SPEAK AS I SAY:
AN EXAMINATION OF LEGAL STANDARDS APPLIED TO COMPELLED SPEECH IN PUBLIC HIGH SCHOOLS

Nora Anne Sullivan

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Approved by:

Cathy Packer, Ph.D.

Michael Hoefges, Ph.D., J.D.

Anne Klinefelter, J.D.

ABSTRACT

NORA SULLIVAN: Speak As I Say: An Examination of Legal Standards Applied to Compelled Speech in Public High Schools
(Under the direction of Dr. Cathy Packer)

First Amendment protections against the government compulsion of student speech in public high schools have been addressed by the U.S. Supreme Court on two occasions and by lower courts in seventeen additional cases. This thesis examines those nineteen cases to determine what level of First Amendment protection courts previously have recognized to protect against different types of compelled student speech. From this analysis of the cases, four categories of compelled student speech were identified – compelled recitations, compelled speech for mandatory education efforts, compelled speech as a form of punishment, and compelled speech that is both part of mandatory education efforts and a form of punishment. Utilizing these categories, a framework for courts to use in the future is proposed; this framework ensures that courts recognize the proper level of First Amendment protection against compelled student speech while also safeguarding the schools' ability to carry out their educational mission.

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CHAPTER I

INTRODUCTION TO COMPELLED STUDENT SPEECH

For nearly seventy years the U.S. Supreme Court has recognized that the First Amendment prohibits the government from censoring and compelling speech,[1] thus protecting an individual's right to decide "both what to say and what *not* to say."[2] The Court noted that recognizing First Amendment protection against government-compelled speech is essential to protecting the structure of the American democracy. The Court explained that the government is formed on the "consent of the governed" and that "[a]uthority [] is to be controlled by public opinion, not public opinion by authority."[3] Failing to recognize constitutional protection against government compulsion of individual speech would give rise to the concern that public discourse does not truly reflect the beliefs of the American people.[4] There are, however, limits to this constitutional protection. In approximately thirteen cases since 1943,[5] the Supreme Court

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[1] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (recognizing that the First Amendment guards against a school compelling students to recite the Pledge of Allegiance).

[2] Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 797 (1988) (emphasis in original).

[3] *Barnette*, 319 U.S. at 641.

[4] *See, e.g.,* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257-58 (1974) (finding that the government cannot compel newspapers to grant a right-to-reply to political candidates because "treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment"); *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[5] The Court handed down the decision in *Barnette* in 1943; that opinion signaled the Court's acceptance of the notion that compelled speech is fully protected against by the First Amendment. *See generally Barnette*, 319 U.S. 624.

has balanced the First Amendment rights of individuals against any government interests that are advanced by the compulsion of speech in order to assess the constitutionality of the government action.[6]

The issue of compelled speech has arisen in a variety of settings, including in public high schools where applying current case precedents has been particularly difficult. A line of cases dealing with the censorship of student speech has acknowledged that a lower standard of First Amendment protection may be afforded to public high

[6] *See* Citizens United v. FEC, 558 U.S. ___, ___, 130 S. Ct. 876, 915-16 (2010) (finding that disclosure requirements related to third-party advertising in political campaigns did not violate the First Amendment because the public's interest in knowing the identity of the speaker was sufficient to justify the compulsion of the disclosure); Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47, 67 (2006) (noting that requiring law schools to allow military recruiters on campus supports the government's interest of "raising and supporting the Armed Forces"); Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 579 (1995) ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."); Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994) (holding that must-carry provisions for cable providers were constitutional after finding that the government interests in protecting free, local broadcast stations and ensuring competition in the market for television broadcasters were significant enough to overcome the First Amendment protections against compelled speech); *Riley*, 487 U.S. at 798 (finding that a state's interest in full disclosure of the percentage of money collected by fundraisers actually given to charity did not override First Amendment protection against compelled disclosure); Pacific Gas & Elec., Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 19-21 (1986) (holding that a state commission's requirements that a utility company disseminate specific information on its billing envelopes violated the First Amendment because the requirements were not "narrowly tailored means of serving a compelling state interest"); Wooley v. Maynard, 430 U.S. 705, 716 (1977) (assessing whether the State of New Hampshire presented any "countervailing interest is sufficiently compelling to justify" the prohibition of citizens covering up the state's motto on their license plates); *Tornillo*, 418 U.S. at 247-54 (discussing the government's interest in ensuring that a wide range of viewpoints reach the public). *See also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562-65 (2005) (distinguishing the analysis for compelled speech cases from the analysis for compelled subsidy cases); United States v. United Foods, Inc., 533 U.S. 405, 424 (2001) (noting that the Court has "found *Barnette* and *Wooley*, and all of 'our compelled speech case law . . . clearly inapplicable' to compelled financial support of generic advertising."); Bd. of Regents v. Southworth, 529 U.S. 217, 219 (2000) (addressing a compelled subsidy case, the Supreme Court found that "[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral."); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 522 (1991) (holding that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation"); Abood v. Detriot Bd. of Educ., 431 U.S. 209, 235-36 (1977) (holding that the government cannot require public employees to pay union dues that are used in part to support "expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative"); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (holding that the state of Maryland could not require that a person profess his or her belief in God before he or she could serve as a notary).

school students in certain situations.[7] Supreme Court precedent and subsequent lower court cases have failed, however, to clarify the appropriate tests for assessing the constitutionality of a school's ability to compel student speech in these same settings.

Courts have been fractured in their approach to compelled student speech cases. The Supreme Court spoke on the issue in 1943 and failed to articulate a precise standard that could apply to future cases.[8] Instead, the Court noted in that case that the government compulsion of the Pledge of Allegiance in schools was unconstitutional because the compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[9] With little more to work with, lower courts have applied different tests to compelled student speech, ranging from tests designed to assess the constitutionality of government *censorship* in public schools[10] to a more vague "reasonableness" standard.[11] Another court declared that the case law points to the notion that different levels of scrutiny apply depending on whether the government compelled speech that requires adoption of a

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[7] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that school officials violated students' First Amendment rights when they suspended students for wearing black armbands to protest the Vietnam War); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that the First Amendment did not bar a school district from suspending a student for giving a sexually suggestive speech at a school assembly); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that a school district did not violate the First Amendment by refusing to print a story about teen pregnancy and a story about divorce in a newspaper published by students and supported with funds from the board of education); Morse v. Frederick, 551 U.S. 393 (2007) (holding that a school district did not violate the First Amendment by punishing a student who displayed a banner that read "BONG HITS 4 JESUS" at an off-campus school-sponsored event).

[8] *See generally Barnette*, 319 U.S. 624.

[9] *Id.* at 642.

[10] Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1231 (10th Cir. 2009) (holding that a school district may compel an apology as long as the speech for which she is forced to apologize is "school-sponsored" and the apology "is related to a legitimate pedagogical purpose").

[11] Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 772 (8th Cir. 2001) (finding that a high school coach could require a student to issue an apology for distributing a letter containing the word "bullshit" to teams because such a punishment was "reasonable").

particular viewpoint.[12] In the close to seven decades since the Court has addressed this issue, there appears to be no consensus among lower courts on the proper constitutional standard to apply.

While a clear standard has not been established, cases addressing the issue have sprung up around the country over the past forty years. Prior research conducted by the author of this thesis has pointed to three types of compelled student speech and argued that different tests should be applied to each type.[13] These three types of compelled student speech include: compelled recitations, compelled speech for mandatory education efforts, and compelled speech as a form of punishment.[14] The case law illustrates these different types of compelled student speech. The Supreme Court case addressing the constitutionality of the government requiring students to recite the Pledge of Allegiance exemplifies the category of compelled recitations.[15] Compelled speech as part of mandatory education efforts is demonstrated by a case in which a Utah university sought to compel a theatre major to deliver all of the content of assigned scripts, including

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[12] C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 188 (3d Cir. 2005).

[13] *See generally* Nora Sullivan, Note, *Insincere Apologies: The Tenth Circuit's Treatment of Compelled Speech in Public High Schools*, 8 FIRST AMEND. L. REV. 533 (2010).

[14] *Id.* at 569. That note argued:

> [C]ourts should apply the following scheme to compelled student speech cases. In cases involving compelled recitations, courts should follow *Barnette* and strike down such policies on First Amendment grounds. In cases involving "mandatory education" efforts, courts should allow a school's compelled speech requirement to stand in order to give teachers enough power to teach critical thinking skills. In all other cases involving compelled student speech, courts should apply the balancing test used in *Wooley*. The court must determine whether the compelled speech raises First Amendment concerns, and then the court must balance those concerns, if any, against the government's interest. In order to pass constitutional muster, the government's interest must be "sufficiently compelling" to outweigh any First Amendment concerns.

Id.

[15] *See generally Barnette*, 319 U.S. 624 (1943).

certain expletives and references to God, during her classroom acting exercise.[16] Cases involving compelled speech as a form of punishment are perhaps the most common type addressed by the courts. For example, a high school student in Georgia was suspended for five days and told that she would not be able to return to school unless she issued an apology in front of her whole class.[17] The apology was meant to punish the student who entered into a verbal altercation with a classmate outside of English class and then, after being reprimanded, told her teacher to "check the Declaration of Independence," apparently in reference to her speech rights.[18] The constitutionality of schools compelling apologies has been examined by courts in a number of other contexts, including when students were forced to issue apologies for: sending and receiving "sexts,"[19] advising a graduation audience to embrace Jesus,[20] calling a coach's actions "bullshit" in a letter to teammates,[21] and reporting a locker room assault to the police.[22]

[16] Axson-Flynn v. Johnson, 356 F.3d 1277, 1282-83 (10th Cir. 2005). While the First Amendment may be more protective of the rights of college students, the case is still illustrative because a federal appeals court applied a test that had been developed through high school student speech cases. *Id.* at 1291-93 (applying the standard laid out in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)). *See also* Healy v. James, 408 U.S. 169, 180 (1972) (finding that college students, unlike high school students, are entitled to full First Amendment protection).

[17] Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712, 714 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

[18] *Id.*

[19] Miller v. Mitchell, 598 F.3d 139, 143-44 (3d Cir. 2010). The court defined "sexting" as "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet" *Id.* at 143. While this case was brought against the district attorney, rather than the school district, the court still considered the constitutionality of compelling minors to speak. *Id.* at 151-52.

[20] Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1222 (10th Cir. 2009).

[21] Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 770, 772 (8th Cir. 2001).

[22] Seamons v. Snow, 206 F.3d 1021, 1024 (10th Cir. 2000).

While this framework from prior research is an essential starting off point for this thesis, a review of the case law also points to the possibility that other categories of compelled student speech may exist. For example, one court looked at whether a survey compiled by community leaders and administered at three public schools to gauge students' attitudes and behaviors related to a range of issues, including alcohol, drugs, sex, and suicide, constituted constitutionally impermissible government action to compel speech.[23] In addition to the possibility that other categories of compelled student speech exist, a comprehensive review of all the cases addressing the issue of compelled student speech has never been conducted.

The purpose of this thesis is to explore the issue of compelled speech in public high schools by reviewing all the federal and state court opinions that have addressed the issue. This thesis starts with an examination of the three forms of compelled speech that were previously identified – compelled recitations, compelled speech for mandatory education efforts, and compelled speech as a form of punishment. This research focuses on determining if there are any other categories of compelled student speech and will determine what, if any, constitutional tests courts currently apply to each type of government compelled student speech. Ultimately this thesis concludes by presenting a summary of findings and proposing a framework that would aid educators who are presented with this issue as well as courts reviewing these cases. This research addresses an important topic that has not been fully addressed in scholarly literature or by the Court. It is an essential step forward in helping to clarify one aspect of the compelled

[23] C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 161-62, 167-68, 189 (3d Cir. 2005).

speech doctrine, which, as First Amendment scholar Rodney Smolla noted, "may have especially subtle and difficult applications in a school setting."[24]

Background on Supreme Court Precedents

Much of the literature addressing First Amendment protection against government compulsion and censorship focuses on the various rules advanced by the Supreme Court in the landmark cases dealing with these issues. A review of the Supreme Court precedents on the issues of student speech rights and First Amendment protection against compelled speech, thus, is necessary to frame a discussion of the scholarly literature. This section discusses the Court's major decisions in the student speech and compelled speech cases. After this background is presented, the scholarly literature on both issues is discussed.

Student Speech Cases

The Supreme Court has delivered four landmark opinions in the realm of student speech rights. In 1969, the Supreme Court famously stated students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25] In *Tinker v. Des Moines Independent Community School District*,[26] decided in 1969, the Court held that the First Amendment protected public high school students' right to wear black armbands in protest of the Vietnam War.[27] While recognizing the "special characteristics of the school environment,"[28] the *Tinker* Court stated that student speech

[24] RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:1.50 (2d ed. 2010).

[25] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[26] *Id.*

[27] *Id.* at 514.

[28] *Id.* at 506.

may only be curtailed if the speech threatens to cause a material interference or a substantial disruption with school activities.[29]

The Court's seemingly broad protection of student speech in *Tinker* was limited by three subsequent opinions, *Bethel School District v. Fraser* in 1986,[30] *Hazelwood School District v. Kuhlmeier* in 1988,[31] and *Morse v. Frederick* in 2007.[32] In *Fraser*, the Court held that the First Amendment did not bar a school district from suspending a student for giving a sexually suggestive speech at a school assembly.[33] It its analysis, the Court focused on the lewd nature of the student's speech, noting that this speech given in a different context by an adult would enjoy full First Amendment protection.[34]

In *Hazelwood*,[35] the Court held that a school district did not violate the First Amendment by refusing to print a story about teen pregnancy and a story about divorce in a newspaper published by students and supported with funds from the board of education.[36] The Court distinguished *Hazelwood* from *Tinker* by noting that the former dealt with a situation where the school was being asked to promote the student's speech,

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[29] *Id.* at 514.

[30] 478 U.S. 675 (1986).

[31] 484 U.S. 260 (1988).

[32] 551 U.S. 393 (2007).

[33] *Fraser*, 478 U.S. at 690.

[34] *Id.* at 682-83. The Court noted, "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* at 684. Notably, in contrast, the Court specially mentions that "tolerance of divergent political and religious views" is at the cornerstone of our society. *Id.* at 681.

[35] *Hazelwood*, 484 U.S. 260.

[36] *Id.* at 263.

namely by publishing the articles in dispute, rather than simply to tolerate it.[37] In *Hazelwood*, the Court established a new standard for determining when a school may properly censor school-sponsored speech[38] without violating the First Amendment. According to the *Hazelwood* Court, a school may censor school-sponsored speech so long as the censorship is "reasonably related to legitimate pedagogical concerns."[39] The Court further limited the application of the *Tinker* standard in *Morse*.[40] In *Morse*, the Court held that a school district did not violate the First Amendment by punishing a student who displayed a banner that read "BONG HITS 4 JESUS" at an off-campus, school-sponsored event. The Court, also distinguishing the case from *Hazelwood*,[41] stated that schools may "restrict student speech that they reasonably regard as promoting illegal drug use."[42] While courts have differed in their application of *Tinker* and the subsequent limiting precedents, it is generally accepted that school officials are granted broad deference to determine what types of speech may be censored without violating the First Amendment.[43]

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[37] *Id.* at 270-71.

[38] School-sponsored speech is that which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271.

[39] *Id.* at 273.

[40] *Morse*, 551 U.S. 393. "Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not." *Id.* at 418 (Thomas, J., concurring).

[41] *Id.* at 405-06. The Court noted that unlike in *Hazelwood*, no one would reasonably believe that the banner at issue assumed the school's imprimatur.

[42] *Id.* at 408. In his concurrence, Justice Alito focused on the narrow holding in *Morse* and stressed that the opinion should not extend beyond situations where the banned speech was advocating the use of illegal drugs. Justice Alito also warned that this opinion stands "at the far reaches of what the First Amendment permits." *Id.* at 425 (Alito, J., concurring).

[43] *See, e.g.,* Thomas Patterson, *Chalk Talk: 'Shedding Their Rights at the Schoolhouse Gate': Morse v. Frederick and The Student's Right to Free Speech*, 38 J.L. & EDUC. 545 (2009) (noting that the Court has

Compelled Speech Cases

The Supreme Court has found government compulsion of speech unconstitutional on First Amendment grounds several times,[44] most notably in *West Virginia State Board of Education v. Barnette* in 1943,[45] *Miami Herald Publishing Company v. Tornillo* in 1974,[46] *Wooley v. Maynard* in 1977,[47] and *Riley v. National Federation of the Blind* in 1988.[48] In this line of cases, the Court consistently recognized that the First Amendment protects against government-compelled speech and found that the government interests at stake did not outweigh this First Amendment protection.[49] In *Barnette*, the Court held that a State Board of Education violated the First Amendment by forcing students to recite the Pledge of Allegiance.[50] The Court noted that, unlike the case of censorship,

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long held that viewpoint discrimination is not permissible under the First Amendment, but arguing that the opinion in *Morse* allows "limitation on speech simply because of its message or content").

[44] For a complete list of compelled speech cases in the U.S. Supreme Court since 1943, see *supra* note 6. This discussion only covers select cases that are relevant in the discussion throughout this thesis. For instance, several cases discussing compelled commercial speech were omitted from this analysis because the Court has recognized different First Amendment standards for commercial speech. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005) (distinguishing between "true 'compelled-speech' cases, in which an individual is obliged by the government personally to express a message with which he disagrees; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity").

[45] 319 U.S. 624 (1943).

[46] 418 U.S. 241 (1974).

[47] 430 U.S. 705 (1977).

[48] 487 U.S. 781 (1988).

[49] *See, e.g., id.* at 797.

[50] *Id.* at 642. In *Barnette*, the West Virginia State Board of Education adopted a resolution requiring all public school teachers and students to salute the flag and stated that refusal to do so would be treated as an act of insubordination. Several Jehovah's Witnesses were expelled from school when they refused to salute the flag, a practice they believed conflicted with their religious beliefs. *Id.* at 626-30.

compelling speech removes two options from the speaker, the option to remain silent and the option to change his or her message.[51]

In *Tornillo*, the Court dealt with Florida's right-to-reply statute, which required newspapers to publish a response when they criticized a political candidate. The *Tornillo* Court noted that the statute, which compelled speech, "operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish in a particular manner."[52] The Court went on to explain that because of the costs associated with printing a reply, the statute served as a disincentive for editors to publish news or commentary on political candidates.[53] By avoiding the topic altogether, the newspapers would never risk invoking the statute and being forced to publish a reply from a candidate.[54] The *Tornillo* Court noted that the particular statute in that case not only compelled speech, but also may have had the effect of chilling speech.[55]

In *Wooley*, the Court held that the state of New Hampshire could not prosecute Jehovah's Witnesses for covering up the state's "Live Free or Die" motto on their license plates.[56] The *Wooley* Court applied a balancing test when it examined the government's interests as well as the First Amendment concerns raised by the compelled speech, and

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[51] *Id.* at 633-34. The Court noted that the clear and present danger test was in place for censoring speech at the time of the *Barnette* opinion and noted that remaining silent during a flag salute did not appear to present a clear and present danger. Therefore, the Court reasoned, "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* at 633.

