoidance vis-à-vis the Establishment Clause.[173] Indeed, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[174] It is no justification for the government to contend that it does not put forth an opinion on religion when it strictly limits religious speech in schools. In that case, it is true that the government is not choosing one religion over another; it is, however, advocating for a hard line opposite the neutrality principle—the absence of religion, a view that

169. 533 U.S. at 118.

170. *Id.* at 119.

171. U.S. Const. amend. I; *Mergens*, 496 U.S. at 250 (stating that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"); Corbin, *supra* n. 110, at 617; Sekulow, *supra* n. 2, at 1018 (stating "that the First Amendment by its very terms prohibits only state, not private, action").

172. *See e.g. Walz*, 342 F.3d at 277 (stating that "[d]etermining the appropriate boundaries of student expression is better handled by those charged with educating our youth").

173. *See e.g. Mergens*, 496 U.S. at 250 (discussing prohibitions and protections of the First Amendment).

174. *Id.*; *see McCreary Co.*, 545 U.S. at 876 (noting that the Establishment Clause is meant "to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate").

inhibits the freedom of speech and exercise protected by the First Amendment.[175]

Adding to the perplexity here, the government cites an expansive Establishment Clause to justify speech restriction, yet Establishment Clause jurisprudence in other areas is much less restrictive, often allowing religious symbols posted on public property[176] or state funding for parochial schools despite the very real possibility of misunderstanding.[177] This shortchanging of children's speech rights in favor of Establishment Clause avoidance is unique and troubling. Enforcing an anti-religion agenda, however, necessarily involves regulating individual liberties not affiliated with the government's advancement of religion—e.g., the right to free speech and free exercise.[178] The fundamental right to free speech is not limited to speech that

175. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (explaining that the Establishment Clause avoids "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community"); *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947) (stating that "[the First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *Hedges*, 9 F.3d at 1298 (stating that "[e]ven when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint . . . [e]specially not on account of a religious subject matter, which the [F]ree [E]xercise [C[lause of the [F]irst [A]mendment singles out for protection" (internal citations omitted)); *Am. Fam. Ass'n v. City & Co. of S.F.*, 277 F.3d 1114, 1121 (9th Cir. 2002) (applying the tripartite *Lemon* test to allegations of governmental hostility toward religion).

176. *See e.g. Lynch*, 465 U.S. at 680–681 (concluding that there was insufficient evidence to determine that a city's inclusion of a nativity scene on public property was meant to express governmental advocacy of a particular religious message).

177. *See e.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 643–645, 653 (2002) (holding that state-based school-voucher programs may include parochial schools without violating the Establishment Clause); *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 822–823, 844–846 (1995) (holding that state university payments for a Christian viewpoint in a student newspaper does not violate the Establishment Clause). Also interesting is an analogy proposed by Judge Easterbrook in *Hedges*, 9 F.3d at 1299–1300. "[T]he police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Id.* at 1299. Therefore, "[j]ust as bellicose bystanders cannot authorize the government to silence a speaker," ignorant bystanders who misinterpret the source of the religious speech at issue cannot justify government restrictions on religious speech. *Id.* at 1299–1300.

178. Though the Free Speech and Free Exercise Clauses are often inextricably intertwined, the Court has generally favored couching religious speech analyses in terms of free speech rights while relegating the Free Exercise Clause to a mere afterthought. *See* Stephen M. Feldman, *Conservative Eras in Supreme Court Decision-Making:* Employment Division v. Smith*, Judicial Restraint, and Neoconservatism*, 32 Cardozo L. Rev. 1791, 1805 (2011) (noting the Court's emphasis on free speech rights at the expense of free-exercise concerns).

does not reference religion. Similarly, the right to free exercise is no less a right than the right of the people to be free from government establishment of religion.[179]

What is lost in many of the judicial decisions upholding government policies restricting an individual's religious speech is the fact that the government's zealous restriction on religion in schools illogically uses the Establishment Clause to infringe on a person's other First Amendment rights.[180] The justification for many of these decisions, based on the impressionability of children, cuts both ways; while children may be influenced by the religious speech of their peers, they are just as surely guided by the anti-religious sentiment of their schools and teachers.[181] In this light, the decisions that restrict privately conducted student religious speech in an effort to justify the government's Establishment Clause concerns are simply misguided.[182]

3. Viewpoint Discrimination

An alternative legal paradigm for upholding students' rights to religious speech lies in the long-established prohibition on

179. U.S. Const. amend. I; *see Everson*, 330 U.S. at 15–16 (stating that "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance").