[52] Tornillo v. Miami Herald Publ'g Co., 418 U.S. 241, 256 (1974).

[53] *Id.* at 256-57.

[54] *Id.* at 257.

[55] *Id.* The Court noted that, "under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.*

[56] Wooley v. Maynard, 430 U.S. 705, 707-08 (1977). The Maynards claimed that the state motto was in conflict with their religious, moral, and policy beliefs. *Id.* at 707.

ultimately found that the government's interests were not "sufficiently compelling" to outweigh the constitutional concerns.[57] The Court noted, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[58]

In *Riley*, the Court held that a North Carolina law requiring professional fundraisers to disclose to potential donors the percentage of donations actually turned over to charities during the course of the past twelve months violated the First Amendment.[59] The Court noted that it would be constitutional for the state to publish the same information itself, but that the First Amendment was violated when the state forced private actors to do this.[60]

From this line of cases, it is clear that the First Amendment provides broad protections against compelled speech. The issue of compelled speech in public high

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[57] *Id.* at 716-17. "The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride." *Id.* at 716. The *Wooley* Court found that the government's interest must be "sufficiently compelling" and that the government's interest "'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved . . . .'" *Id.* at 716 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). This standard may be likened to a "strict scrutiny" test. As one scholar explained, the strict scrutiny test requires a two-pronged inquiry:

> Courts first determine if the underlying governmental ends, or objectives, are "compelling . . . ." Because the government is impinging upon someone's core constitutional rights, only the most pressing circumstances can justify the government action. If the governmental ends are compelling, the courts then ask if the law is a narrowly tailored means of furthering those governmental interests. Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends. An alternative phrasing is that the law must be the "least restrictive alternative" available to pursue those ends. This inquiry into "fit" between the ends and the means enables courts to test the sincerity of the government's claimed objective.

Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal* Courts, 59 VAND. L. REV. 793, 800-01 (2006).

[58] *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637).

[59] Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795, 800 (1988).

[60] *Id.* at 800.

schools raises a more complex problem; this exact topic was directly addressed by the Court in *Barnette* where full First Amendment protection was granted to the students. The Court's ruling in *Barnette*, however, was handed down more than 25 years before the Court first started to recognize that a lower standard of First Amendment protections may be afforded to public high school students in certain situations.[61]

Literature Review

While much has been written separately about student speech rights and compelled speech, there are only three articles that deal directly with the intersection of compelled speech prohibitions and student speech rights in a high school setting.[62] One of these articles touches on, but does not focus on, the appropriate standards to protect

[61] *Barnette* was decided in 1943 and *Tinker*, the first of the student speech cases, was decided in 1969. *See* 319 U.S. 624 (1943); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). For a discussion of the student speech cases, *see supra* pp. 7-9.

[62] This paper will not discuss the four recent articles that addressed compelled student speech because those articles discussed the rights of college and university students, not high school students. *See generally, e.g.*, Brook Bristow, *King Solomon: Did the Supreme Court Make a Wise Decision in Upholding the Solomon Amendment in Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 58 MERCER L. REV. 815 (2007) (noting that the Court distinguished *FAIR* from other Supreme Court cases dealing with compelled speech because the government did not provide specific content to the law schools in *FAIR*; it only required that they accommodate military recruiters); Matthew K. Brown, Note, *First Amendment and Congress's Spending Clause Power — The Supreme Court Supports Military Recruiters and the United States Military's Discrimination Against Homosexuals Despite Law Schools' Protests*, 29 U. ARK. L. REV. 345 (2007) (noting the significance of the *FAIR* opinion as the first delivered by Chief Justice Roberts); Michael Joseph Palumbo, Comment, *How Solomon and His Army of Military Recruiters Destroyed Academic Superfree Speech But in Turn Saved Academic Freedom*, 33 OHIO N.U. L. REV. 199 (2007) (noting that while the Court ruled in favor of the government in *FAIR*, in cases that involve a government interest less compelling than national security, academic freedom is more likely to be protected); Emily S. Wilbanks, Comment, *Speaking With Your Mouth Shut? Exploring the Outer Limits of First Amendment Protection in the Context of Military Recruiting on Law School Campuses*, 59 FLA. L. REV. 437 (2007) (arguing that the First Amendment should not protect a law school's exclusion of military recruiters because this action does not equate to speech). *See also* Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47 (2006) (holding a law that allowed federal funds to be withdrawn from universities that failed to allow military recruiters on campus did not violate the schools' First Amendment rights when the schools sought to exclude the recruiters because of the military's policy related to sexual orientation).

against compelled student speech,[63] and the two other articles discuss the Tenth Circuit's treatment of two different compelled student speech cases.[64]

Beyond these three articles that directly deal with compelled student speech, more than seventy-five articles have been written about general student speech rights since the Supreme Court's most recent decision on the topic in 2007.[65] Of these articles, only those interpreting the current state of the major student speech tests are relevant for the analysis in this thesis.[66] Like the literature on student speech, scholarly discussion of

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[63] *See* Seana Valentine Shiffrin, *What is Really Wrong With Compelled Associations*, 99 NW U. L. REV. 839, 884-85 (2005).

[64] *See generally* Brandon C. Pond, Note, *To Speak or Not to Speak: Theoretical Difficulties of Analyzing Compelled Speech Claims Under a Restricted Speech Standard*, 10 BYU EDUC. & L.J. 149 (2010) (discussing the Tenth Circuit's holding in *Axson-Flynn v. Johnson* and arguing that courts should consider whether speech was "school-mandated"); Sullivan, *supra* note 13 (arguing that the Tenth Circuit's holding in *Corder v. Lewis Palmer School District* was incorrectly decided and proposing a new framework for compelled student speech cases that focuses on the compelled speech, rather than the student speech, line of cases).

[65] In 2007, the Court held that a school district did not violate the First Amendment by punishing a student who displayed a banner that read "BONG HITS 4 JESUS" at an off-campus, school-sponsored event. Morse v. Frederick, 551 U.S. 393 (2007).

[66] The post-*Morse* literature dealing with the limited issue of student speech and new technology will not be reviewed because it only focuses on the extent to which schools may censor, but not compel speech in very specific circumstances. These same issues are dealt with more broadly in the review of the literature that discusses the current state of student speech tests. *See generally, e.g.,* Mary-Rose Papandrea, *Student Speech Rights In the Digital Age*, 60 FLA. L. REV. 1027 (2008) (arguing that student speech tests should not apply to cyberspeech because the common justifications allowing schools to censor speech do not apply in the Digital Age); Sarah O. Cronan, *Grounding Cyberspeech: Public Schools' Authority to Discipline Students for Internet Activity*, 97 KY. L.J. 149 (2008/2009) (arguing that tests for student speech over the Internet should focus on the effect in the school setting); Jessica Moy, Note, *Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment after* Morse v. Frederick, 37 HASTINGS CONST. L.Q. 565 (2010) (explaining the various approaches that courts have applied to student cyberspeech outside of schools post-*Morse* and noting that a modified version of the *Tinker* test may be suitable for regulating this type of speech); Tova Wolking, Note, *School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights*, 23 BERKELEY TECH. L.J. 1507 (2008) (discussing how courts have applied student speech tests for school punishment of cyberspeech). This thesis will also not review the literature that debates whether *Morse* was correctly decided based on the specific facts in that case. *See generally, e.g.,* Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205 (2007) (arguing the Court's decision in *Morse* and its treatment of the student speech issue more generally exemplifies the Court's movement away from serving a guidance function for lower courts); Justin Lee Bell, Note, Morse v. Frederick: *A Dubious Decision Shows a Need for Judicial Restraint by the Supreme Court*, 53 S.D. L. REV. 100 (2008) (arguing the Court should have decided *Morse* on qualified immunity grounds); Jeremy Jorgensen, Note, *Student Rights Up in Smoke: The Supreme Court's Clouded Judgment in* Morse v. Frederick, 25 TOURO L. REV.

First Amendment protection against compelled speech focuses on a wide range of issues. The discussions of the justifications for restricting compelled speech based on the interests of the speaker, listener, and society as a whole are applicable to this study and are reviewed below.[67]

Compelled Speech in Public High Schools

Of the three articles dealing directly with compelled speech in schools, two student-written law review articles discuss the Tenth Circuit's treatment of compelled student speech. Brandon Pond, a law student at Brigham Young University, wrote a piece discussing the court's holding in *Axson-Flynn v. Johnson*.[68] In that case, the University of Utah sought to compel a theatre major to deliver all of the content of her assigned scripts, including certain expletives and references to God, during a classroom acting exercise.[69] While this case deals with the rights of college students, it is relevant

739 (2009) (discussing the notion that *Fraser, Hazelwood,* and *Morse* have been interpreted broadly by lower courts and arguing that the Court should clarify that these opinions must be read narrowly to prevent widespread censorship).

[67] This thesis will not review the literature dealing with First Amendment issues arising out of the use of student fees because this research focuses on actual student speech, not speech subsidized by fees. *See* Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (holding that the mandatory university student fees used to support groups with views that conflicted with some students' personal beliefs did not violate the First Amendment so long as the university's administration of the fees was viewpoint neutral). *See generally, e.g.,* Kim Hudson, *To Fee or Not to Fee: The Use of Mandatory Student Activity Fees to Fund Private Organizations that Engage in Political or Ideological Speech or Activity*, 30 CUMB. L. REV. 277 (2000) (discussing the lower courts' treatment of mandatory student fees and the Court's decision in *Southworth*). This thesis will also not focus on the literature covering compelled speech in the context of government regulations of certain industries, such as the food industry, nor will it focus on government-mandated advertising programs because those topics are outside the scope of this thesis. *See generally, e.g.,* Mark Champoux, *Uncovering Coherence in Compelled Subsidy of Speech Doctrine:* Johanns v. Livestock, 29 HARV. J.L. & PUB. POL'Y 1107 (2006) (discussing the line of compelled speech cases dealing with agricultural promotions for certain producers that were mandated by the USDA); Brent Bernell, Article, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839 (2010) (discussing the provision of the federal healthcare bill that requires chain restaurants to include nutritional information on their menus and the First Amendment challenge to New York City's landmark labeling law).

[68] 356 F.3d 1277 (10th Cir. 2004).

[69] *Id.* at 1282-83.

because the U.S. Court of Appeals for the Tenth Circuit applied a test announced in *Hazelwood School District v. Kuhlmeier*,[70] a high school student speech case dealing with censored speech, to determine whether the university violated the First Amendment by compelling the student's speech.[71] The court held that the speech was school-sponsored and that the compulsion was related to a legitimate pedagogical concern and, thus, the compelled speech requirement did not violate the First Amendment on its face.[72] In addition to Pond's analysis of *Axson-Flynn*, the author of this thesis also wrote a law review note discussing the Tenth Circuit's holding in *Corder v. Lewis Palmer School District*.[73] The *Corder* court relied on *Axson-Flynn* and applied the *Hazelwood* test to an apology that school officials compelled a high school valedictorian to issue after she deviated from her pre-approved graduation speech by urging the audience to find Jesus.[74] The Tenth Circuit in that case held that the compelled apology did not violate the First Amendment because, like in *Axson-Flynn*, the graduation speech was school-sponsored and was related to a legitimate pedagogical concern.[75]

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[70] 484 U.S. 260 (1988). Under *Hazelwood*, a school may censor school-sponsored speech when the censorship is "reasonably related to legitimate pedagogical concerns." *Id.* at 273.

[71] *Axson-Flynn*, 356 F.3d at 1289 (noting that although the court was using a test arising from a high school student speech case, it would factor in the "[a]ge, maturity, and sophistication level of the students" in applying the test).

[72] *Id.* at 1291-93. The university claimed that it promoted three interests by compelling speech in this case: "(1) it teaches students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue; (2) it teaches students to preserve the integrity of the author's work; and (3) it measures true acting skills to be able convincingly to portray an offensive part." *Id.* at 1291. In this case, the student was a Mormon and argued that the university's stated purposes for the requirement that students perform the scripts as written was simply a "pretext for religious discrimination." The case was remanded to determine whether the justifications given by the university were presented only to veil religious discrimination. *Id.* at 1293.

[73] 566 F.3d 1219 (10th Cir. 2009).

[74] *Id.* at 1230-32.

[75] *Id.* Josie Foehrenbach Brown argued that the speech in *Corder* was not actually school-sponsored because a valedictorian is clearly not "the school's delegate delivering an official message." Josie

Pond focused on both the distinctions between compelled and censored speech and the result of applying the *Hazelwood* test to compelled speech cases to argue that the Tenth Circuit erred in its application of this test in *Axson-Flynn*. Pond asserted that the dissimilarities between the motivations to censor and the motivations to compel speech suggest that the First Amendment protections against each should differ.[76] He noted that one might seek to censor speech because of a "disagreement with the viewpoint, the content is offensive, or the time, place, or manner is inappropriate."[77] On the other hand, "[m]otivations to compel speech could be as mundane as creating the appearance that the citizenry upholds a particular viewpoint, to more offensive motives such as attempting to actually mandate compliance with a particular viewpoint."[78] Pond, thus, argued that there are incidences where the motivations for compelling speech are more invidious than the motivations for censoring speech and, in those situations, First Amendment protections should be greater.[79]

The author of this thesis also argued that there are inherent differences between compulsion and censorship. Instead of focusing on motivations, this author looked at the available alternatives to illuminate the differences. "A censored party has the option to remain silent or reframe his or her point to comply with the censorship restrictions; a compelled party is required to make statements that reflect the beliefs or opinions of

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Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & EDUC. 1, 67 (2009). Brown also faulted the school district for failing to establish a clear policy or engage in a meaningful dialogue with students regarding what was within the scope of acceptable topics for the speech. *Id.* at 67-68.

[76] Pond, *supra* note 64, at 156-57.

[77] *Id.* at 156.

[78] *Id.*

[79] *Id.* at 156-57.

another party and has no alternative."[80] Compelling speech, therefore, may raise greater First Amendment concerns because of the lack of alternate courses of action. Furthermore, this author advanced the idea that there are unique harms that are caused by compelled speech that justify different standards from censored speech.[81]

In addition to these distinctions between censorship and compulsions, Pond further argued that the application of censored-speech tests to compelled speech has the effect of granting too much deference to school officials. In applying the *Hazelwood* test, the *Axson-Flynn* court noted that it was extremely deferential to school officials in determining what constitutes a pedagogical concern and that most justifications would satisfy this prong of the test, except a justification that was nothing more than "a pretext for invidious discrimination."[82] Pond then went on to apply the test articulated in *Axson-Flynn* to the facts of *West Virginia Board of Education v. Barnette*,[83] the well-known case where the Supreme Court held that a school could not require students to recite the Pledge of Allegiance.[84] Pond argued that the case would have been decided differently under the *Axson-Flynn* test. He said the compelled Pledge would have been held constitutional because reciting the Pledge would be considered a school-sponsored event

[80] Sullivan, *supra* note 13, at 556.

[81] *Id.* at 560-65. For a further discussion of these unique harms caused by compelled speech, *see infra* pp. 22-26.

[82] Pond, *supra* note 64, at 157.

[83] 319 U.S. 624 (1943).

[84] *Id.* at 641-42.

and requiring students to recite it would be related to a pedagogical concern, teaching civics to the students.[85]

Based on this analysis, Pond suggested that courts should consider "school-mandated" speech as a separate category of student speech, distinct from school-sponsored speech.[86] He argued that the appropriate test for evaluating the constitutionality of a school's ability to mandate speech is as follows: "The court would first decide whether the speech is in fact compelled, and if so, whether the compulsion 'invades the sphere of intellect and spirit' proscribed [sic] by the First Amendment."[87] The second part of the test proposed by Pond requires an analysis of "whether the government action compels espousal of any particular view, belief, or ideology."[88] Pond argued that the government has violated the First Amendment only when the school mandates speech that requires the espousal of a particular view.[89] Applied to the facts of *Axson-Flynn*, Pond found that the compelled speech in that case did not violate the First Amendment because the student was only required to repeat words that she found offensive while playing a character, but was not required to "espouse or endorse a particular idea or belief."[90]

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[85] Pond, *supra* note 64, at 157-59. In *Barnette*, the Court looked to see "whether the curricular requirement invaded 'the sphere of intellect and spirit' proscribed by the First Amendment." *Id.* at 159 (quoting *Barnette*, 319 U.S. at 642).

[86] Pond, *supra* note 64, at 159.

[87] *Id.* at 169. This is a version of the test originally articulated in *Barnette* and applied by the District Court in *Axson-Flynn* before that standard was rejected by the Tenth Circuit. *Id.*

[88] *Id.* at 160.

[89] *Id.* ("In effect, what offends the First Amendment is not the compulsion of any particular type of speech, but rather compulsion that requires espousal or endorsement of any particular idea.").

[90] *Id.* at 161-62.

Instead of focusing on a distinction between "school-mandated" speech and other types of student speech, Seanna Valentine Shiffrin, a UCLA law professor, argued that compelled student speech cases should be divided into two categories based on the type of speech: compelled recitations, like the Pledge of Allegiance, and "mandatory education efforts," like classroom exercises designed to teach and persuade.[91] She argued that the latter category is less troubling from a constitutional perspective because the teacher in that situation is attempting to help students think critically and "arrive at conclusions that are truly their own,"[92] rather than showing an indifference for the students' judgment.[93]

Building off of Shriffin's distinctions, the author of this thesis proposed three categories of compelled student speech – compelled recitations, compelled speech for

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[91] Shiffrin, *supra* note 63, at 884-85. For example, a teacher may require a student to argue a particular side in the course of a debate or write a research paper on a particular topic. The general tension between the compelled speech doctrine and the necessity to compel speech in the educational setting was discussed by Rodney Smolla in a treatise. SMOLLA, *supra* note 24, at § 17:1.50. Smolla explained:

> The First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry. The constitutional harm — and what the First Amendment prohibits — is being forced to speak rather than to remain silent. This harm occurs regardless of whether the speech is ideological. Schools routinely require students to express a viewpoint that is not their own in order to teach the students to think critically.

Id.

[92] Shiffrin, *supra* note 63, at 884. Vincent Blasi and Seana Valentine Shiffrin noted two problems with compelled recitations: (1) the indifference toward the speakers' beliefs is "at odds with an underlying constitutional respect to develop, voice, and exercise independent opinions and commitments," and (2) the fact that compelling recitations places the speaker in a situation where he may either refuse to follow the rules or "fail to practice the character virtue" of sincerity. Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 433, 458-61 (Michael C. Dorf, ed., 2004).