180. Of paramount concern in many Establishment Clause cases is the government's role in favoring one religion over another, or "adherence to religion generally," which "clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.'" *McCreary Co.*, 545 U.S. at 860. The government's countervailing view that the Establishment Clause somehow permits blind restriction on any religion does not comport with the basic principle that "[t]he First Amendment mandates governmental neutrality between . . . religion and nonreligion." *Epperson v. Ark.*, 393 U.S. 97, 104 (1968).

181. *Cf. Nurre v. Whitehead*, 580 F.3d 1087, 1090 (9th Cir. 2009) (stating that "[t]here exists a delicate balance between protecting a student's right to speak freely and necessary actions taken by school administrators to avoid collision with the Establishment Clause").

182. Asking whether a school "is entitled to silence its students, lest the audience infer that the school endorses whatever it permits," Judge Easterbrook notoriously answered in the negative, highlighting several Supreme Court cases that reject the argument that "in order to avoid the appearance of sponsorship, a school may restrict religious speech," and stating that "nothing in the [F]irst [A]mendment postpones the right of religious speech until high school, or draws a line between daylight and evening hours." *Hedges*, 9 F.3d at 1298 (citing *Lamb's Chapel*, 508 U.S. at 394–395; *Mergens*, 496 U.S. at 247–252; *Widmar*, 454 U.S. at 271–272); *Good News Club*, 533 U.S. at 113.

viewpoint discrimination.[183] Though not central to the above analysis and the central premise of this Article, a First Amendment analysis would not be complete without briefly discussing this doctrine. To be clear, many courts have stated that even if *Hazelwood* does apply based on the student speech framework, and the speech takes place in a nonpublic forum, the government may not discriminate against speech based on its particular viewpoint.[184] Indeed, regardless of the forum-dependent scrutiny developed by school-speech jurisprudence, the Supreme Court has long said that discrimination against speech based on "its message is presumed to be unconstitutional."[185] Undoubtedly, discrimination against religious, as opposed to secular, expression is viewpoint discrimination.[186] A government's ability to regulate such speech is subject to the narrow limitations of strict scrutiny, requiring any regulation to be narrowly tailored to serve a compelling state interest.[187]

In sum, this Article's student speech analysis is unaffected by viewpoint-discrimination doctrine, and vice versa. Therefore, this Part is simply meant to paint a more complete picture of the student religious speech framework without adding to, or taking away from, the Article's central argument—that courts should more consistently label student speech as what it is, private expression, rather than bearing state imprimatur, thus invoking *Tinker*'s stricter standard for government restriction.

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183. *See e.g. Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

184. *See Peck*, 426 F.3d at 629–630 (asking whether viewpoint discrimination existed as part of *Hazelwood* analysis); Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech*, § 177:14.50 (3d ed., Clark Boardman Callaghan 1996) (stating that "[t]here is a division among courts as to whether the . . . deferential First Amendment standard articulated in *Hazelwood* is nonetheless trumped and displaced by the First Amendment norm heavily disfavoring viewpoint discrimination"); *see also Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (stating that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination").

185. *Rosenberger*, 515 U.S. at 828 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–643 (1994)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 395–396 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

186. *Good News Club*, 533 U.S. at 107; *Rosenberger*, 515 U.S. at 830–831; *Lamb's Chapel*, 508 U.S. at 393–394.

187. *See e.g. Simon & Schuster*, 502 U.S. at 118 (stating that "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end") (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

Nonetheless, legal arguments invoking viewpoint discrimination are a powerful tool in the First Amendment arsenal. In the seminal Supreme Court case on the issue, the *Good News Club* Court specifically passed on deciding whether a "[s]tate's interest in avoiding an Establishment Clause violation" can ever justify viewpoint discrimination.[188] Though the Court highlighted that prior Establishment Clause jurisprudence did not "foreclose private religious conduct during nonschool hours" simply because it took place on school grounds, it did give credence to the concern in the Establishment Clause context that "elementary school children are more impressionable than adults."[189]