[93] Shiffrin, *supra* note 63, at 884. Shiffrin's approach was adopted by the author of this thesis in an analysis of the compelled student speech issues. *See* Sullivan, *supra* note 13, at 567-69. Blasi and Shiffrin noted the distinction between "compulsory education" meant to "convey information, arguments, ideas, and views to children, often by means of required exercises" and "compulsory inclination" meant to "requir[e] [a student] to agree with the position or represent as sincerely embracing it." Blasi & Shiffrin, *supra* note 92, at 464.

mandatory education efforts, and compelled speech as a form of punishment.[94] This author argued that compelled recitations should always be found unconstitutional because of the reasons advanced by Shiffrin, mainly that they fail to engage the student in the process of forming a judgment about the validity of the speech.[95] In cases involving compelled speech for mandatory education efforts, this author argued that courts should find the government action constitutional given that such an exception is important because it "recognizes the special mission of schools to teach children."[96] Finally, this author concluded that the *Wooley* test was appropriate for cases dealing with compelled speech as a form of punishment because it strikes the appropriate balance between the government's interest in compelling speech in certain circumstances and a student's right to be free from being coerced by the government to speak.[97] In applying the test, this author asserted: "The court must determine whether the compelled speech raises First Amendment concerns, and then the court must balance those concerns, if any, against the government's interest. In order to pass constitutional muster, the government's interest must be 'sufficiently compelling' to outweigh any First Amendment concerns."[98] While these articles provide some insight into the problems courts have encountered when dealing with the intersection between compelled and student speech, none of these articles provides a comprehensive analysis of all compelled student speech cases. This

[94] Sullivan, *supra* note 13, at 569.

[95] *Id.* at 567.

[96] *Id.* at 569.

[97] *Id.* at 567-68.

[98] *Id.* at 569 (quoting Wooley v. Maynard, 430 U.S. 705, 716 (1977)).

thesis will seek to fill that gap in the literature by examining the different types of compelled student speech and the tests applied by courts to each type.

Compelled Speech in Non-School Settings

Much of the scholarly literature on compelled speech has sought to characterize the harms caused by compulsion in order to understand why it should be prohibited by the First Amendment. The harm issue has been analyzed from three perspectives – the perspectives of the speaker, the listener, and society as a whole.

Speaker-Based Harms

The courts have traditionally focused on the effect of compelled speech on the speaker when considering whether compelling the speech was permissible.[99] Shiffrin argued that the Supreme Court's holdings in *Barnette*[100] and *Wooley*[101] rested on a "speaker-based rationale."[102] Shiffrin identified two main justifications for the holdings in this line of cases: (1) compelled speech interferes with freedom of thought; and (2) compelled speech conflicts with the virtue of sincerity.[103] Shiffrin argued that "what one regularly says may have an influence on what and how one thinks"[104] and that because

[99] Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 337-60 (2008) (tracing the courts' focus on the "freedom of mind" justification in compelled speech cases).

[100] 319 U.S. 624 (1943) (holding that a State Board of Education violated the First Amendment by forcing students to salute the flag).

[101] 418 U.S. 241 (1974) (holding that the state of New Hampshire could not prosecute Jehovah's Witnesses for covering up the state's "Live Free or Die" motto on their license plates).

[102] Shiffrin, *supra* note 63, at 853.

[103] *See id.* at 852-63. Two other scholars argued that the First Amendment jurisprudence protecting against compelled speech focuses more on "freedom of thought," rather than on freedom of speech, because "the right to speak freely is meaningless if the speaker has not been permitted to freely formulate her thoughts prior to speaking." Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 76 (2002).

[104] Shiffrin, *supra* note 63, at 854.

compelled speech is delivered without rational deliberation by the speaker, it is particularly dangerous.[105] Shiffrin further stated that sincerity is one of the "character virtues that [is] reasonably precious to citizens, both as individuals and as First Amendment actors,"[106] and that compelling speech undermines this value.

Larry Alexander rejected Shiffrin's argument that compelled speech causes harm to a speaker[107] and, instead, argued that prohibiting compelled speech is unnecessary because there is no evidence that compelling speech causes such harm.[108] Alexander surmised compelled speech might create four potential harms by forcing a speaker to present a false front, to undermine his or her own beliefs, to undermine his or her personal integrity, and/or to risk divine retribution.[109] He concluded that none of these potential harms, so far as he could find, actually occurred. Alexander noted coerced speakers have the option to explain their true beliefs;[110] compelled speech does not undermine the rational decision-making process because individuals still have the ability to make an independent determination about the validity of any speech that they are compelled to deliver;[111] rational people understand that when certain recitations are

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[105] *See id.*

[106] *Id.* at 860.

[107] *See* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENTARY 147, 155 (2006). Alexander pointed to "grammar, arithmetic, spelling, [and] world capitals" as examples of speech that students are required to listen to and learn in public schools, but noted that schools present this information as fact rather than one possible viewpoint. *Id.*

[108] *See id.* at 161.

[109] *See id.* at 153-59.

[110] *See id.* at 153.

[111] *Id.* at 155-56.

required, these words do not reflect the actual beliefs of the speaker;[112] and compelling speech does not alter one's true beliefs.[113] Alexander concluded that the line of Supreme Court holdings recognizing full First Amendment protections for compelled speech were unwarranted because the compelled speech did not cause harm to the speakers.[114]

Listener-Based Harms

Laurent Sacharoff rejected the courts' focus on speaker-based analyses in compelled speech cases, arguing that compelled speech cases always deal with at least two competing speakers, the government and the actor who objects to the compelled speech.[115] Since there are always competing speaker-based interests in a compelled speech case, Sacharoff found that an analysis focusing on the speaker gives little guidance as to which side should prevail.[116] Sacharoff argued that courts should consider adopting a framework that considers listener interests in addition to those of the speakers in compelled speech cases.[117] Sacharoff noted that compelled speech leads to a "distortion of the total mix of information."[118] He stated that this happens in a number of ways, including through misattribution where the listener alters the weight that he or she gives to information based on the identity of the speaker,[119] the government's ability to

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[112] *Id.* at 160.

[113] *Id.* at 158.

[114] *Id.* at 161.

[115] *See* Sacharoff, *supra* note 99, at 335.

[116] *Id.*

[117] *Id.* at 384.

[118] *Id.* at 385.

[119] *Id.*

use compulsion as a form of free advertising for its viewpoint,[120] and group ritual and recitation where the government is able to amplify its own message.[121] Sacharoff further argued that generally listeners have an interest in being put on notice if a message is compelled by the government so that they can properly evaluate it.[122]

Society-Based Harms

Scholars also have noted that beyond speaker and listener harms, there are broad societal harms that are avoided by limitations on compelled speech. In a *Cornell Law Review* article, Martin Redish and Kevin Finnerty noted that government-compelled speech is troubling because it "breaches the barrier between government and private individuals and threatens to skew the political marketplace to further governmental goals and interests."[123]

Shiffrin pointed out that sincerity of speech underlies several First Amendment values including the search for the truth, individual autonomy, and self-expression.[124] By compelling speech, Shiffrin argued, the government may undermine the First Amendment culture by "encourage[ing] cynicism and ambivalence about the value of the truth."[125] Sacharoff also argued that compelled speech runs counter to First Amendment theory. He noted compelled speech may inhibit the promotion of self-governance by

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[120] *Id.* at 398.

[121] *Id.* at 400.

[122] *Id.* at 401-02.

[123] Redish & Finnerty, *supra* note 103, at 75.

[124] *See* Shiffrin, *supra* note 63, at 862 ("[P]art of the value of the First Amendment rests upon our joint interest in approaching and appreciating the truth.").

[125] *See id.*

limiting or altering political discourse[126] and may reduce the effectiveness of the checking function by limiting access to truthful information on government officials and government action.[127] Alexander, however, rejected the notion that government-compelled speech violates some underlying societal norm.[128] Alexander argued that such a norm would exist only if it was clear that compelled speech caused harm in society.[129]

While scholars have presented various justifications for prohibiting or not prohibiting compelled speech, the constitutionality of the government compulsion of speech in the distinctive setting of a public high school has not been fully explored.[130]

Student Speech Rights

Forty years after the Court's decision in *Tinker*, the status of student speech post-*Morse* has generated attention from many legal scholars. While the literature on student speech rights addresses a broad range of topics, three bodies of literature are relevant for this analysis. The first is a general discussion of the level of First Amendment protection against school censorship in light of the Court's holding in *Morse*. The second proposes different tests to analyze future student speech cases. The third deals with special considerations for the after-the-fact punishment of student speech.[131]

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[126] *See* Sacharoff, *supra* note 99, at 377.

[127] *Id.* at 380. Sacharoff explained the checking function as follows: "speech functions to check abuse of government authority and improve government, because government officials will avoid corruption if they think a free press will catch and expose them." *Id.*

[128] *See* Alexander, *supra* note 107, at 157-58.

[129] *See id.*

[130] The author of this thesis discussed how these harms were applicable to the specific compelled student speech issue in *Corder v. Lewis Palmer School District*, 566 F.3d 1219 (10th Cir. 2009), but a more general analysis has not been put forward. *See* Sullivan, *supra* note 13, at 560-65.

[131] This discussion was included and highlighted in a separate section because several of the compelled student speech cases deal with school-mandated apologies for conduct.

First Amendment Protection Against School Censorship

Prior to the Court's holding in *Morse*, "*Tinker* was ostensibly the de facto test where the types of speech carved out in *Fraser* and [*Hazelwood*] were inapposite."[132] With the Court recognizing yet another exception from the broad speech-protective test in *Tinker*, many commentators have pointed to *Morse* as a signal that courts will continue to be extremely deferential to school administrators.[133] That prediction, in fact, may already be coming to fruition despite the fact that two Justices who joined the 6-3 opinion[134] did so only so far as it was understood to allow censorship of speech that "advocat[es] illegal drug use."[135] Just one year after the Court handed down its opinion, a review of lower courts' application of *Morse* found that it was frequently being used "to censor speech that has absolutely nothing to do with illegal drug use but that has everything to do with subjects such as violence and homophobic expression."[136]

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[132] Joseph O. Oluwole, *The Genesis of Gangrenes in the Student Free Speech Taxonomy*, 13 U.C. DAVIS J. JUV. L. & POL'Y 299, 327 (2009).

[133] *See, e.g., id.* at 329 ("[I]t took less than four decades for the Court to move from a stringent protection of student free speech rights to aggressive protection of school police powers over student speech.").

[134] Some consider *Morse* as a 5-4 decision, depending on the reading of Justice Breyer's concurrence and dissent. *See Morse v. Frederick*, 551 U.S. 393, 425-33 (2007) (Breyer, J., concurring & dissenting) (arguing that the Court should have decided only the qualified immunity question in *Morse* and then remanded the case).

[135] *Id.* at 422 (Alito, J., concurring). In his concurrence in *Morse*, Justice Alito, joined by Justice Kennedy, explained:

> I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

Id.

[136] Clay Calvert, *Misuse and Abuse of* Morse v. Frederick *by Lower Courts: Stretching the High Court's Ruling too Far to Censor Student Expression*, 32 SEATTLE UNIV. L. REV. 1, 3 (2008).

This movement toward greater power for school administrators has led scholars to call for a return to the *Tinker* "material interference or substantial disruption" standard.[137] Clay Calvert, for instance, noted that although "*Tinker* may not be looking fabulous at forty," it is still binding precedent.[138] In addition to recommending against any additional exceptions to *Tinker*, he asserted that courts should afford less deference to school officials by requiring evidence that the censorship was necessary.[139] Douglas Laycock also pointed to placing a higher evidentiary burden on school officials as crucial to the protection of students' First Amendment rights.[140] He concluded, "No other doctrine can safely substitute for *Tinker*'s requirement that if school officials want to suppress high-value student speech, they must demonstrate that suppression is necessary to prevent a material and substantial disruption."[141]

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[137] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969). *See generally* Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 836-41 (2009) (arguing that *Tinker* should apply to all non-curricular student speech).

[138] Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1190 (2009).

[139] *Id.* at 1191.

[140] Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 128 (2008).

[141] *Id.* at 128. Laycock argued that the more deferential tests are not appropriate for "high-value" speech such as political and religious speech. *Id.* at 123-24. He warned that the more deferential tests allow "school officials [] unfettered discretion to ban speech that the school subjectively determines is inconsistent with its educational mission." *Id.* at 128. Several student authors also called for a strengthening of the *Tinker* standard to protect student speech rights. *See, e.g.,* Jennifer A. Giuttari, Note, Morse v. Frederick: *Locking The "Schoolhouse Gate" On The First Amendment*, 69 MONT. L. REV. 447, 456 (2008) ("The Supreme Court's decision in *Morse* makes a clear statement to the American public that the First Amendment only protects student speech in public schools when school officials determine that the speech is not too controversial. Instead of sending this message to the public, the Court should have re-affirmed *Tinker* . . . ."); Angie Fox, Note, *Waiting to Exhale, How "Bong Hits 4 Jesus" Reduces Breathing Space for Student Speakers & Alters the Constitutional Limits on Schools' Disciplinary Actions Against Student Threats in Light of* Morse v. Frederick, 25 GA. ST. U. L. REV. 435, 473-74 (2008) (noting that *Tinker* has been reaffirmed in each subsequent case and, thus, the analysis should always start with the presumption that student speech is protected); Adam K. Nalley, Note, *Did Student Speech Get Thrown Out with the Banner? Reading "Bong Hits 4 Jesus" Narrowly to Uphold Important Constitutional Protections*

While some scholars were alarmed by the Court's opinion in *Morse*, others have pointed to it as an inevitable move by the Court. The latter group of scholars argued that the tragedies at Columbine and Virginia Tech were the reason why the Court continued to show deference to school officials in *Morse*.[142] One student author found that increased regulation of speech in schools is a sign of the times because "parental guidance of children is declining," resulting in "a shift of the burden of child rearing away from parents and onto school systems."[143] Erwin Chemerinsky noted that the opinion in *Morse* is consistent with other post-*Tinker* Supreme Court and lower court cases in which "schools have won virtually every constitutional claim involving students' rights."[144] He asserted, however, that the decision was contrary to other First Amendment precedent because it "upheld a viewpoint-based restriction in a public forum."[145] Chemerinsky opined, "[T]he Court underestimates the danger of government power in the school

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for Students, 46 HOUS. L. REV. 615, 642-47 (2009) (arguing that *Tinker* remains the default test in student speech cases and is still the appropriate test for speech related to social issues, religion, and politics).

[142] *See* Caroline B. Newcombe, Morse v. Frederick *One Year Later: New Limitations on Student Speech and the "Columbine Factor"*, 42 SUFFOLK U. L. REV. 427, 450-51 (2009) (arguing that the *Morse* opinion and its application by lower courts was driven by "overwhelming concern for student safety and that this concern cannot be understood without reference to the Columbine factor"). *See also* Calvert, *supra* note 138, at 1170-72 (discussing a Fifth Circuit case where a student threatened a Columbine-like attack in a journal); Fox, *supra* note 141, at 436 ("In the wake of high-profile shootings, (such as Columbine, and more recently Virginia Tech), and the accompanying perception of increased school violence, educators, administrators, and policymakers have been re-assessing the scope of schools' disciplinary authority to respond to students' conduct, writings, and speech before they erupt in tragedy.").

[143] Brittany Love, Note, *Today's Inconsistencies, Tomorrow's Problems: An In Depth Consideration of the Challenges Facing School Administrators in Regulating Student* Speech, 35 S.U. L. REV. 611, 628 (2008). The author also contended schools should have more discretion because "students have become increasingly undisciplined, and administrators and teachers are finding it very difficult to teach their students important, valuable lessons." *Id.*

[144] Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 25 (2008).

[145] *Id.* at 19.

context" and pointed to Justice Alito's concurrence as hope that the holding in *Morse* would be construed narrowly.[146]

Different Modes of Analysis Under the Current Framework

Some scholars have sought to make sense of the line of student speech cases by focusing on various aspects of the cases. Through these analyses, they have made suggestions about the best approaches to dealing with future student speech cases. Generally, scholars have approached student speech cases by either focusing on the role the school is assuming with regard to the speech or the type speech the student delivers.

Two scholars pointed to the role of the government as an important factor in determining whether censorship of student speech violates the First Amendment. Josh Davis and Josh Rosenberg argued that government could play one of two roles that have the potential to interfere with speech.[147] The first role is that of the regulator where "government does not undertake its own acts but rather discourages private conduct."[148] The second role is that of the patron where "government itself acts . . . by communicating a message or subsidizing expression."[149] In the patron role, the government may also

[146] *Id.* at 24. Chemerinsky's concern stems from his belief that school officials may be inclined to punish speech or students they do not like. *Id.* at 24-25.

[147] *See* Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047 (2009).

[148] *Id.* at 1051. Davis and Rosenberg give the example of the government prohibiting the distribution of pamphlets on a public street to illustrate the government working in this role. *Id.*

[149] *Id.* "[T]he government might campaign against use of illegal drugs, putting up posters in public schools and on billboards. Government may even sponsor speech by private actors—offering a prize, for example, for the best essay demonstrating the ill effects of the abuse of illegal drugs." *Id.* at 1051-52.

need to undertake some managerial functions that require ensuring employees and private individuals do not act or speak in a manner that "interfere[s] with tasks it undertakes."[150]

Davis and Rosenberg contended that the First Amendment is invoked when the government is serving as a regulator and in limited situations where the government is serving as a patron.[151] They explained:

> There are limits on the role of a school as patron, limits which vary with the particular function a school performs. In addition to acting as a speaker or sponsor, among the less controversial tasks of the public school as proprietor are conveying technical knowledge, maintaining order, ensuring the safety of students, and controlling the curriculum. More controversial tasks include protecting students from obscene, lewd or offensive language, and inculcating values and behaviors in students.[152]

To clarify this point, they reviewed the student speech cases by focusing on the role of the government.[153] For example, the school in *Fraser* may have been seen as serving the patron role because it sought to punish the student who gave the lewd speech in order to disassociate itself and to protect other students from the content of the speech.[154] Applying this approach to *Morse*, Davis and Rosenberg noted that the school may have been serving the patron role by protecting students from the dangers of drug use, but that the Court's analysis does little to help define the outer limits of

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[150] *Id.* at 1052. The authors noted that in a post office, the government can stop employees from communicating incorrect information about postal rates and can stop citizens from disrupting the service in the post office. *Id.*

[151] *Id.* at 1058-59.

[152] *Id.* at 1082-83.

[153] *See id.* at 1082-94. For example, the authors pointed to the *Hazelwood* school as playing the classic role of a patron. In *Hazelwood*, the Court's analysis focused on the notion that the articles in the student newspaper could be viewed as speech that the school had sponsored. Davis and Rosenberg noted that this focus on "school-sponsored" speech is analogous to situations where the school is acting a patron. *Id.* at 1087-88.

[154] *Id.* at 1085-86.

constitutionally permissible conduct while serving this function.[155] As they explained, "*Morse* appears to grant schools a license to inculcate values — and to silence student speech that might interfere with that effort — in a way that none of the earlier school speech cases suggested was permissible."[156] While focusing on the role of government may provide some insight into the understanding the Court's rulings in the student speech cases, Davis and Rosenberg seemed to find that the government may be acting as a patron even when censoring a broad range of student speech, including that in *Fraser* and *Morse*.