The *Good News Club* Court explained that a school's restriction on the use of its limited public forum solely because of the religious content of the speech was indistinguishable from precedent that invalidated similar restrictions.[190] The school nonetheless argued that despite its discrimination against religious speech, "its interest in not violating the Establishment Clause outweighs the [speaker's] interest in gaining equal access to the school's facilities."[191] The Court disagreed, explaining that there was no Establishment Clause concern in the instant case, and therefore the government's concern was no justification for its discriminatory policy.[192]

In the wake of this lack of clarity over whether Establishment Clause avoidance justifies viewpoint discrimination, there is a circuit split among the federal courts of appeals on whether public schools must afford the same viewpoint neutrality required of the rest of the government when restricting religious speech.[193] On the one hand, some courts fall back to the

188. 533 U.S. at 113 (citing *Lamb's Chapel*, 508 U.S. at 394–395).

189. *Id.* at 115.

190. *Id.* at 107.

191. *Id.* at 112.

192. *Id.* at 114, 119.

193. *Compare Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (stating that "[*Hazelwood*] did not require that school regulation of school-sponsored speech be viewpoint neutral") *and Fleming*, 298 F.3d at 928 (stating that "*Hazelwood* does not require educators' restrictions on school-sponsored speech to be viewpoint neutral") *with Child Evangelism Fellowship of N.J. Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 526 (3d Cir. 2004) (quoting that "'[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn . . . *are viewpoint neutral*'") (emphasis in original) *and C.H. ex rel. Z.H.*, 226 F.3d at 210 (Alito, J., dissenting) (stating that "even in a 'closed forum,' governmental 'viewpoint discrimination' must satisfy strict scrutiny and . . . disfavoring speech because of its religious nature is

Hazelwood standard and something akin to intermediate scrutiny to the speech restrictions involved. The Sixth Circuit, in *Curry ex rel. Curry v. Hensiner*, did just that when it upheld a school prohibition of a student's distribution of religious messages to classmates.[194] The court's rationale, however, was troubling. Rather than avoiding the obvious viewpoint discrimination involved, the court highlighted viewpoint discrimination to justify the school's restrictions, explaining that its desire to avoid "subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose."[195] In effect, the court established a governmental construct in which the government may "protect" certain citizens from the speech of other "citizens" simply because the message might conflict with the government's own religious viewpoint. Justifying religious discrimination in this way is problematic in light of First Amendment jurisprudence, but even more so considering the court's validation of the "school's desire to avoid having its curricular event offend other children or their parents"[196]—reasoning that lacks any support in First Amendment jurisprudence.[197]

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viewpoint discrimination") *and Hedges*, 9 F.3d at 1298 (stating that "[e]ven when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint . . . . Especially not on account of a religious subject matter, which the [F]ree [E]xercise [C]lause of the [F]irst [A]mendment singles out for protection") (internal citation omitted) *and Planned Parenthood v. Clark Co. Sch. Dist.*, 941 F.2d 817, 830 (9th Cir. 1991) (holding that because school district's actions were "not an effort at viewpoint discrimination, the school district did not violate the [F]irst [A]mendment") *and Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989) (stating that "there is no indication that *[Hazelwood]* . . . drastically rewr[o]te First Amendment law to allow a school official to discriminate based on a speaker's views") *and* Sekulow, *supra* n. 2, at 1018 (stating that "the First Amendment Free Speech Clause never allows the government to restrict speech based on its viewpoint and generally requires a compelling state interest to restrict speech based on content (that is, subject matter)"). The mere existence of this split is problematic from the standpoint of student speech rights because of the qualified immunity framework established *supra*. If courts cannot agree on whether viewpoint discrimination is prohibited in public schools, then a school administrator is accordingly not expected to recognize the right. *See Layne*, 526 U.S. at 617–618 (holding that split among federal circuits made it "unfair to subject police to money damages for picking the losing side of the controversy").

194. 513 F.3d 570 (6th Cir. 2008).

195. *Id.* at 579.

196. *Id.*

197. *See e.g. United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814–816 (2000) (stating that when considering "content-based regulation, the answer should be clear: The standard is strict scrutiny"); *R.A.V.*, 505 U.S. at 382 (stating that "[c]ontent-based regulations are presumptively invalid"); *Tinker*, 393 U.S. at 508–509 (stating that "for the

The Sixth Circuit does not stand alone; a handful of courts have essentially abandoned viewpoint-discrimination jurisprudence in the context of student religious speech.[198] It is undoubtedly important to consider the nature of the school setting when deciding the constitutionality of speech regulation. The failure to do so would be detrimental from both a policy and a legal standpoint. Public schools are unique in that the students that attend them are both impressionable and in most cases are required by law to attend. In this way, the government has some duty (ethically, if not legally) to regulate the flow of information that reaches its students. The important paradigm shift here, however, is that schools should have no prerogative to decide, in the absence of harm to students or detriment to the school's educational mission, that religious speech is somehow unfit for impressionable minds. Lastly, the justification that some students may be offended or distraught to learn of other religious doctrines is indicative not of the harmful nature of the speech at issue but the intolerance of the listener. In countless other areas, students are told to appreciate diversity, to acknowledge different viewpoints, and to do unto others as you would have them do unto you.[199] We trust young children every day with the ability to embrace different races, cultures, family backgrounds, and socioeconomic statuses, yet when it comes to religion there is such hesitance to offend that students are never exposed to the plethora of theological diversity. The Supreme Court has explicitly stated that the unpopularity of particular ideas is no

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[s]tate . . . 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").

198. *Walz*, 342 F.3d at 277; *Nurre*, 580 F.3d at 1095; *but see Peck*, 426 F.3d at 632–633 (extensively analyzing Supreme Court jurisprudence to determine that the Court has made no occasion to overrule its prior viewpoint discrimination precedents that apply regardless of forum); *Searcey*, 888 F.2d at 1325 (stating that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral"). Some lower courts have also gone out of their way to avoid this framework. To do so, these courts have changed the rules when the speech at issue is religious, taking the position that qualified immunity insulates school-based religious speech discrimination because the law in this area is not "clearly established." *See e.g. Ashcroft v. al-Kidd*, 131 S. Ct. at 2084; *Morgan*, 659 F.3d at 379 (noting that the Supreme Court stated in *Ashcroft v. al-Kidd* that courts cannot "define clearly established law at a high level of generality").

199. *Matthew* 7:12.

indicator of their value or the protection afforded under the First Amendment.[200]

Would school administrators similarly prohibit a student from giving out rainbow flags to fellow students? From drawing and hanging a mural of the low-income housing projects where the student lives? What about presenting a history of Kwanzaa at show and tell? Understandably, the principal reaction to most of the foregoing examples is that religion is constitutionally different. While this is true to a certain extent, as already discussed, the Establishment Clause should have limited immediate bearing on a student's right to practice, and speak on, his or her personal religious beliefs.[201]

B. Reconciling the First Amendment: Speech v. Religion

The First Amendment's waters are murkiest at the intersection of speech and religion. At this point, the government must reconcile its duty to avoid advocating for a particular religion while still according students' rights to free speech. Doing so requires an analysis of the type of speech at issue and whether it bears the endorsement of the government. It is this impasse that requires courts to select between applying *Tinker* or *Hazelwood* review to government restrictions on student religious speech. This Article suggests that elementary- and high-school-age students should be accorded the same rights to free speech

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200. *Tinker*, 393 U.S. at 510–511.

> [T]he action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression . . . . 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.

Id.

201. *See e.g.* Corbin, *supra* n. 110, at 607 (explaining that private speech does not impact the Establishment Clause but invokes the protections of the Free Speech Clause); *see also Good News*, 533 U.S. at 113 (finding that the school's "reliance on the Establishment Clause is unavailing"); *Rosenberger*, 515 U.S. at 845 (finding that "[t]o obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their [religious] viewpoint"); *Lamb's Chapel*, 508 U.S. at 395 (explaining that it had "no . . . trouble . . . in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded"); *Mergens*, 496 U.S. at 253 (finding that a requirement that schools provide equal access to student clubs, including religious groups, did not violate the Establishment Clause); *Widmar*, 454 U.S. at 271 (stating that an "equal access" policy is not necessarily "incompatible with this Court's Establishment Clause cases").

and thereby necessitates applying *Tinker*-based scrutiny to either when the speech at issue is private.