Rather than concentrating on the different roles of government, Chemerinsky maintained that cases should be distinguished by "speech of the government institution and the speech of the students."[157] The distinction between school speech and student speech[158] provides a different approach than the one adopted by the Court in the student speech quartet of cases. Chemerinksy argued that schools serve as speakers when they make decisions about the substance of the school's curriculum and, when censorship deals with curricular decisions, the schools have a wide range of power.[159] This power, however, "does not then carry over to allow the school to regulate student speech."[160] Under Chemerinsky's framework, a school is free to determine what books it places in its

[155] *Id.* at 1090-91.

[156] *Id.* at 1094.

[157] Chemerinsky, *supra* note 137, at 834.

[158] *Id.* at 832.

[159] *Id.*

[160] *Id.*

library,[161] but it may not censor what a student says about those books.[162] "There is a clear difference between the government choosing the curriculum it will teach and the government deciding that it does not like a certain message, such as a banner that the principal interprets as encouraging illegal drug use."[163]

Instead of focusing on the government's role in a particular case as Davis and Rosenberg as well as Chemerinsky advocated, Laycock argued that the type of student speech is essential to determining the scope of a school's censorship authority.[164] The Court has held that public schools are not the proper place to "inculcate religion among students."[165] For this reason, Laycock argued that religious speech is not part of the educational mission of schools and, therefore, schools should not be able to censor religious student speech because it will never conflict with the school's ability to carry out its mission.[166] Similarly, school officials cannot constitutionally force students to adopt a particular political view or punish a student simply because they disagree with a student's professed political beliefs.[167] Following this logic, political, like religious,

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[161] *See id.* at 832-33 (discussing Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)).

[162] Chemerinsky does not give this specific example, but does describe the importance of allowing students to speak. He is particularly mindful of the school's role in teaching students about their constitutional rights and notes the irony of teaching these rights but then refusing to extend them to the students. *Id.* at 834-36.

[163] *Id.* at 836.

[164] *See* Laycock, *supra* note 140 (arguing that certain types of speech are at the core of the First Amendment and, thus, cannot be censored by a school).

[165] *Id.* at 124.

[166] *Id.* at 124-25.

[167] *Id.* at 117-120. Laycock noted that it is difficult to draw a clear line in some circumstances. "We are unlikely to find a bright line between 'Don't hit' and 'Support the Republican Party.' There is a continuum from uncontroversial ideas to controversial ones, from ideas that are accepted as part of the school's mission to ideas that almost certainly would not be if the issue were squarely raised." *Id.* at 119.

speech is at the core of the First Amendment and should be fervently guarded from school censorship.[168] Laycock then proposed that a focus on the type of student speech was the appropriate starting point for a First Amendment analysis of student speech: "If a student speaks in his or her private capacity, without school sponsorship, then political speech, religious speech, and other speech about serious ideas is protected by *Tinker*, unless the speaker causes material and substantial disruption of the school."[169]

Emily Gold Waldman also considered the importance of certain core First Amendment types of speech when addressing how courts should treat potentially hurtful speech, such as speech used to bully another student.[170] Waldman advanced the idea that potentially hurtful speech can be divided into two categories: "(1) speech that identifies particular students for attack; and (2) speech . . . that expresses a general political, social, or religious viewpoint without directly naming or speaking to particular students."[171] Waldman argued that schools may properly censor hurtful speech that is directed at a particular student because the primary purpose of the speech is to disparage another.[172] When speech is not directed at an individual, Waldman argued, *Tinker* should apply and, thus, the speech is presumptively constitutional, but that courts should consider the

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[168] *Id.* at 120, 123-24. "What is true of political issues entrusted to other organs of government is equally true of religious issues entrusted to churches, synagogues, families, and individual conscience. Religious speech, like political speech, is at the core of the First Amendment." *Id.* at 123-24.

[169] *Id.* at 129.

[170] Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 492 (2008).

[171] *Id.*

[172] *Id.* at 492-96. Waldman indicated that even speech that appears to be political or religious in nature, but is directed at an individual, falls into this category. As she explained, "[A] student can express his belief that Jesus Christ is the only path to salvation, or that homosexuality is sinful, without singling out non-Christian or gay students and telling them that they are going to Hell or calling them derogatory names." *Id.* at 494-95.

"psychological well-being" of students as an important government interest.[173] These various approaches to dealing with student speech cases shed light on the compelled student speech cases because they provide a complete set of considerations to apply when examining any type of school restriction on speech.

Special Considerations for Punishment of Student Speech

In many cases, schools have sought to punish students for speech that they already delivered; in some cases this punishment may include a compelled apology. Waldman argued that schools do have the power to censor student speech, but when they are unsuccessful in censorship, they may not have the right to subsequently punish the student.[174] Waldman noted that after-the-fact punishment of speech should be treated differently because it raises three concerns.[175]

First, she noted that the Court has relied on educational and protective justifications for suppressing student speech.[176] Applying these rationales to punishment of speech, Waldman found that the justifications are not convincing when the student is not first given notice that the school wants to suppress the speech. This is true because after the speech is delivered, the listeners are already exposed to the potentially harmful effect of the message. School officials are presented with a missed opportunity to give the student speaker a "lesson" on appropriate communication after the speech is

[173] *Id.* at 503.

[174] *See* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113 (2010).

[175] *Id.* at 1119-20.

[176] *Id.* at 1122. Waldman explained that the "basic goal [of the protective function] is to shield other students and the school environment from being exposed to the harmful speech in the first place." *Id.* She noted that the purpose of the educational function is "to teach students to speak civilly or (in the context of school-sponsored speech) to speak in a way that comports with a particular curricular lesson . . . ." *Id.* at 1123.

delivered.[177] Second, Waldman argued that a lack of prior notice "forces speakers to take an undefined risk" because speakers will never know if they will be punished when they speak.[178] Finally, Waldman pointed out that a school's ability to impose an after-the-fact punishment may be limited by a student's due process rights.[179] In light of these three considerations, Waldman proposed that a proper analysis of after-the-fact punishment for student speech first requires that the school show that the speech could first be suppressed under the current Supreme Court framework. After that, schools would have the burden of showing that "(1) the student speaker had adequate prior notice that the speech was prohibited and (2) the actual punishment was reasonable."[180]

From this review, it is clear that there is a significant gap in the scholarly literature. While much has been written about both compelled speech and student speech generally, compelled student speech has largely been ignored. The literature on compelled speech generally indicates that the compulsion of speech is different from the censorship of speech because compulsion raises unique speaker-based, listener-based, and societal harms. This literature suggests that assessing the constitutionality of the government's compulsion of speech in all settings requires a specialized standard that addresses these potential harms. The student speech literature tracks the trend of the Court continuing to show greater deference to school officials to censor speech. Scholars have presented different suggestions for the most effective way to analyze student

[177] *Id.* at 1123.

[178] *Id.* at 1124.

[179] *Id.* at 1131. Waldman pointed to the Court's opinion in *Fraser* to support this view. She argued that punishing students for speech without "adequate notice of what the applicable rules are in the first place" may violate due process. *Id.* at 1131-32.

[180] *Id.* at 1114.

censorship cases, by focusing either on the role that the government is assuming or the type of speech that the government is attempting to censor. Of particular relevance to the issue of compelled speech as a form of punishment, at least one scholar has argued that the power to punish speech after it has been delivered is wholly different from the power to censor that speech in the first place.

This thesis seeks to provide a missing piece in the literature by providing a comprehensive review of all the state and federal compelled student speech cases. The law review note written by the author of this thesis serves as a starting point for the subsequent analysis. In particular, this thesis will explore the three types of compelled speech previously identified in that note: compelled recitations, compelled speech for mandatory education efforts, and compelled speech as a form of punishment. After a review of the cases, any other types of compelled student speech that have not been discussed previously will be identified and included in this research. First, the different types of compelled speech will be categorized and defined, using the framework as a starting point. Next, this thesis will review the tests that have been applied by the courts to these different categories. Finally, an approach for assessing the constitutionality of the government's compulsion of student speech will be presented. Developing a complete structure for handling future compelled student speech cases appears particularly important given the lack of a clear approach either articulated by the Supreme Court or adopted by lower courts.

Research Questions and Methodology

A comprehensive examination of the First Amendment protection against the government compulsion of student speech requires an evaluation of the following research questions:

- What types of compelled speech in public high schools have courts examined?
- What First Amendment standards have courts used to assess the constitutionality of each type of compelled student speech in public high schools?
- What changes to the existing framework,[181] if any, are needed to ensure that there are proper protections against government compulsion of speech for public high school students?

To answer these questions, all the federal and state cases since 1940, the year that the Court first spoke on the issue,[182] dealing with the constitutionality of the government's compulsion of student speech will be examined. Cases were identified using both LexisNexis and Westlaw databases to ensure that all available cases were located. Searches were conducted using the following parameters: "compelled speech" AND "high school." The search results were then reviewed to determine if the cases addressed the issue of compelled student speech. Additional cases were identified by reviewing cases cited within those identified in the LexisNexis and Westlaw population as well as by Shepardizing the cases pulled through the searches. Cases dealing with

[181] The "existing framework" refers to the approaches currently used by courts assessing the constitutionality of compelled student speech. This framework is discussed in the analysis of the cases presented in Chapters II-IV, and is summarized in Chapter V.

[182] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

college and private school students were included in the sample only if tests applied were derived from high school speech cases or if the analysis was useful to a discussion of compelled speech in public high schools. Based on these parameters, nineteen cases[183] were identified for this research.

Limitations

Cases addressing the issue of compelled commercial speech were omitted because the Court has recognized different First Amendment standards for commercial speech.[184] Furthermore, this thesis only seeks to understand the First Amendment protections against compelled speech of public high school students and does not extend to students in private school or to college students. Cases discussing private school and college students are included only to the extent that they provide useful guidance for understanding public high school student speech cases. Cases discussing the rights of college students are not otherwise included because the Court has recognized that college students have greater First Amendment protection than high school students.[185] Also, this

[183] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *Gobitis*, 310 U.S. 586; Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219 (10th Cir. 2009); Head v. Bd. of Trs. of Cal. State Univ., 315 F. App'x 7 (9th Cir. 2008); Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2005); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004); Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 (8th Cir. 2001); Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989); Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971); Rogers *ex rel.* Rogers v. Cook, No. 08 C 2270, 2008 WL 5387642 (N.D. Ill. Dec. 23, 2008); Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007) *aff'd,* 527 F.3d 41 (2d Cir. 2008); Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998); Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410 (N.D. Miss. Nov. 1, 1996) *aff'd*, 163 F.3d 1356 (5th Cir. 1998); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969); Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

[184] *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. ___, ___, 130 S. Ct. 1324, 1339 (2010) (noting the different First Amendment standards that apply to misleading and nonmisleading commercial speech).

[185] *See* Healy v. James, 408 U.S. 169, 180 (1972) (finding that college students, unlike high school students, are entitled to full First Amendment protection).

thesis is restricted to public rather than private schools because censorship and compulsion in private schools do not involve state action and, thus, do not trigger a First Amendment analysis. This thesis also does not cover the compelled speech cases dealing with the issue of compelled subsidy of speech because this thesis focuses on actual student speech, not speech subsidized by fees.[186]

[186] *See, e.g., supra* note 67 for more discussion on the First Amendment concerns related to student fees.

CHAPTER II

COMPELLED RECITATIONS

Compelled recitations occur when the government mandates a student to say specific words or to engage in an activity that amounts to implicit expression. The U.S. Supreme Court's holding in *Barnette v. West Virginia Board of Education*[187] makes clear that there is strong First Amendment protection against government compulsion of recitations in public schools. This chapter discusses the Supreme Court's treatment of compelled recitations, including a detailed analysis of the *Barnette* holding, the six subsequent lower court cases addressing the constitutionality of compelled recitations, and the relevant scholarly literature. Four key points about judicial treatment of compelled recitations emerged from this research: (1) the wide range of justifications for strong First Amendment protections against compelled recitations; (2) compelled recitations include situations beyond those in which students are required to actually speak; (3) the special considerations that support recognizing strong First Amendment protection against compelled recitations when the compulsion takes place in a school setting; and (4) there are some situations in which *Barnette* controls and other situations in which *Tinker v. Des Moines Independent Community School District*,[188] a Supreme Court case dealing with censorship of student speech, controls.

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[187] 319 U.S. 624 (1943).

[188] 393 U.S. 503 (1969).

First, this chapter defines the category of compelled recitations by reviewing the pertinent literature and providing examples from cases. Second, this chapter analyzes the cases that have addressed the constitutionality of compelled recitations. This section first provides a discussion of the two Supreme Court cases directly on point and then provides an analysis of the six lower court opinions discussing compelled recitations. Finally, this chapter concludes by summarizing the findings and highlighting the main points that were distilled from the research presented in this chapter.

Definition of Compelled Recitations

A review of literature and cases dealing with compelled recitations makes clear that recitations must be defined in a way that covers actual speech as well as other types of expressive activity. This section presents a definition of compelled recitations based on the distinctions presented by courts and scholars between speech that falls in this category and other types of compelled speech.

Compelled recitations are government-mandated reiterations of specific words and government-mandated participation in expressive activities that equate to "speech." These two forms of compelled recitations are best illustrated by examining the Supreme Court's opinion in *Barnette*[189] and the U.S. Court of Appeals for the Third Circuit's opinion in *Lipp v. Morris*.[190]

The first type of compelled recitation is exemplified by the speech at issue in *Barnette*. In that case, the Supreme Court considered the constitutionality of a state board of education's resolution requiring all teachers and students to participate in pledging

[189] 319 U.S. 624.

[190] 579 F.2d 834 (3d Cir. 1978).

allegiance to the American flag.[191] The Court described the compelled recitation required by the board's mandate as follows:

> What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."[192]

The students who failed to participate in this compelled recitation were found to be insubordinate and were subject to expulsion from school.[193] In *Barnette*, the Court held that the board of education resolution was unconstitutional, noting that First Amendment protections should ensure that "ceremonies are voluntary and spontaneous instead of a compulsory routine."[194]

Building off of *Barnette*, lower courts applied that precedent in cases involving compelled recitations where the students were not required to speak at all. In *Lipp v. Morris*, the Third Circuit found that a state statute that required public school students to "stand at attention during the salute to the flag," but did not require that students recite the Pledge, violated the First Amendment.[195] Following Supreme Court precedent from a different compelled speech case, *Wooley v. Maynard*,[196] the Third Circuit noted forcing

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[191] *Barnette*, 319 U.S. at 626.

[192] *Id.* at 628-29. The Court noted that prior to accepting this formulation, "the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs" were concerned that the required salute was similar to that of the salute to Hitler. *Id.* at 627-28.

[193] *Id.* at 629.

[194] *Id.* at 641. In its decision, the *Barnette* Court expressly overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the Court held that a Pennsylvania board of education could compel students and teachers to participate in saluting the flag and reciting the Pledge of Allegiance just three years earlier. *Gobitis*, 310 U.S. at 600.

[195] Lipp v. Morris, 579 F.2d 834, 835 (3d Cir. 1978).

[196] 430 U.S. 705 (1974) (holding that the enforcement of a state statute allowing criminal sanctions against persons who covered up the state motto on their licenses plates violated the First Amendment).

students to stand during the salute equated to "requiring a student to engage in what amounts to implicit expression" and, thus, the compulsion of this expression violated the First Amendment.[197] The *Lipp* court specifically looked to the Court's holding in *Wooley* to support the notion that the government does not necessarily need to force the individual to actually speak in order to raise First Amendment concerns related to compelled speech.[198] As the *Wooley* Court noted, the First Amendment not only protects against the government compelling a person to announce specific words by speaking, as was the case in *Barnette*, but also more broadly protects a citizen's right "to refuse to foster . . . an idea they find morally objectionable."[199] The expressive activity in *Lipp* demonstrates the type of compelled recitations that do not require actual speech, but rather "implicit expression," usually through requiring a student to engage in specific expressive conduct that amounts to "speech."

Vincent Blasi and Seana Shiffrin were the first scholars to argue that compelled recitations may constitute a unique category of compelled student speech, raising distinct

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[197] *Lipp,* F.2d at 836 (citing Wooley v. Maynard, 430 U.S. 705 (1974)).

[198] *Lipp*, 579 F.2d at 836.

[199] *Wooley*, 430 U.S. at 715. In *Wooley*, the Court noted that there were distinctions between the type of speech at issue in *Barnette* and *Wooley*, but found that the differences were slight. For this reason, the same level of First Amendment protection against compelled speech appeared to be recognized. The *Wooley* Court explained:

> The Court in *Barnette* . . . was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures . . . . Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life – indeed constantly while his automobile is in public view – to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. at 714-15 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

First Amendment considerations.[200] The scholars argued that First Amendment protection against most types of compelled speech is justified because compulsion of speech violates an individual's right to refrain from speaking or to refrain from delivering speech others might believe is a reflection of the speaker's beliefs.[201] Compelled recitations are different, however, because the audience is usually aware that the speech is part of a government-mandated exercise and, thus, is unlikely to attribute the speech to the speaker's own beliefs.[202] The real problem, Blasi and Shiffrin asserted, is that *not* participating in the government-mandated exercise causes "self-exposure" because the audience will likely infer that the nonparticipant does not agree with the message.[203] The speaker who does not agree with the government-compelled recitation then is left with two options, not participate and raise awareness of his or her disagreement, or participate insincerely so as not to risk revealing his or her actual beliefs.[204]

Shiffrin advanced this discussion in a separate law review article and sought to explain the First Amendment issues raised by government-compelled recitations. She explained that compelled recitations fail to recognize a distinction between "the proponent of the views (the state) and the intended audience (the students)."[205] Instead of allowing the student to understand, deliberate, and evaluate information, during a

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[200] *See generally* Blasi & Shiffrin, *supra* note 92.

[201] *Id.* at 456.

[202] *Id.* The Ninth Circuit adopted this view in a challenge the constitutionality of school-mandated uniforms for students. The court found that requiring students to wear uniforms did not equate to compelled speech, because "it is unlikely that anyone viewing a uniform-clad student would understand the student to be communicating a particular message via his or her mandatory dress." Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 428 (9th Cir. 2008).

[203] Blasi & Shiffrin, *supra* note 92, at 456.

[204] *Id.*

[205] Shiffrin, *supra* note 63, at 884.

compelled recitation, a student is simply "corralled" into speaking the words required by the government.[206] Because individual reflection is not part of the process, Shiffrin argued, compelled recitations do not allow students to "arrive at conclusions that are truly their own."[207] Government-compelled recitations, whether they require the student to actually say specific words or to participate in other "implicit expression," raise unique First Amendment concerns, at least according to Blasi and Shiffrin. However, while Blasi and Shiffrin have argued that compelled recitations may be a distinct category of compelled speech, deserving of unique considerations under the First Amendment, courts have yet to explicitly accept that view.