The Fifth Circuit aptly described the rationale in affording elementary students the same *Tinker* rights as high school students. In *Morgan v. Swanson*,[202] the court, sitting en banc, clarified that *Tinker* is available to elementary school students as the court could not "identify a constitutional justification for cabining the First Amendment protections announced in *Tinker* to older students."[203] This application is supported by Supreme Court jurisprudence in other First Amendment areas. In *West Virginia Board of Education v. Barnette*, for example, the "Court recognized that the government may not *compel* particular speech from citizens, school children or otherwise."[204] As a corollary, the government should not be able to restrict the speech of school-age children simply because they are young.[205]

Simply determining that *Tinker* is available to all students is not the end of the inquiry, however.[206] Going forward, courts must additionally scale back what speech is considered school-sponsored. Several factors are relevant for this purpose, including whether the student is speaking to a captive audience, whether school administrators are involved (not acquiescing) in the speech, whether the speech is part of the school curriculum, whether the expressive activity will be permanently attached to the school, and, most importantly, whether a reasonable person would believe the school is advocating for the religious ideas put forth.

In contrast, some factors play little role and should be limited or discarded. For instance, whether the speech happens to take place at school or during school hours, whether school administrators allow the speech, and whether the student is supervised when the speech occurs. This Article concedes, as it

202. 659 F.3d 359.

203. *Id.* at 386. The student there distributed pencils bearing religious inscriptions to a small group of classmates after school hours, and only to students who specifically asked for one. *Id.* at 387. The events did not take place as part of a structured activity or under teacher supervision. *Id.*

204. *Id.* at 386.

205. Similarly, the Court recently struck down California's restriction against the sale of violent video games to minors. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741–2742 (2011).

206. *But cf. Walz*, 342 F.3d at 277 (stating that "in an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred").

must, that speech properly deemed to bear the imprimatur of the school (government) may be reasonably restricted under *Hazelwood*'s paradigm and to avoid Establishment Clause violations. Nonetheless, the concerns prompted by the writing of this Article are those engendered by private speech: young students' invocation of their First Amendment rights to speech and to free exercise.

Once it is established that the speech at issue is private—and thereby necessarily does not invoke Establishment Clause concerns—a court is left with a simple inquiry under *Tinker*. Unless this speech interferes with the school's educational mission or other students' rights to be free from harassment, the government cannot legally restrict it.[207] The *Morgan* court took a pragmatic approach in accounting for the younger age of elementary students yet still affording them rights comparable to high school students.[208] There, the court reiterated that *Tinker* must be applied on a case-by-case basis.[209] As such, the age of the children involved is to be considered when deciding whether the speech at issue is disruptive, infringes on other students' rights, or is simply inappropriate for young children.[210] The court quite cogently pointed out that "to extend *Tinker*'s protections to public elementary schools is not necessarily to hold that the speech rights of elementary students are coextensive with those of older students."[211] In doing so, the Fifth Circuit smartly accounted for the varying development of elementary- and high-school-age students while providing all students adequate First Amendment rights. In sum, the court aptly readjusted the question not by lowering the scrutiny applied to speech in elementary schools but by asking whether that speech is disruptive, accounting for the emotional and cognitive development of younger students.

Many court decisions unnecessarily address the Establishment Clause based on the apparent lingering concerns over

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

208. 659 F.3d at 386–387 (5th Cir. 2011).

209. *Id.* at 386.

210. *Id.* Recall that in addition to *Hazelwood*'s exception to *Tinker*, the Supreme Court has also carved out certain speech that is objectionable to young children in schools. *See e.g. Morse*, 551 U.S. at 410 (declining to extend First Amendment protection to speech advocating for drug use); *Fraser*, 478 U.S. at 682 (allowing schools to restrict offensively suggestive or lewd speech).

211. *Morgan*, 659 F.3d at 386.

government religious advancement. The Establishment Clause, however, is irrelevant when student speech is deemed private, outside the realm of *Hazelwood*, and not reasonably bearing the imprimatur of the school.[212] Indeed, these questions are coextensive to the point that *Hazelwood* and school-sponsored speech are concomitantly relevant to Establishment Clause concerns. This inquiry is nonetheless definitionally exclusive of a *Tinker*-based approach involving private speech.[213] To be sure, individually expressed speech (not bearing government imprimatur) cannot represent government establishment of religion.[214] For this reason, the Establishment Clause is not relevant when private student speech is concerned, whether on school grounds or not.

As any First Amendment scholar will readily attest, the intersection of the Free Speech and Establishment Clauses entails a complicated mix of legal and policy issues. Supreme Court jurisprudence in the area is complex and confusing, addressing viewpoint discrimination, public forum doctrine, various levels of scrutiny, and the government's necessary consideration of the Establishment Clause. The result is not always clear, and in a world where clarity is imperative to vindicate a right violated by the government—e.g., showing a government official's violation of a "clearly established" right—courts must make a concerted effort to address this First Amendment arena in a straightforward manner.

Though long-abused, this inquiry does not have to be esoteric and daunting. Ultimately, this Article simply asks courts to step back to their constitutional roots—speech that may truly be attributable to the government should be treated as such—no more, no less. There is no readily available new solution to incorporate the jumble of First Amendment concerns inherent in student-evoked religious speech; rather, this Article attempts to untangle and realign the thorny bramble of conflicting principles

212. *See e.g.* Corbin, *supra* n. 110, at 607 (stating that "[w]hen a private person speaks, the [E]stablishment [C]lause plays no role, but the [F]ree [S]peech [C]lause does," and "[w]hen the government speaks, it is just the reverse: The [E]stablishment [C]lause, but not the [F]ree [S]peech [C]lause, applies").

213. *Supra* n. 116 and accompanying text.

214. *See e.g. Hedges*, 9 F.3d at 1298 (explaining that a school may have justification in restricting speech that bears the imprimatur of the school but may not enforce a policy that blindly restricts private religious speech).

and caselaw that serve to shield unconstitutional governmental restrictions from liability.

IV. CONCLUSION

The First Amendment provides thought for an extensive and complex body of law. At the heart of this Amendment are two clauses central to this Article: the Free Speech Clause and the Establishment Clause. Though separate, these doctrines sometimes interact to create complex and frustrating bodies of law. One such instance involves religious speech by students in public schools. Though the government naturally has broad authority to regulate students enrolled in its schools, students unquestionably hold the right to free speech in school. The extent of these rights is subject to debate—even more so when the speech bears religious content. In this vein, schools have often attempted to avoid violating the Establishment Clause by suppressing students' religious speech. These policies have remained in place mostly by limiting the First Amendment rights of children and, to a limited extent, by justifying viewpoint discrimination on the basis of Establishment Clause avoidance. As discussed, this reasoning bears no justification in the Constitution or in Supreme Court jurisprudence.

Nonetheless, as an arm of state government, schools have never been subject to civil liability for these policies.[215] Indeed, qualified immunity has resoundingly protected these questionable policies because the First Amendment caselaw in this area is not "clearly established." Adding fuel to the fire, lower courts are generally not required to actually reach the constitutional question at issue, leaving complex cases dismissed on the merits simply because the law has not been established without clarifying the law in the field to protect future student speech rights.

Free speech and free exercise of religion are fundamental concepts in American understanding of the Constitution's protections. Our jurisprudence should reflect an appreciation for the

215. *See e.g. Morgan*, 659 F.3d at 371 (stating that "[t]he many cases and the large body of literature on this set of issues demonstrate a lack of adequate guidance, which is why no federal court of appeals has ever denied qualified immunity to an educator in this area") (internal quotations omitted).

gravity of students' rights to free speech, regardless of its religious content. Courts must therefore accept the tasks set before them, deciding to rule on the constitutionality of these fundamental issues. In so doing, this Article suggests that courts reevaluate the speech that is properly considered school-sponsored, requiring actual school involvement in the speech at issue and thereby pressing a heavier thumb on the justification schools must provide for regulating speech bearing religious content.

The Supreme Court said it well in the often-forgotten opinion in *Zorach v. Clauson*:[216]

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[217]

As it stands, school policies that restrict students from speaking to their classmates on religious subjects are subject to impunity through a complex web of contradictory caselaw and qualified immunity. The First Amendment's Free Speech and

216. 343 U.S. 306 (1952) (upholding a school's policy to alter its schedule to accommodate religious holidays).

217. *Id.* at 313–314.

Establishment Clauses could not have possibly contemplated limiting students' speech simply because it contained religious content and occurred on government property. This field of law is concededly complicated, yet the concepts entrenched in these two clauses are not. At its most basic, the First Amendment was not meant to suppress student speech, least of all because it invoked religious content. Our federal courts would be remiss to forget this.