Courts' Treatment of the Constitutionality of Compelled Recitations

This section reviews the eight court opinions that have addressed the constitutionality of compelled recitations. The first part of this section discusses the two Supreme Court cases on point and provides a summary of the Court's analysis in *Barnette*. *Barnette* is useful for this discussion not only because it remains binding precedent, but also because some elements of the opinion are important to develop a complete understanding of the proper level of First Amendment protection against compelled recitations. For example, the Court presented an interesting justification for its decision, namely that the Framers' understood the First Amendment to protect against compelled recitations like the one at issue in the case. The Court also seemed to find that First Amendment protection against compelled recitations might need to be particularly strong in the school setting.

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[206] *Id.*

[207] *Id.*

The second part of this section discusses the six lower court cases dealing with the constitutionality of compelled recitations. Those cases provide an analysis of the difference between situations where *Barnette* applies and where *Tinker*, a Supreme Court student speech censorship case, applies. The lower court cases also provide other information important to understanding the constitutionality of school-compelled recitations. The cases include discussion of the view that compelled recitations include government-mandated speech as well as implicit expression, like standing at attention during the Pledge; recognition of additional justifications for strong First Amendment protections against compelled recitations, like the rationale that compulsion of speech may have a chilling effect on the speech of other students; and development of one special consideration that supports recognizing strong First Amendment protection against compelled recitations in a school setting, namely that compelled recitations in a school setting may be particularly problematic because of the power imbalance between students and teachers and administrators. The following section reviews the eight compelled recitation cases.

Supreme Court's Treatment of the Constitutionality of Compelled Recitations

The Supreme Court has addressed the issue of First Amendment protections against government-compelled recitations imposed on public school students in only two cases. The Supreme Court first dealt with the issue in the 1940 case *Minersville School District v. Gobitis*.[208] In that case, two school children and their parents challenged the students' expulsions from public school for violating a Pennsylvania board of education policy that required all students to participate in the Pledge of Allegiance by reciting the

[208] 310 U.S. 586 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Pledge and standing with their hands over their hearts.[209] The students, who were Jehovah's Witnesses, asserted that they refused to participate because they believed that "such a gesture of respect for the flag was forbidden by command of scripture."[210] Ultimately the Court, in an opinion delivered by Justice Felix Frankfurter, held that the policy requiring students to participate in the Pledge was constitutional.[211]

In its analysis of the First Amendment issued raised in *Gobitis*, the Court focused on whether requiring students to participate in the Pledge violated the free exercise of religion, rather than the free speech, clause of the First Amendment.[212] The *Gobitis* Court did briefly note the possibility that compelling recitations might raise free speech concerns, but did not explore the nature of First Amendment protections derived from the free speech clause. The Court instead asserted that *even if* the First Amendment "includes freedom from conveying what may be deemed an implied but rejected affirmation," the government interest in "national cohesion" still overrides this protection.[213] In brushing aside the free speech issue, the Court noted that the

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[209] *Id.* at 591. The phrase "participating in the Pledge" is used throughout this thesis and includes both the actual recitation of the words of the Pledge as well as any expressive activities, like standing at attention or placing one's hand over one's heart, that were compelled while the Pledge was recited. For a discussion of the different policies related to the Pledge, see *infra* notes 246-48 and accompanying text.

[210] *Id.* at 592.

[211] *Id.* at 600.

[212] *See id.* at 593-95 (discussing whether mandating that public school students must participate in the Pledge violates their right to religious freedom guaranteed by the First Amendment). The Court found that one main goal of the free exercise clause was to promote religious toleration, but the Court asserted that the protection of this goal should be balanced against the ability of government to promote the common good. *Id.* at 593-94. Here, the Court argued that the purpose for requiring students to participate in the Pledge was to build a "free society," which is accomplished through a "cohesive sentiment." *Id.* at 596. Furthermore, the Court noted that just because some individuals may hold religious beliefs that conflict with a particular law does not mean that law violates the First Amendment's free exercise clause. *Id.* at 594-95. The Court found that the board of education policy did not violate the students' right to freedom of religion protected by the First Amendment because the policy was "a general law not aimed at the promotion or restriction of religious beliefs." *Id.* at 594.

[213] *Id.* at 595.

government's interest in promoting national unity and, through that, national security was "an interest inferior to none in the hierarchy of legal values."[214] After its determination that the government interest in the case trumped any First Amendment concerns, the Court held that schools could compel students to participate in the Pledge, pointing out that people who opposed policies like the one at issue in *Gobitis* may attempt to effect change through the legislative process.[215]

Finally, while *Gobitis* was decided before the Court expressly recognized that public school students may have less First Amendment protection than adults,[216] the Court did deem it noteworthy that the plaintiffs were students. The Court noted that the Pennsylvania policy was justified by the "belief in the desirable ends to be secured by having its public school children share a common experience at those periods of development when their minds are supposedly receptive to its assimilation . . . ."[217] While the Court did not expressly state that its holding was based, at least in part, on the fact that the plaintiffs were public school students, the fact that this policy was imposed in schools seemed to be one reason why the Court was deferential to the government.[218]

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[214] *Id.* at 595. After the Court asserted the importance of the government's interest in promoting national unity, it reframed the issue before it. The Court stated the question was "whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious." *Id.* at 597.

[215] *Id.* at 600.

[216] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[217] *Gobitis*, 310 U.S. at 597.

[218] *Id.* at 597-98. The Court noted that:

> To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.

From the opinion, it is unclear whether the Court would have recognized stronger free speech protections for adults.

Regardless of the Court's justifications for its holding in *Gobitis*, the power of the decision was short-lived. The ruling was overturned by the Court in 1943, just three years later, in the seminal case dealing with compelled recitations in schools, *West Virginia Board of Education v. Barnette*.[219] *Barnette* also involved a challenge by Jehovah's Witnesses to a board of education resolution that required all public school students to recite the Pledge of Allegiance.[220] Unlike in *Gobitis*, however, the *Barnette* Court focused its analysis on the free speech, rather than freedom of religion, issues raised by the compelled recitations.[221]

The Court noted that while the plaintiffs in both *Gobitis* and *Barnette* objected to reciting the Pledge of Allegiance because of religious reasons, this was not the central issue in either case.[222] The Court said the flaw in the *Gobitis* opinion was the assumption that the government's compulsion of the Pledge was constitutional in the first place, regardless of the religious basis of the objections raised by the plaintiffs.[223] In its decision to overrule *Gobitis*, the Court made clear that the proper First Amendment challenge to the constitutionality of the government-compelled Pledge focused on the

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Id.

[219] 319 U.S. 624, 642 (1943).

[220] *Id.* at 629.

[221] *See id.* at 635 (noting that the *Gobitis* Court "only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule"); *supra* note 212 and accompanying text (discussing the *Gobitis* Court's focus on freedom of religion in its analysis of the constitutionality of the board of education's policy).

[222] *Barnette*, 319 U.S. at 634-36.

[223] *Id.* at 635-36.

restriction it placed on free speech.[224] A proper analysis, the Court reasoned, should turn on "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."[225] If the Court found that the government may compel students to participate in the Pledge of Allegiance, then the Court could examine the constitutionality of the statute based on the religious objections raised by the plaintiffs.[226] The *Barnette* Court, however, never reached the free exercise challenge because it held that the government compulsion of the Pledge of Allegiance violated *any* protesting student's First Amendment rights, not just the rights of those students who objected on religious grounds.[227]

The Court, in an opinion delivered by Justice Robert Jackson, noted that schools have a valid interest in promoting patriotism. The real issue in *Barnette* then, the Court reasoned, was not the goal that the school was trying to accomplish through the compelled recitation, but rather the means through which it attempted to reach this goal.[228] The *Barnette* Court asserted that the proper, albeit somewhat vague, test for assessing the constitutionality of the policy was to determine if the government compulsion of speech in this case was "a permissible means" for the government to reach its goal.[229] Justice Jackson characterized the means employed by government as follows:

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[224] *See id.* at 635.

[225] *Id.*

[226] *Id.* ("It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.").

[227] *Id.* at 642.

[228] *Id.* at 631.

[229] *Id.* at 640.

> [W]e are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.[230]

The Court then considered the nature of First Amendment protections in order to assess the constitutionality of the board of education policy. The Court found that protection against government compulsion of speech meant to demonstrate "adherence to government as presently organized" was implicit in the Framers' understanding of free speech.[231] While it was, at the time, commonly understood that the First Amendment protected against government censorship of speech with the exception of speech that would cause a clear and present danger, the Court noted that compelled speech may be guarded against by even stronger First Amendment protections.[232] The Court stated that government could justify compelling speech "only on even more immediate and urgent grounds" than it could justify censoring speech.[233]

While this conclusion is strongly worded, it is difficult to distill from the *Barnette* opinion when, if ever, government compelled recitations in public schools may pass constitutional muster. What doctrinal test can be taken away from *Barnette*? It is clear that the Court examined the government interest as well as the means used to reach that goal and applied some form of balancing test.[234] It is unclear whether a compelled recitation is ever a constitutional means to reach even a legitimate governmental goal.

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[230] *Id.* at 631.

[231] *Id.* at 633.

[232] *Id.*

[233] *Id.*

[234] *See* discussion *supra* note 229 and accompanying text; *Barnette*, 319 U.S. at 640.

What does appear clear is that, at least in 1943 when *Barnette* was handed down, the Court explicitly stated that it could not name an exception to its finding.[235] Furthermore, although the *Barnette* Court dealt specifically with the issue of government-compelled recitations, it is unclear whether the applicability of its analysis is limited to that specific type of compelled speech.

In addition to recognizing strong First Amendment protection against compelled recitations, the *Barnette* Court did not seem persuaded by the notion that students in public schools should receive a lower standard of First Amendment protection than adults, at least based on the facts in that case.[236] The Court noted that provisions enacted by boards of education, just like those enacted by any other government-entity, must pass constitutional scrutiny. The Court reasoned:

> [Boards of education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[237]

Based on this rationale, it appears that the *Barnette* Court not only believed the First Amendment rights of students to be equal to those of adults, at least in this particular situation, but also found that there might be a greater need for protection in schools because of schools' important role in educating young people.[238]

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[235] *Barnette*, 319 U.S. at 642.

[236] *See id.* at 637-38.

[237] *Id.* at 637.

[238] *See id.* The Supreme Court has since found that, at least in the case of school censorship of speech, students may be afforded less First Amendment protections than adults. As the Court explained:

Finally, after concluding that the board of education policy that compelled students to participate in the Pledge of Allegiance violated the students' First Amendment rights, the Court's conclusion reaffirmed the importance of the issues at stake in *Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[239]

Although *Barnette* leaves many important issues open, it is essential to understand the Court's reasoning in *Barnette* because it is the only compelled student speech case decided by the Supreme Court that is still binding precedent.[240] Furthermore, several important points can be understood from *Barnette*: (1) the First Amendment protects against government compulsion of speech to the same extent, or possibly more, than it protect against government censorship of speech;[241] (2) schools serve an important role in society and, in recognition of that important role, there may be situations where First Amendment protections should be greater for public school students than for adults;[242] and (3) even when there is an important government interest at stake, the practice of

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> It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school . . . . [T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

[239] *Barnette*, 319 U.S. at 642.

[240] As previously mentioned, *Barnette* overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). *Barnette*, 319 U.S. at 642.

[241] *See* discussion *supra* notes 222-33 and accompanying text.

[242] *See* discussion *supra* notes 236-38 and accompanying text.

compelling recitations is a "short-cut"[243] to reaching that government goal, raising serious First Amendment concerns.[244]

Lower Courts' Treatment of the Constitutionality of Compelled Recitations

Since the Supreme Court's ruling in *Barnette*, the constitutionality of compelled recitations has been addressed six times by lower courts.[245] In the wake of *Barnette*, many lower courts struggled to determine what action, if any, the government could require of students choosing not to participate during the Pledge of Allegiance in public schools. Some schools and states instituted policies requiring students to silently stand during the Pledge,[246] while others required non-participating students to leave the room[247] or choose between leaving the room and standing.[248] Courts addressing the constitutionality of these provisions sometimes applied *Barnette* and sometimes applied the test announced by the Supreme Court in *Tinker*, a case dealing with the censorship of student speech. The courts discussing the distinction between *Barnette* and *Tinker* found that *Barnette* only applied to assess the constitutionality of the school policies and not the First Amendment protection for the students' actions in resistance to the policies. Some

[243] *Barnette*, 319 U.S. at 631.

[244] *See* discussion *supra* notes 228-33 and accompanying text.

[245] *See generally* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004); Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Banks v. Bd. of Public Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969); Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963). This analysis does not include cases where the court deemed that recitations were not compelled. For example, the Tenth Circuit in *Bauchman v. West High School* found that a student was not compelled during choir to sing religious songs because she was not actually forced to participate. 132 F.3d 542, 558 (10th Cir. 1997).

[246] *See Lipp*, 579 F.2d at 835 n.2 (citing N.J. STAT. ANN. § 18A:36-3); *Banks*, 314 F. Supp. at 303 n.3, *aff'd mem.*, 450 F.2d 1103 (noting that a Florida school board policy required students to stand during the Pledge and the National Anthem).

[247] *Frain*, 307 F. Supp. at 30 (citing a policy of the New York City Superintendent of Schools).

[248] *Goetz*, 477 F.2d at 636 (discussing the option of standing or leaving the room during the Pledge that was offered to students in a New York high school).

of the lower court cases also provide useful discussion of the justifications for guarding against compelled speech and the special considerations that support recognizing strong First Amendment protection against compelled recitations when the compulsion takes place in a school setting.

The courts addressing the First Amendment concerns surrounding these new Pledge policies often sought to distinguish the protections recognized in *Barnette* from the protections subsequently recognized by the Supreme Court in a student speech censorship case, *Tinker v. Des Moines Independent Community School District*.[249] The U.S. District Courts for the Eastern District of New York, the Southern District of Florida and the District of Arizona provided useful discussion of when courts should apply *Barnette* and when courts should apply *Tinker*.

In *Frain v. Baron*,[250] the U.S. District Court for the Eastern District of New York found a difference between *Barnette*-like and *Tinker*-like cases in a challenge to a New York City policy that required non-participating students to leave the room during the Pledge of Allegiance.[251] The court explained that *Barnette* alone was not controlling in that case because *Barnette* dealt with a policy that actually compelled students to recite the Pledge, whereas the *Frain* policy only required students to leave the classroom.[252] The court found that *Tinker* was controlling since the real issue in this case was not the constitutionality of a compelled recitation, but rather the censorship of the students'

[249] 393 U.S. 624 (1943) (holding that public high schools students' right to wear black armbands in protest of the Vietnam War was protected by the First Amendment).

[250] 307 F. Supp. 27.

[251] *Id.* at 30.

[252] *Id.* at 31.

expression, namely the students' demonstration of their disagreement with the Pledge by remaining silently in the room.[253] The court explained the distinction between situations where *Barnette* would apply versus situations where *Tinker* would apply as follows: "The original concern with limitation of the state's power to compel a student to act contrary to his beliefs has shifted to a concern for affirmative protection of the student's right to express his beliefs."[254] Following this reasoning, the court found that *Barnette* should be used to assess the First Amendment protection *against* government compelled recitations whereas *Tinker* should be used to assess the First Amendment protection *for* students to express their beliefs, even when their conduct violates a school policy. In other words, *Barnette* controls what a government cannot do, and *Tinker* controls what a student can do. Based on *Tinker*,[255] the *Frain* court ultimately granted the student's motion for preliminary injunction against the school and held that the school had the burden of establishing that allowing students to remain seated during the Pledge "materially infringed the rights of other students or caused disruption."[256]

This practice of distinguishing between the First Amendment protections in *Barnette* and those in *Tinker* was adopted by the U.S. District Court for the Southern District of Florida in *Banks v. Board of Public Instruction*.[257] In that case, a Florida high

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[253] *Id.* at 30-31.

[254] *Id.* at 30.

[255] *Id.* at 31 ("The Supreme Court's decision in *Tinker* makes it unnecessary to explore further the differences between *Barnette* and the present case.").

[256] *Id.* at 32-33.

[257] *See* Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 303 n.3 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971). The U.S. District Court for the Southern District of Florida initially issued an opinion in *Banks*. This opinion was subsequently affirmed by the Fifth Circuit. *See Banks*, 450 F.2d 1103. The reasoning discussed in this section comes from the district court opinion. *See generally Banks*, 314 F. Supp. 285.

school student challenged a school board regulation under which he was punished for refusing to stand during the Pledge of Allegiance.[258] Unlike the district court in *Frain*, the *Banks* court accepted that both *Barnette* and *Tinker* applied when assessing the constitutionality of that policy.[259] The *Banks* court reasoned that the student's refusal to stand was a form of expression similar to that recognized as protected under the First Amendment in *Tinker*.[260] The court found that refusing to stand was an act of expression because it was meant as a "protest against black repression in the United States."[261] Furthermore, the court noted that the policy requiring students to stand was like the school policy at issue in *Barnette* requiring students to actually recite the Pledge. The *Banks* court explained that the school policy was like the one in *Barnette* because "the regulation required the individual to communicate, by standing, his acceptance of and respect for all that for which our flag is but a symbol."[262] Thus, the U.S. District Court for the Southern District of Florida affirmed the view that the student's refusal to stand

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Banks involved a student who refused to stand during the Pledge of Allegiance. The district court explained the applicability of *Barnette* and *Tinker* in that case as follows:

> Without more *Barnette* would be dispositive of this matter for Andrew Banks was suspended for his refusal to act in accordance with a regulation, the operation of which prevented him from exercising his First Amendment rights. Yet, the tenor of *Barnette* is negative. It prohibits the state from compelling individuals to act in a certain manner; it is not a recognition of student's [sic] rights. On the other hand, the Supreme Court's decision in [*Tinker*] speaks affirmatively. There the court held that public school students could not be suspended for wearing black arm-bands to protest American involvement in Vietnam, a form of silent protest and non-disruptive First Amendment expression in the classroom.

Id. at 295 (citations omitted).

[258] *Id.* at 287.

[259] *Id.* at 295-96.

[260] *Id.* at 295.

[261] *Id.*

[262] *Id.* at 296.

was protected by the First Amendment as discussed in *Tinker* and the school's regulation that required students to stand during the Pledge was unconstitutional under *Barnette*.[263]

Beyond these cases that dealt with the compulsion of the Pledge of Allegiance in public schools, a federal district court addressed the constitutionality of an Arizona Board of Education policy that required students to stand during the National Anthem.[264] While this case was decided before *Tinker*, it still provides useful insight into when *Barnette*, rather than *Tinker*, should apply. Similar to the facts in *Barnette*, the students in *Sheldon v. Fannin* refused to stand during the National Anthem and were expelled as a result of that action. The students in *Sheldon* believed that standing during the anthem ran counter to their religious beliefs as Jehovah's Witnesses.[265] While the students raised First Amendment claims based on the free exercise clause, the court ultimately found that *Barnette* was controlling and issued a permanent injunction, barring the school from expelling or suspending students for refusing to stand during the National Anthem.[266] In its decision, the court characterized *Barnette* as a decision grounded in both the free exercise and free speech clauses.[267] The court explained that *Barnette* stood for the principle that "the governmental authority may not directly coerce the unwilling expression of any belief, even in the name of 'national unity' in time of war."[268] This

[263] *See id.* at 295-97.

[264] Sheldon v. Fannin, 221 F. Supp. 766, 769 (D. Ariz. 1963).

[265] *Id.* at 768.

[266] *Id.* at 774-75.

[267] *Id.* at 775.

[268] *Id.*

case was handed down six years prior to the Court's decision in *Tinker*.[269] Nevertheless, the federal district court noted an exception to student speech rights in dicta, explaining that the First Amendment does not protect "unruly or boisterous conduct" that might disrupt "order and discipline" in the classroom.[270] From *Sheldon*, it appears that *Barnette* applies to cases even where a student's objections are not based on religion, but a student's objections cannot cause a disruption as the Court later declared in *Tinker*.

The U.S. Courts of Appeals for the Second and Third Circuits squarely addressed the issue of what actions outside of actually requiring a student to speak amounted to compelled recitations and, thus, were subject to First Amendment protection under *Barnette*. In *Goetz v. Ansell*,[271] the Second Circuit grappled with a school policy that required non-participating students to stand during the Pledge of Allegiance or leave the room.[272] A high school student challenged the constitutionality of that policy, arguing that it was his First Amendment right to silently remain seated in the classroom during the Pledge.[273] The Second Circuit agreed, finding that the two alternatives offered to students under the policy violated their rights. Relying heavily on *Barnette*, the court noted that compelling students to stand during the Pledge is just as troubling from a First Amendment perspective as compelling them to actually recite the Pledge.[274] Like the

[269] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[270] *Sheldon*, 221 F. Supp. at 775.

[271] 477 F.2d 636 (2d Cir. 1973).

[272] *Id.* at 636.

[273] *Id.* at 637.

[274] *Id.* at 637-38. "[T]he alternative offered plaintiff of standing in silence is an act that cannot be compelled over his deeply held convictions. It can no more be required than the pledge itself." *Id.* at 638.

Banks court,[275] the Second Circuit reasoned that standing was an act that expressed respect for and affirmation of the Pledge and the symbolism of the flag.[276] The court, thus, found that *Barnette* applied to the school policy based on the logic that if the school "cannot compel participation in the pledge, it cannot punish non-participation."[277] While the Second Circuit mainly relied on *Barnette*, the court did mention *Tinker* in its opinion. The *Goetz* court also noted that sitting silently, as the plaintiff wished to do, did not cause a "substantial and material disruption" under *Tinker* and, thus, could not be precluded from First Amendment protection under that precedent.[278] Finally, the court noted that the policy was not saved by the fact that non-participating students had the option to leave the classroom. The court reasoned that requiring non-participating students to leave the classroom could be viewed as a punishment and, thus, was not a reasonable alternative.[279] The Second Circuit's approach rested most strongly on the notion that compelling a student to stand during the Pledge violated a student's First Amendment rights in the same way as compelling a student to actually recite the words of the Pledge.[280]

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[275] *See* discussion *supra* notes 262 and accompanying text.

[276] *Goetz*, 477 F.2d at 637-38.

[277] *Id.* at 638.

[278] *Id.*

[279] *Id.*

[280] *Id.* at 638 (noting that with the provision allowing the student to leave the room, "the effect upon the plaintiff of adhering to his convictions is far less drastic than in *Barnette*," but still recognizing that "standing 'is no less a gesture of acceptance and respect than is the salute or the utterance of the words of allegiance'") (quoting Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 296 (S.D. Fla.1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971).

Similar to the Second Circuit, the Third Circuit relied heavily on *Barnette* in reaching its finding that a New Jersey statute requiring students to "stand at attention"[281] during the Pledge violated the First Amendment. In *Lipp v. Morris*, a high school student objected to standing during the Pledge and argued that she did so "only because she had been threatened."[282] The Third Circuit, citing *Banks* and *Goetz*, found that the requiring students to stand during the Pledge "amount[ed] to implicit expression"[283] and that government compulsion of such expression violated the First Amendment rights of the students.[284] This characterization that "implicit expression" outside of actual speech constitutes compelled recitations supports the definition presented earlier in this chapter and presents a standard that could be used in future cases.

The most recent compelled recitation case, decided in 2004, dealt with a school punishing a student for failing to recite the Pledge of Allegiance despite a state statute noting that student participation in the Pledge was voluntary.[285] This case includes a pertinent discussion of an audience-based justification for strong First Amendment protection against compelled recitations and as well as a discussion of the power

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[281] Lipp v. Morris, 579 F.2d 834, 835 n.2 (3d Cir. 1978) (citing N.J. STAT. ANN. § 18A:36-3).

[282] *Id.* at 835.

[283] *Id.* at 836.

[284] *Id.* Unlike the other lower courts, the Third Circuit did not discuss *Tinker*; this was perhaps because *Lipp* was the only case in which the student adhered to the policy in school and only challenged it in court, thus failing to raise the issue of whether the manner in which the student refused to participate was constitutionally protected. *See id.* at 835. *See also* Goetz v. Ansell, 477 F.2d 636, 636 (2d Cir. 1973) (noting that the high school student "refuses to participate in the Pledge of Allegiance"); Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 287 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971) (discussing that the student was suspended for refusing to stand during the Pledge); Frain v. Baron, 307 F. Supp. 27, 29 (E.D.N.Y. 1969) (noting that the junior high and high schools students who brought that case refused to stand during the Pledge as required by New York City school policy).

[285] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1259, 1262 (11th Cir. 2004) (citing ALA. CODE §§ 16-6B2(h), 16-43-5).

imbalance in schools which is a special consideration supporting the notion that there should be strong First Amendment protection against compelled recitations that take place in a school setting.

In *Holloman v. Harland*, an Alabama high school student remained silent and raised his fist in the air during the Pledge of Allegiance, apparently in protest after his teacher reprimanded a classmate on the previous day for not reciting the Pledge.[286] Holloman, the student, was chastised in front of the class and sent to the principal's office where he was told that he would not be given his diploma until he spent three days in detention. The incident happened late in the school year, however, so there was not enough time for Holloman to complete his punishment prior to graduation. The principal "consequently offered Holloman the opportunity to receive a paddling instead. Holloman agreed and, with [the teacher] watching, was paddled by [the principal]."[287] The federal district court granted summary judgment to the principal and teacher in *Holloman*, but the U.S. Court of Appeals for the Eleventh Circuit reversed that holding in part because it found that Holloman's First Amendment rights were violated.[288]

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[286] *Holloman*, 370 F.3d at 1260-61. The other student who was previously reprimanded for not participating was originally listed as a plaintiff in the suit, but was later dropped from the suit in an amended complaint. *Id.* at 1262. The teacher apparently took exception to the fact that he remained silent during the Pledge, especially because he was the recipient of a U.S. Air Force Academy scholarship. *Id.* at 1260. The teacher ordered the student to issue an apology to the class and also threatened to report him to his Air Force Academy recruiter and the Congressman who recommended him for the Academy. *Id.* After that, the teacher went to a physics class and declared that anyone who "'refused to say the pledge or committed similar action would be punished.'" *Id.* (quoting the teacher who demanded an apology and threatened to report the student).

[287] *Id.* at 1261.

[288] *See id.* at 1260, 1294-95. The district court granted the defendants' motion for summary judgment based on a finding that they had qualified immunity. *Id.* at 1260. The Eleventh Circuit reversed, noting that its findings on the constitutional claims in the case were binding and stating that "Holloman has successfully articulated claims against the School Board for violations of his Speech Clause right to be free from compelled speech." *Id.* at 1264 n.7, 1294-95.

The Eleventh Circuit noted that the First Amendment protects against government compulsion of speech and that this right "unquestionably exist[s] in public schools."[289] Citing *Barnette*, the court noted that several assertions supported the claim that Holloman was disciplined for remaining silent during the Pledge: (1) the incident the day before in which a classmate was threatened for non-participation; (2) the teacher's deposition in the case which reflected that she was "deeply offended by the notion of Americans not wanting to salute the flag"; (3) the teacher's threat that students who refused to participate would be punished; and (4) Holloman's account of the incident, including his claim that he was told that he was being punished for refusing the recite the Pledge.[290] The Eleventh Circuit found that if these facts were proven at trial, they would establish as a matter of law that the school and its officials violated Holloman's First Amendment right against government compulsion of speech.[291]

Citing *Barnette*, the court found that a school may not compel a student to recite the Pledge and, thus, "any 'reasonable person would have known' that disciplining Holloman for refusing to recite the pledge impermissibly chills his First Amendment rights."[292] The Eleventh Circuit reasoned that punishing Holloman had a potential chilling effect upon other students, especially since Holloman was reprimanded and punished by authority figures "whose words carry a presumption of legitimacy."[293] The court further noted that the chilling effect of the punishment may be heightened in a

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[289] *Id.* at 1264.

[290] *Id.* at 1268.

[291] *Id.* at 1268-69.

[292] *Id.* (quoting Thomas v. Roberts, 261 F.3d 1160, 1170 (11th Cir. 2001)).

[293] *Id.* at 1269.

school setting "'where . . . the risk of compulsion is especially high'" and, therefore, pressuring student conformity "may not be used to deter, even if 'subtl[y] or indirect[ly],' the exercise of constitutional rights."[294] Unlike the approach of other circuits,[295] the Eleventh Circuit rested its holding on the compelled speech issue, at least in part, on the notion that *Barnette* also protects against the potential effect that the compulsion and subsequent punishment for noncompliance may have on students *other than the speaker*.[296]

Conclusions on the Constitutionality of Compelled Recitations

Four key points emerged from this analysis of the literature and cases addressing compelled recitations. The first key point is that there is a wide range of justifications for strong First Amendment protections against compelled recitations. While courts and scholars presented several reasons why government compulsion of recitations violates the First Amendment, there was not one universal justification that emerged. The second key point is the recognition that compelled recitations include situations beyond those where students are required to actually speak. The third key point is the acknowledgment of special considerations that support recognizing strong First Amendment protection against compelled recitations when the compulsion takes place in a school setting. The fourth key point is the difference between situations where *Barnette* controls and situations where *Tinker* controls. It is important to note that regardless of the approach adopted by the courts, the students prevailed over the schools in every post-*Barnette* case

[294] *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

[295] *See supra* notes 251-80 (discussing the distinction other courts adopted in applying *Barnette* and *Tinker*).

[296] *See Holloman*, 370 F.3d at 1269.

discussed in this chapter.[297] This section will discuss, in turn, the findings related to each key point.

The first key point derived from this discussion is the wide range of justifications for strong First Amendment protections against compelled recitations. Both courts and scholars reasoned that compelled recitations violate the First Amendment, but they presented a wide range of justifications for that conclusion. As Blasi and Shriffin noted, one major problem with compelled recitations is that "[t]hese methods constitute efforts forcible to inculcate and to instill rather than to persuade through direct, transparent arguments, reasons, or even direct, transparent emotional appeals."[298] The scholars further noted that one particular issue unique to compelled recitations is self-exposure through non-participation by the speaker.[299] The Supreme Court in *Barnette*, on the other hand, seemed persuaded by the notion that the Framers understood the First Amendment to protect against the government compelling speech that reflects "adherence to government as presently organized."[300] The Eleventh Circuit in *Holloman* expressed concern that compelling recitations and subsequent punishments for refusal to comply with these compelled recitation policies would have the effect of chilling the speech of other students, not just the speech of the speaker.[301] Other courts appeared to apply a speaker-based approach, finding that schools could not compel recitations because the

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[297] *Gobitis* was the only case where the school won and was subsequently overturned by *Barnette*. *See* Barnette v. W. Va. Bd. of Educ., 319 U.S 624, 642 (1943).

[298] Blasi & Shiffrin, *supra* note 92, at 458.

[299] *Id.* at 456.

[300] *See Barnette*, 319 U.S. at 633; *supra* note 231-32 and accompanying text.

[301] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1269 (11th Cir. 2004).

compulsion violates the speaker's right to free expression.[302] While one pervasive justification does not arise from the scholarly discussion and the courts' treatment of compelled recitations, it generally appears that government compulsion of recitations seems at odds with the First Amendment because it disregards the true beliefs of the speaker, forces dissenters to participate or expose their thoughts, and may have the effect of chilling the speech of others who witness the punishment of peers for noncompliance.

The second key point derived from this discussion is recognition that compelled recitations include situations beyond those where students are required to actually speak. The analysis of the compelled recitations cases demonstrated the courts' acceptance that compulsion of both words and actions are protected against by the First Amendment.[303] As the Third Circuit explained in *Lipp*, precedent makes clear that the state cannot compel "a student to engage in what amounts to implicit expression," like requiring a student to stand during the Pledge.[304] Thus, First Amendment protection extends to guard against the government compulsion of actions that constitute "implicit expression" as well as government compulsion of actual speech.

The third key point derived from this discussion is the special considerations that support recognizing strong First Amendment protection against compelled recitations when the compulsion takes place in a school setting. Through this analysis, it appears

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[302] *See, e.g.,* Goetz v. Ansell, 477 F.2d 636, 638 (2d Cir. 1973) (noting that requiring a student to stand during the Pledge "is an act that cannot be compelled over [the student's] deeply held convictions"); Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 296 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971) (finding that standing during the Pledge reflects "acceptance of and respect for all that [] our flag" represents): Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963) (noting that "governmental authority may not directly coerce the unwilling expression of any belief").

[303] *See* Lipp v. Morris, 579 F.2d 834, 836 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636, 637-38 (2d Cir. 1973); *Banks*, 314 F. Supp. at 295-96; Frain v. Baron, 307 F. Supp. 27, 30-31 (E.D.N.Y. 1969); Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963).

[304] *Lipp*, 579 F.2d at 836.

that the First Amendment protection against compelled recitations is extremely strong even in a school setting. In fact, the dicta in some of the cases seems to indicate that the First Amendment should be *more* protective in the school setting than in a different setting. As the *Barnette* Court noted, there should be "scrupulous protection of Constitutional freedoms of the individual" in schools because of their role in educating the citizenry.[305] Blasi and Shiffrin also argued that the *Barnette* holding rested on the notion that compelled recitations are particularly troubling in a school setting:

> [The holding in *Barnette*] derives from the assumption that a person's youth and schooling are the primary time and place at which the moral, civic, and intellectual virtues, virtues essential to the functioning of a democratic society are developed. Sincerity, authenticity, tolerance, responsibility for one's beliefs, and intellectual independence cannot emerge and flourish in a context of inculcation and are not easily or reliably acquired later in life. Hence the importance of the developmental years to the realization of a culture that sustains and celebrates the freedom of speech.[306]

The *Holloman* court also noted that protecting against government compulsion in student speech was particularly important because of the power imbalance between students and teachers, which may lead to a chilling effect on other students' speech.[307] Furthermore, as Shriffin recognized, some of the issues raised by compulsion of speech are particularly troubling in a school setting because they undermine the students' critical thinking skills, the very thing that schools are designed to teach.[308] All of these rationales further validate the trend of the courts' willingness to find government compulsion of

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[305] *Barnette*, 319 U.S. at 637.

[306] Blasi & Shiffrin, *supra* note 92, at 465.

[307] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1269 (11th Cir. 2004).

[308] Shiffrin, *supra* note 63, at 884.

student speech unconstitutional, starting with the Supreme Court's holding in *Barnette*[309] and continuing on through the Eleventh Circuit's holding in *Holloman*.[310]

The fourth key point derived from this discussion is the difference between situations where *Barnette* controls and situations where *Tinker* controls. In the view of the U.S. District Court for the Eastern District of New York[311] and the U.S. District Court for the Southern District of Florida,[312] the constitutionality of the government's compulsion of a recitation should be assessed under *Barnette*. In situations where a court is assessing the constitutionality of the action taken by the student in lieu of participating in the Pledge, such as in *Banks* where the student refused to stand,[313] courts found *Tinker* should control.[314] While the courts do not appear to adopt a particular test from *Barnette*, when *Barnette* was found to be controlling, the school policy was always found by the court to violate the First Amendment.[315] When *Tinker* was found to control, the student's actions were found to be protected by the First Amendment so long as the actions "d[id] not materially infringe the rights of other students or disrupt school activities."[316]

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[309] *See generally Barnette*, 319 U.S. 624.

[310] *See generally Holloman*, 370 F.3d 1252.

[311] *See* Frain v. Baron, 307 F. Supp. 27, 30 (E.D.N.Y. 1969).

[312] *See* Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 295 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971).

[313] *Id.*

[314] *Id.*; *Frain*, 307 F. Supp. at 32.

[315] *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004); Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); *Banks*, 314 F. Supp. at 295-97; Sheldon v. Fannin, 221 F. Supp. 766, 774-65 (D. Ariz. 1963).

[316] *Frain*, 307 F. Supp. at 32. *See also id.* at 31-33 (finding that *Tinker* was controlling and that the student's decision to remain quietly in the classroom during the Pledge was protected by the First Amendment); *Banks*, 314 F. Supp. at 295-96 (holding that the student's refusal to stand during the Pledge was protected under *Tinker*).

From this line of reasoning, it may be distilled that government compulsion of recitations is unconstitutional regardless of the state's interest. This position is supported by the Supreme Court's holding in *Barnette*, where the Court noted that it could not think of any exceptions to the rule in that case.[317] Furthermore, the government interest at stake in *Barnette*, promoting national unity,[318] was the same interest that the Court characterized as "an interest inferior to none in the hierarchy of legal values" just three years earlier in *Gobitis*.[319] Despite the importance of this government interest, the Court still found that the individual rights guarded by the First Amendment protection were stronger. Thus, while the government may seek to advance important interests through compelled recitations, it appears, at least under *Barnette* and the subsequent lower court opinions applying *Barnette*, that such government interests do not override a student's First Amendment rights against compelled recitations.

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[317] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The *Barnette* Court explained:

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

Id.

[318] *Id.* at 640.

[319] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940).

CHAPTER III

COMPELLED SPEECH FOR MANDATORY EDUCATION EFFORTS

Compelled speech for mandatory education efforts is speech that is compelled as part of in-class exercises or related homework assignments. There have only been two cases that addressed the constitutionality of the government compulsion of speech as part of mandatory education efforts. In both cases, the courts applied the *Hazelwood* standard, derived from a U.S. Supreme Court case dealing with the censorship of school-sponsored student speech, to the compelled speech; the schools prevailed in both cases. Furthermore, the courts purported that the *Hazelwood* standard, which is extremely deferential to schools, should apply to all compelled speech that is school sponsored; school sponsored speech includes speech that occurs outside of the classroom or related homework assignments. In contrast to the courts' approach, student authors have argued that courts should not apply tests used to determine the constitutionality of the censorship of speech to the compulsion of speech.

First, this chapter defines what types of compelled speech fit into this category by discussing the relevant literature and illustrative cases. Second, this chapter discusses the two cases that have addressed the constitutionality of compelled student speech for mandatory education efforts. Finally, this chapter concludes by summarizing the findings and highlighting the differences between the approach adopted by the courts and those proposed by student authors.

Definition of Compelled Speech for Mandatory Education Efforts

This section seeks to define compelled speech for mandatory education efforts by examining the literature and cases. Scholars have argued that compelled speech for mandatory education efforts is afforded less First Amendment protection than other types of speech because schools must be allowed to compel speech in some situations in order to teach students. What distinguishes this category of compelled speech from others is the purpose of the compulsion and the context in which the compulsion arises. The purpose of compelled speech for mandatory education efforts is to teach students how to think critically and arrive at their own conclusions about a particular issue. The context in which compelled speech for mandatory education efforts arises is either curricular in-class exercises or homework assigned as part of the curriculum. The following section discusses the pertinent literature and cases that helped to develop this definition of compelled speech for mandatory education efforts.

Compelled speech as part of mandatory education efforts is defined as compulsion of speech and expressive activities as part of "classroom exercises designed to teach" students.[320] This type of compelled speech is different from compelled recitations because the compulsion as part of the educational process is intended to engage students' minds and allow them to arrive at their own conclusions.[321] Because of this respect for a student's development of his or her own beliefs, Shiffrin concluded that it is "constitutionally permissible to require children to be schooled and to subject them to direct efforts to influence their mental content, even in light of their resistance and even

[320] Sullivan, *supra* note 13, at 559.

[321] Shiffrin, *supra* note 63, at 882.

where mandatory education of adults would be constitutionally suspect."[322] Compelled speech for mandatory education efforts is considered a distinct category with lower First Amendment protection because schools must be given some leeway in order to fulfill their mission of educating young people.

There are two factors that should be examined to identify compelled speech for mandatory education efforts: the purpose behind the compulsion and context in which the speech is compelled. Shiffrin and Blasi distinguished the purpose behind the compulsion of speech as part of mandatory education efforts from the compulsion of recitations as follows:

> [E]ducational efforts keyed to persuasion go further and show more nuanced attention to the beliefs of students. A teacher who employs the pedagogy of persuasion engages with the questions and doubts of her students. Such a teacher actively nurtures the evaluative and deliberative capacities of students to help them arrive at conclusions that are truly their own. Such interactions show respect for the judgments and attitudes of students, in contrast to the indifference manifest in recitation requirements.[323]

Compelled speech for mandatory education efforts, then, must be designed to engage the student in order to allow him or her to develop his or her own opinions about a specific topic.

Consideration of the context in which the compulsion of speech arises is also relevant for determining whether the speech is part of a mandatory education effort. Compulsion of speech as part of a mandatory education effort is limited to speech that is compelled either as part of a classroom exercise or homework assignment.[324] The U.S.

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[322] *Id.*

[323] Blasi & Shiffrin, supra note 92, at 458-59.

[324] The author of this thesis previously noted that compelled speech for mandatory education efforts includes speech during "classroom exercises." Sullivan, *supra* note 13, at 559. The stricter definition

Court of Appeals for the Ninth Circuit offered two examples of this category of speech in dicta, "[A] college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write 'opinions' showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question."[325]

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offered here is based on the author's research during the course of this thesis. The decision to incorporate these limitations on the purpose and context of this category of compelled student speech is in response to the Tenth Circuit's discussion in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2005), and is explained later in this chapter. *See infra* pp. 78-81. Compelled speech designed to educate and engage a student outside of a school setting is not included in this category. For example, in *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010), a district attorney sought to require high school students who were caught participating in "sexting" to attend an "educational program." *Id.* at 143-44. The program involved five sessions:

> In the first session, students are assigned to write "a report explaining why you are here," "[w]hat you did," "[w]hy it was wrong," "[d]id you create a victim? If so, who?," and how their actions "affect[ed] the victim[,] [t]he school[, and] the community." The first two sessions focus on sexual violence, and the third on sexual harassment. The fourth session is titled "Gender identity-Gender strengths," and the fifth "Self Concept," which includes a "Gender Advantages and Disadvantages" exercise.

Id. at 144 (alterations in original). This case falls outside the discussion of compelled speech for mandatory education efforts because the "educational program" was designed by the district attorney's office in "consultation with the Victims Resource Center and the Juvenile Probation Department," not the school, and was offered as part of a plea agreement in lieu of filing charges against the students. *Id.* at 143-44. Thus, the case is discussed more fully in the following chapter on compelled speech as a form of punishment. *See* discussion *infra* Chapter IV.

[325] Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002). *Brown* did not involve compelled speech, but rather dealt with the constitutionality of a public university's refusal to approve a student's thesis unless he removed the "acknowledgements" section of the thesis. *Id.* at 941. The relevant part of the thesis as described by the court follows:

> "I would like to offer special *Fuck You's* to the following degenerates for being an ever-present hindrance during my graduate career . . . ." It then identified the Dean and staff of the UCSB graduate school, the managers of Davidson Library, former California Governor Wilson, the Regents of the University of California, and "Science" as having been particularly obstructive to Plaintiff's progress toward his graduate degree.

Id. at 943 (quoting the "Disacknowledgements" section of Brown's thesis). Although this case dealt with the constitutionality of the censorship of this speech, the Ninth Circuit nevertheless touched on the ability of schools to compel speech for certain purposes. *Id.* at 953.

Other cases that have addressed the constitutionality of a teacher's approval of assignment topics fall outside of compelled speech for mandatory education efforts because they deal with censorship rather than compulsion. For instance, in *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995), one teacher refused to allow a student to write a research paper on Jesus Christ for several reasons, including the fact that the student already knew about the topic and, thus, would not have to conduct significant research in order to complete the assignment. *Id.* at 154. This case did not involve compelled speech, however, because each student was allowed to pick his or her topic as long as it was "'interesting, researchable and decent.'" *Id.* at 153 (quoting the teacher's guidelines for approving a topic).

The facts of *Axson-Flynn v. Johnson*,[326] a recent U.S. Court of Appeals for the Tenth Circuit case, illustrate the category of compelled speech for mandatory education efforts. In *Axson-Flynn*, a public university theater major "refused to say the word 'fuck' or take God's name in vain during classroom exercises" because she believed that doing so conflicted with her religious beliefs as a member of the Church of Latter Day Saints.[327] During acting exercises, Axson-Flynn began changing scripts when performing them to remove the objectionable language and, after some resistance from her professor, was permitted to do so for her first semester of school.[328] After her first semester, Axson-Flynn was told by administrators of her program that she would have to either perform the scripts as written or resign from the program.[329] The university argued that requiring students to perform the scripts verbatim was important because:

> (1) it teaches students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue; (2) it teaches students to preserve the integrity of the author's work; and (3) it measures true acting skills to be able convincingly to portray an offensive part.[330]

The student chose to resign from the program and filed suit against the university, alleging that her First Amendment rights were violated.[331] This case exemplifies scenarios in which speech is compelled as part of a mandatory education effort. While scholars have argued that this type of compelled speech garners less First Amendment

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[326] 356 F.3d 1277 (10th Cir. 2004).

[327] *Id.* at 1280.

[328] *Id.* at 1282.

[329] *Id.*

[330] *Id.* at 1291.

[331] *Id.* at 1282-83.

protection,[332] courts have only rarely addressed the issue and have never addressed it in a high school setting.

Courts' Treatment of the Constitutionality of Compelled Speech for Mandatory Education Efforts

This section reviews the two court opinions that have addressed the constitutionality of compelled speech for mandatory educations efforts. In both cases, the courts found that the compelled speech was school sponsored and, thus, the courts decided to apply the *Hazelwood* standard to determine whether the schools violated the First Amendment. Applying the *Hazelwood* standard, which is extremely deferential to school officials, both courts found that the schools' compulsion of speech did not violate the First Amendment.[333] The courts' determination that *Hazelwood* was controlling in these cases is interesting for three reasons. First, neither court fully explained why it decided to apply a test developed by the Supreme Court in a student speech censorship case to a compelled speech case. Second, the courts purported that the *Hazelwood* standard applies to all government compulsion of "school-sponsored speech" and that category includes far more speech than compelled speech for mandatory education efforts as defined earlier in this chapter.[334] Finally, it should be noted that both of these cases deal with compelled speech in a university rather than high school setting. The fact that

[332] *See* Shiffrin, *supra* note 63, at 882. *Cf.* Blasi & Shiffrin, *supra* note 92, at 457-59, 461 (reviewing the Court's decision in *Barnette* and contrasting the constitutional issues raised by the compelled recitation in that case with those raised by compelled speech for mandatory education efforts).

[333] *See generally* Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2005); Head v. Bd. of Trs. of Cal. State Univ., 315 F. App'x 7 (9th Cir. 2008). One case, *Marinello v. Bushby*, No. CIV. A.1:95CV167-D-D, 1996 WL 676410 (N.D. Miss. Nov. 1, 1996), *aff'd*, 163 F.3d 1356 (5th Cir. 1998), deals with compelled speech both as a mandatory education effort *and* a punishment. This case is discussed in the next chapter. *See infra* pp. 95-97.

[334] For a discussion of the broad range of speech that has been deemed "school-sponsored" by courts, see *infra* pp. 86-87.

courts have applied high school student speech precedents in a college setting has been criticized since it has generally been recognized that college students receive a higher level of First Amendment protection than high school students.[335] While the debate over whether *Hazelwood* and other high school student speech precedents should apply to college students is outside the scope of this thesis, the two courts' treatment of the compelled speech for mandatory education efforts in the college setting is still relevant since college students have at least the same, if not a higher, level of First Amendment protection as high school students.[336] The following section discusses the approaches adopted by the Tenth Circuit in *Axson-Flynn*[337] and the U.S. District Court for the

[335] *See, e.g.,* Healy v. James, 408 U.S. 169, 180 (1972) (finding that college students, unlike high school students, are entitled to full First Amendment protection). *See generally, e.g.,* Edward L. Carter et al., *Applying* Hazelwood *to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV 157 (2006) (presenting a study of thirteen federal appellate court cases that applied the *Hazelwood* standard to college students and finding that there is much confusion about when and whether this standard should apply to higher education students); Michael O. Finnigan, Jr., Comment, *Extra! Extra! Read All About It! Censorship at State Universities:* Hosty v. Carter, 74 U. CIN. L. REV. 1477 (2006) (criticizing a Seventh Circuit case where the court applied the *Hazelwood* standard to college students); Chris Sanders, Comment, *Censorship 101: Anti*-Hazelwood *Laws and Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV 159 (2006) (noting that courts have applied *Hazelwood* to assess the constitutionality of censorship of college students' speech and arguing that states should enact speech-protective statutes for college students); Jeff Sklar, Note, *The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of* Hazelwood*'s Application to Colleges*, 80 S. CAL. L. REV. 614 (2007) (arguing that the application of the *Hazelwood* standard to college students is acceptable, but asserting that courts should be more restrictive in determining what constitutes a "legitimate" pedagogical concern in a college setting rather than in a high school setting); Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173 (2003) (arguing that the *Tinker* "material disruption test" should apply in colleges but not the *Hazelwood* standard that recognizes limited First Amendment protection for school-sponsored speech). *But see generally* Christopher N. LaVigne, Note, Hazelwood v. Kuhlmeier *and the University: Why the High School Standard is Here to Stay*, 35 FORDHAM URB. L.J. 1191 (2008) (arguing that courts' application of *Hazelwood* to college students is consistent with the trend of courts recognizing the power of college officials to regulate speech).

[336] *See supra* notes 62, 185, 335 and accompanying text. The Tenth Circuit in *Axson-Flynn* noted that "[a]ge, maturity, and sophistication level of the students" was considered when applying the test in a university setting. *Axson-Flynn*, 356 F.3d at 1289.

[337] *Axson-Flynn*, 356 F.3d 1277.

Northern District of California in *Head v. Board of Trustees of California State University*.[338]

The Tenth Circuit in *Axson-Flynn* presented a detailed analysis of the compelled speech claim raised by the student who challenged the university's requirement that she perform her assigned scripts verbatim.[339] The court started its analysis by finding that *Barnette* and *Tinker* were relevant because they supported the notion that compelled student speech was protected against by the First Amendment.[340] The Tenth Circuit, however, found that the Court's holding in *Hazelwood*, a student speech censorship case, was controlling, because the compelled speech in *Axson-Flynn* was "school-sponsored" just like the censored speech in *Hazelwood*.[341] The court found that compelling Axson-Flynn to perform the scripts was school-sponsored speech because it was "speech that a school 'affirmatively . . . promotes' as opposed to speech that it 'tolerates.'"[342] The Tenth Circuit, quoting *Hazelwood*, defined school-sponsored speech as all "expressive activities" that are related to the school's curriculum, including those activities that occur outside of the classroom, "'so long as they are supervised by faculty members and

[338] No. C 05-05328 WHA, 2006 WL 2355209 (N.D. Cal. Aug. 14, 2006), *aff'd*, 315 F. App'x 7 (9th Cir. 2008).

[339] *See generally Axson-Flynn*, 356 F.3d at 1283-93.

[340] *Id.* at 1283-84.

[341] *Id.* at 1285. The Tenth Circuit found that there were three types of school speech: (1) speech that "'happens to occur on the school premises'" like in *Tinker*; (2) "government speech" that is delivered by a school official; and (3) "school-sponsored speech" like that in *Hazelwood*. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1980)).

[342] *Id.* (quoting *Hazelwood*, 484 U.S. at 270-71) (alteration in original).

designed to impart particular knowledge or skills to student participants and audiences.'"[343]

The *Axson-Flynn* court reasoned that the government has more latitude than it would with adults to limit students' speech and "[n]owhere is this more true than in the context of a school's right to determine what to teach and how to teach in its classrooms."[344] The court then determined that under *Hazelwood*, "school officials may place restrictions on school-sponsored speech 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"[345] The Tenth Circuit then reasoned that any compulsion of student speech that was "'related to learning'" did not violate the First Amendment.[346]

In its discussion of the compelled speech at issue in *Axson-Flynn*, the Tenth Circuit rejected the lower court's finding that the First Amendment only protects against compulsion that requires the speaker to "'espouse an ideological point of view on behalf of the State.'"[347] The Tenth Circuit found that the First Amendment protects against government compulsion of all types of speech because the "constitutional harm," forcing one to speak instead of allowing him or her to remain silent, is the same regardless of the content of the compelled speech.[348] While the Tenth Circuit discussed the First

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[343] *Id.* at 1286 (quoting *Hazelwood*, 484 U.S. at 271).

[344] *Id.* at 1284 (citing *Hazelwood*, 484 U.S. at 266 (1980)).

[345] *Id.* at 1286 (quoting *Hazelwood*, 484 U.S. at 273).

[346] *Id.* (quoting Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)).

[347] *Id.* at 1284 n.4 (quoting Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1335 (D. Utah 2001), *rev'd*, *Axson-Flynn*, 356 F.3d 1277).

[348] *Id.* The Tenth Circuit also noted the difficulty in developing a standard to determine whether speech was ideological in nature. *Id.*

Amendment protection against compelled speech, it failed to explain why it was proper to apply a test from a student speech censorship case to a student speech compulsion case.[349] The only explanation was offered in a footnote, where the court simply noted, "For First Amendment purposes, it is irrelevant whether the speech at issue here was restricted or compelled."[350]

The Tenth Circuit moved forward with its analysis, finding that the speech compelled in *Axson-Flynn* was undeniably school-sponsored because it was speech required for an in-class exercise as part of the official school curriculum.[351] The court then found that compulsion was "related to learning" because it was designed to train the students to become professional actors, which often would require performance of scripts as written.[352] In its application of the *Hazelwood* standard, the Tenth Circuit was deferential to schools, noting that "[t]he school's methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be 'reasonably related' to pedagogical concerns."[353]

The *Axson-Flynn* court did acknowledge that there was one important exception to its application of the *Hazelwood* standard to the censorship and compulsion of school-

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[349] *See id.* at 1290 n.9.

[350] *Id.* The court cited the Supreme Court's decision in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), to support this statement, but also noted in a parenthetical that the *Riley* Court explained that there are some differences between compelled speech and censorship. *Id.*

[351] *Id.* at 1286. The court cited opinions from other circuits, all dealing with the censorship of speech, to support this notion. *Id.* at 1286-87 (citing Brown v. Li, 308 F.3d 939 (9th Cir. 2002); Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995); Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991)).

[352] *Id.* at 1291. The court explained that "[r]equiring an acting student, in the context of a classroom exercise, to speak the words of a script as written is no different than requiring that a law or history student argue a position with which he disagrees." *Id.* at 1292-93.

[353] *Id.* at 1292. The court noted that it was important to be deferential to school officials in cases involving school-sponsored speech, otherwise it would "subject[] the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day." *Id.*

sponsored speech. Axson-Flynn argued that the school only required her to perform the scripts verbatim as a veiled form of discrimination because she was Mormon.[354] The Tenth Circuit found that while the *Hazelwood* standard requires courts to be deferential to schools, the court should also inquire whether the government's interest in the compulsion or censorship is simply a pretext for discrimination and, thus, unconstitutional.[355] The court explained, "Although we do not second-guess the *pedagogical* wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was *pretextual*."[356] Under the Tenth Circuit's approach, courts should apply the *Hazelwood* standard only after they determine that the government's stated goal for the compulsion or censorship is not a "sham pretext for an impermissible ulterior motive."[357] The *Axson-Flynn* court then remanded the case so that the district court could determine whether the school's stated purpose for compelling the student to perform the scripts as written was a legitimate pedagogical objective or a pretext for religious discrimination.[358]

The Tenth Circuit's approach to assessing the constitutionality of compelled student speech for mandatory education efforts was adopted by the U.S. District Court for

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[354] *Id.* at 1293. Axson-Flynn pointed to several incidents where the school administrators and her professor discussed with her whether her faith precluded her for performing the scripts as they were written. In particular, Axson-Flynn was told to "speak with other 'good Mormon girls'" and was told that "she could 'still be a good Mormon'" if she complied with the school's requirement. *Id.*

[355] *Id.*

[356] *Id.* at 1292-93.

[357] *Id.* at 1293.

[358] *Id.*

the Northern District of California. In *Head*,[359] a student enrolled in a secondary education Teacher Credential Program brought a claim in federal court against the university.[360] Head argued that the university violated his First Amendment rights against compelled speech by "requiring him to take a course on 'multiculturalism' where he was forced to adopt 'predetermined radical leftist or otherwise socially controversial viewpoints' that are counter to his conservative positions."[361]

The district court noted that no Ninth Circuit courts had addressed the constitutionality of compelled student speech in a university setting and then, citing *Axson-Flynn*, adopted the view that *Hazelwood* should apply.[362] The district court found that the school's compulsion of speech, namely the allegation that Head was forced "to espouse liberal views,"[363] was reasonably related to a legitimate pedagogical concern and, thus, the court dismissed the case.[364] The district court cited several reasons why it was important for universities to train secondary education teachers in the importance of diversity and multiculturalism, like preparing teachers to effectively communicate with

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[359] No. C 05-05328 WHA, 2006 WL 2355209 (N.D. Cal. Aug. 14, 2006), *aff'd*, 315 F. App'x 7 (9th Cir. 2008).

[360] Head v. Bd. of Trs. of Cal. State Univ., No. C 05-05328 WHA, 2006 WL 2355209 (N.D. Cal. Aug. 14, 2006), *aff'd*, 315 F. App'x 7 (9th Cir. 2008).

[361] *Head*, 315 F. App'x at 8.

[362] *Head*, 2006 WL 2355209, at *6. The district court explained:

> Although our own circuit has not spoken with one voice on this issue, the Tenth Circuit's formulation seems entirely correct to this Court. For example, if a student takes an algebra course, the student cannot ace a quiz by offering biblical quotes. Conversely, if he takes a course on the Bible, he cannot answer exam questions by reference to mathematics. The student must learn the premises of the course and how to apply them.

Id.

[363] *Id.* at *1. Head pointed to the course's syllabus that stated students would learn reasons why it was important to "'express sensitivity to . . . diversity.'" *Id.* (quoting the course syllabus).

[364] *Id.* at *7.

children from a variety of backgrounds.[365] Finally, the district court found that Head was not really compelled to say anything, since it appeared that Head's primary objection was to the fact that his teacher reacted negatively to his comments.[366]

The Ninth Circuit heard the appeal in *Head* and affirmed the district court's opinion, but never expressly accepted or rejected the application of the *Hazelwood* standard in that case.[367] Instead, the Ninth Circuit simply quoted the district court opinion and agreed that a "'student must learn the premises of the course and how to apply them. Learning the course material in no way comprises one's personal right to believe as he wishes.'"[368] The Ninth Circuit also ruled that Head could not amend his complaint because there was no way that he could state a "colorable claim" against the university.[369]

Conclusions on the Constitutionality of Compelled Speech for Mandatory Education Efforts

The category of compelled speech for mandatory education efforts consists of speech compelled as part of curricular in-class exercises or homework assignments. An analysis of the two cases addressing the constitutionality of compelled speech for mandatory education efforts shows that both federal courts found *Hazelwood* controlling. Two student authors have asserted that the *Hazelwood* standard should not apply to cases dealing with the school compulsion of speech because compulsion is different from

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[365] *Id.*

[366] *Id.*

[367] *See generally Head*, 315 F. App'x 7 (9th Cir. 2008).

[368] *Id.* at 8 (quoting *Head*, 2006 WL 2355209, at *6).

[369] *Id.*

censorship and raises different First Amendment concerns. The courts' application of the *Hazelwood* standard, which is extremely deferential to schools, may also be inappropriate because school-sponsored compelled speech includes expressive activities far outside of what is considered compelled speech for mandatory education efforts.

Axson-Flynn and *Head* are the only cases where courts have addressed the constitutionality of compelled speech for mandatory education efforts. The Tenth Circuit and the U.S. District Court for the Northern District of California accepted, without much explanation, that the *Hazelwood* standard, developed by the Supreme Court in a case involving the censorship of student speech, should apply.[370] Two student authors, including the author of this thesis, have questioned the prudence of the Tenth Circuit's decision to apply the *Hazelwood* standard in compelled student speech cases.[371] Brandon Pond argued that the broad deference granted to school officials through the *Hazelwood* standard is inappropriate in a compelled speech case.[372] He found that the motivations for government compulsion of speech could be more offensive than the motivations for government censorship of speech from a First Amendment perspective and, thus, should be afforded different tests.[373] Pond noted one such motivation was a school "attempting to actually mandate compliance with a particular viewpoint" through compelled speech.[374] Pond also noted that if the *Hazelwood* standard was applied to the facts of *Barnette*, the Court likely would have concluded that school officials could compel

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[370] *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2005); Head v. Bd. of Trs. of Cal. State Univ., No. C 05-05328 WHA, 2006 WL 2355209, at *6 (N.D. Cal. Aug. 14, 2006).

[371] *See generally* Pond, *supra* note 64, at 155-59; Sullivan, *supra* note 13, at 555-65.

[372] Pond, *supra* note 64, at 157-59.

[373] *Id.* at 156-57.

[374] *Id.* at 156.

students to recite the Pledge.[375] He also argued that the *Hazelwood* standard, at least as it was interpreted by the *Axson-Flynn* court, allows a school to compel any type of school-sponsored speech, as long as the compulsion is not completely arbitrary or a pretext for discrimination.[376]

The author of this thesis argued that instead of applying the *Hazelwood* standard to cases that involve compelled student speech for mandatory education efforts, like in *Axson-Flynn* and *Head*, courts should find the government compulsion of speech in those cases constitutional in light of the "special characteristics of the school environment."[377] This argument was supported by the fact that the Court has recognized a lower level First Amendment protection for high school student speakers than for other types of speakers, the notion that schools must be granted some deference to carry out their educational mission, and the idea that compulsion of speech for this purpose is designed to engage the students and help them develop critical thinking skills.[378]

In addition to student authors' questioning of the deference granted to school officials through the Tenth Circuits application of *Hazelwood*, application of that standard in compelled student speech cases is troubling for another reason. It appears that the Tenth Circuit's definition of what compelled speech is "school-sponsored" and, thus, governed by *Hazelwood*, is broader than the definition in this thesis of compelled speech for mandatory education efforts. The Tenth Circuit, borrowing language from

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[375] *Id.*

[376] *Id.* at 157.

[377] Sullivan, *supra* note 13, at 566, 569 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[378] *Id.* at 568.

Hazelwood, noted that "school-sponsored speech" includes any speech or expressive activity that "'may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart knowledge or skills to student participants and audiences.'"[379]

Scholars have found that lower courts since *Hazelwood* have found a broad range of activities to be school-sponsored. Emily Gold Waldman explained that "*Hazelwood* itself made clear that [the] category [of school-sponsored speech] should be construed broadly, encompassing not only classroom activities and official school-sponsored publications and productions but also any 'other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . .'"[380]

Indeed, it appears that courts quickly accepted that school-sponsored speech comes in many different forms. Rosemary Salomone, in 1992, just four years after *Hazelwood* was decided, found:

> Just about any aspect of school sponsored activity (newspapers, career days, elective courses) conducted anywhere in the school (classrooms, hallways) is considered to be . . . subject to the reasonableness standard of *Hazelwood*. Even extracurricular activities that appear to be associated with the school may fall under the rubric of "sponsorship," broadly defined. Schools teach the "lessons of civility" and school officials may impose sanctions for discourteous, rude, controversial, even politically sensitive and religious speech that appears to carry the imprimatur of the school.[381]

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[379] Axson-Flynn v. Johnson, 356 F.3d 1277, 1286 (10th Cir. 2004) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

[380] Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 73 (2008).

[381] Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 316 (1992).

Waldman studied the lower court cases that applied *Hazelwood* in the nineteen years after the opinion was handed down and also found that the courts deemed a broad range of speech to be school sponsored.[382] Waldman noted several examples of school-sponsored speech that occurred outside of classroom exercises and homework assignments, including: an elementary school student who was not allowed "to distribute, during a classroom holiday party, candy canes with religious messages"; and, "[s]everal Columbine High School students . . . [who were not allowed to hang] tiles that they had created as part of a tile painting project to commemorate the April 1999 Columbine massacre."[383]

Applying the far-reaching *Hazelwood* standard for "school-sponsored speech" to compelled speech cases and then using that standard to justify applying a more deferential standard is troubling because of the wide scope of cases it encompasses. A review of the tests used to determine compelled speech for mandatory education efforts and school-sponsored speech illustrates the difference. As previously noted, the proper inquiry for determining whether compelled speech fits into the mandatory education efforts category focuses on the purpose behind the compulsion and context in which the speech is compelled. Blasi and Shiffrin found that compelled speech for mandatory education efforts was less constitutionally troubling because in those situations "a teacher actively nurtures the evaluative and deliberative capacities of students to help them arrive

[382] *Id.* at 73-74.

[383] *Id.* at 74. Waldman noted that the trend of courts broadly applying *Hazelwood* has expanded in recent years as "numerous courts apparently [have] conclude[ed] that all speech that can be considered 'school sponsored' – student speech, teachers' classroom speech, outside-entity speech, and speech that reflects district-level decisions about textbooks and curricula – comes within *Hazelwood*'s reach." *Id.* at 74-75.

at conclusions that are truly their own."[384] Based on this finding, compelled speech for mandatory education efforts comprises only speech that was compelled in order to teach students through critical thinking. Furthermore, this category of compelled speech embodies only speech that was compelled during a classroom exercise or as part of a student's homework assignment. The category of school-sponsored speech, on the other hand, comprised anything that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," regardless of the purpose or context of the speech.[385]

While both *Axson-Flynn* and *Head* dealt with in-class exercises that fit into both definitions, cases exist where a court may deem compelled speech to be school-sponsored, but the speech would not fit into the category of compelled speech for mandatory education efforts. For example, in *Corder v. Lewis Palmer School District*,[386] another Tenth Circuit case discussed in the next chapter, a school compelled a high school student to issue an apology for mentioning Jesus Christ during her graduation speech.[387] The *Corder* court found that the apology was "school-sponsored" because the apology was related to the student's graduation speech, which was also school-sponsored, and the apology was sent out by the principal's office.[388] The court then applied the *Hazelwood* standard to determine the constitutionality of the government compulsion of

[384] Blasi & Shiffrin, *supra* note 92, at 458-59.

[385] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[386] 566 F.3d 1219 (10th Cir. 2009).

[387] *Id.* at 1222-23.

[388] *Id.* at 1231.

the speech.[389] Under the definition presented in this chapter, the apology would not constitute compelled speech for mandatory education efforts because the apology was not required as part of a curricular, in-class exercise nor was it part of a homework assignment. Thus, the framework presented by the Tenth Circuit in *Axson-Flynn* and adopted by the U.S. District Court for the Northern District of California in *Head*, would allow the deferential *Hazelwood* standard to apply to a broad spectrum of situations where the government compels student speech.

[389] *Id.* at 1231-32.

CHAPTER IV

COMPELLED SPEECH AS A FORM OF PUNISHMENT

Compelled speech as a form of punishment is speech that is compelled in order to discipline a student, including compelled apologies. A study of the relevant cases and literature reveals that there are currently three approaches to assessing the constitutionality of compelled speech as a form of punishment. In the first approach, compelled speech precedents, such as those from *West Virginia Board of Education v. Barnette*[390] and *Wooley v. Maynard*,[391] are applied; this approach is the most protective against compelled student speech. In the second approach, student speech censorship precedents, such as those from *Tinker v. Des Moines Independent Community School District*[392] and *Hazelwood School District v. Kuhlmeier*,[393] are applied; this approach is deferential to school officials. In the third approach, courts do not inquire into the constitutionality of the compelled student speech, appearing to accept that the compulsion is permissible; this approach is the most deferential to school officials because the court does not conduct an independent inquiry into the school's actions. This study also revealed that there is a fourth category of compelled student speech. In some cases,

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[390] 319 U.S. 624 (1943).

[391] 430 U.S. 705 (1977).

[392] 393 U.S. 503 (1969).

[393] 484 U.S. 260 (1988).

speech is compelled as a form of punishment and also as a part of mandatory education efforts.

First, this chapter defines what types of speech fit into the category of compelled speech as a form of punishment by discussing the relevant literature and illustrative cases. This section of the chapter also discusses the two cases that deal with the fourth, hybrid category of compelled student speech, meaning speech that was compelled in order to punish and educate. Second, this chapter discusses the seven cases that have addressed the issue of student speech compelled only as a form of punishment. Finally, this chapter concludes by summarizing the findings and highlighting the differences between the three approaches.

Definition of Compelled Speech as a Form of Punishment

Schools have used compelled speech as a means of disciplining students. For example, one school compelled an apology from a student who got into an altercation with a classmate and then talked back to her teacher.[394] In another case, a school required a student to issue an apology after the student posted comments on her blog about her school's principal.[395]

This section presents a complete definition of compelled speech as a form of punishment. This section then discusses two cases that demonstrate a fourth, hybrid category of compelled student speech. In this category, speech is compelled as a form of punishment and also as part of mandatory education efforts. Next, this section reviews an

[394] *See generally* Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

[395] *See generally* Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007) *aff'd,* 527 F.3d 41 (2d Cir. 2008).

argument presented by the author of this thesis that the constitutionality of compelled speech as a form of punishment should be assessed based on the standard used by the U.S. Supreme Court in *Wooley*.[396] Finally, this section discusses the possible issues with the after-the-fact punishment of speech. This discussion is relevant because several of the cases analyzed later in this chapter address the constitutionality of government-compelled apologies for prior speech.

Speech that a student is required to deliver as a consequence for his or her prior actions or speech is categorized as compelled speech as a form of punishment. The impetus for the school compelling speech in these situations is always the student doing something wrong. The most common example is when a student is forced to issue an apology for violating a school policy or otherwise behaving badly. There also is always a consequence for refusing to deliver the compelled speech, such as suspension, expulsion, or the school's refusal to award the student a diploma. Schools have asserted discipline[397] and the desire to teach students about socially acceptable behavior[398] as justifications for compelling speech as a form of punishment.

Several cases have dealt with the constitutionality of compelled apologies. For example, in *Corder v. Lewis Palmer High School*, a high school valedictorian delivered a

[396] 430 U.S. 705 (1977).

[397] *See, e.g.,* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1232 (10th Cir. 2009) (noting that discipline is a legitimate reason for compelling student speech); *Kicklighter*, 968 F. Supp. at 719 (finding that schools have the power to discipline students through compulsion of speech).

[398] *See, e.g.,* Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 771 (8th Cir. 2001) ("It is well within the parameters of school officials' authority to prohibit the public expression of vulgar and offensive comments and to teach civility and sensitivity in the expression of opinions."); *Kicklighter*, 968 F. Supp. at 719 (noting that "[t]he mission of any school is to impart varied lessons contributing to a student's well-rounded edification").

graduation speech where she urged the audience to get to know Jesus.[399] As part of her punishment for deviating from the version of her speech that had been previously approved by the high school's principal, the school refused to award Corder a diploma until she composed an e-mail apology to members of the school community.[400] In another case, *Wildman v. Marshalltown School District*, a school refused to let a high school athlete rejoin the basketball team unless she apologized to her teammate for sending them a letter in which she criticized the team's coach.[401]

Two cases demonstrate the fourth, hybrid category of compelled speech. In these cases, two courts addressed the constitutionality of compelled speech as a form of punishment; in both of these cases, however, the compelled speech did not take the form of a compelled apology, but rather the compelled speech was designed to educate the students. In *Miller v. Mitchell*,[402] the U.S. Court of Appeals for the Third Circuit addressed a compelled speech claim outside of a school setting. The case is still relevant, however, as an example of this fourth category of compelled student speech. In *Miller*, a district attorney designed a plea bargain for a group of high school students who were caught "sexting."[403] In exchange for not charging the students with "possession and distribution of child pornography," the district attorney notified parents that their children

[399] *Corder*, 566 F.3d at 1222.

[400] *Id.* at 1222-23.

[401] *Wildman*, 249 F.3d at 769-70.

[402] 598 F.3d 139 (3d Cir. 2010).

[403] *Id.* at 143-44. Sexting was defined as "'the practice of sending and posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.'" *Id.* at 143 (quoting a definition presented by the plaintiffs in the case).

could complete an education program.[404] A letter to parents of the described the program for the females as follows:

> In the first session, students are assigned to write "a report explaining why you are here," "[w]hat you did," "[w]hy it was wrong," "[d]id you create a victim? If so, who?," and how their actions "affect[ed] the victim[,] [t]he school[, and] the community." The first two sessions focus on sexual violence, and the third on sexual harassment. The fourth session is titled "Gender identity-Gender strengths," and the fifth "Self Concept," which includes a "Gender Advantages and Disadvantages" exercise.[405]

The children's parents objected to the district attorney's proposal, claiming that requiring the students to write about "how [their] actions were wrong" violated the students' First Amendment right against compelled speech.[406] The Third Circuit agreed that the students had a colorable compelled speech claim. After citing *Barnette*, the court explained that "[t]he compulsion here takes the form of the District Attorney's promise to prosecute [the student] if she does not satisfactorily complete the education program."[407] The court seemed persuaded by the fact that it was not proper for the juvenile criminal justice system to educate students about their proper place in society.[408] Noting the importance of the age of the plaintiffs, the court explained: "Minors are often more susceptible to external influences, and while this susceptibility may weigh in favor of certain educational or rehabilitative programs, it also cautions against allowing actors in the juvenile and criminal justice systems to venture outside the realm of their elected

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[404] *Id.* at 143-44.

[405] *Id.* at 144 (alterations in original) (quoting the district attorney's letter).

[406] *Id.* at 151-52.

[407] *Id.* at 152.

[408] *Id.*

authority."[409] The Third Circuit did not cite to any student speech cases other than *Barnette*, probably because this instance of compelled speech occurred outside of school. The facts of the case are still important because they demonstrate a different type of compelled speech as form of punishment, namely an education program.

In *Marinello v. Bushby*,[410] the U.S. District Court of the Northern District of Mississippi addressed the constitutionality of a punishment that also appeared designed to educate a student. In *Marinello*, a college student, pursuing the degree of Doctor of Veterinary Medicine, wrote a letter to appeal his grade in a course.[411] As part of the letter, the student noted that "'it has become quite clear to me that politics, cowardice, and corruptness have transcended the obligation of certain Food Animal faculty members to impartially educate those students involved in their rotation . . . .'"[412] The university's Academic Review and Professional Standards Select Committee investigated the student's conduct, citing the professional ethical code for veterinarians that provided "no one should 'belittle or injure the professional standing of another member of the profession or unnecessarily condemn the character of that person's professional act in such a manner as to be false or misleading.'"[413] The committee found that the student violated the ethical code, and the school ordered him to present a "written synopsis clearly indicating [his] understanding of these principles and how they apply to [his] conduct during the grade appeal process" before he would be promoted to the next step in

[409] *Id.*

[410] No. CIV. A.1:95CV167-D-D, 1996 WL 671410 (N.D. Miss. Nov. 1, 1996) *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

[411] *Id.* at *1-*2.

[412] *Id.* at *2.

[413] *Id.* at *4 (quoting a letter from the committee to the student).

his program.[414] The student refused to complete the writing requirement and challenged the constitutionality of the requirement, claiming that it violated his First Amendment protection against compelled speech.[415]

The U.S. District Court for the Northern District of Mississippi in *Marinello* held that the school did not violate the student's First Amendment rights, relying at least in part on the fact that he was a student enrolled in a professional degree program.[416] The court first found that the school's compulsion of the synopsis was outside the scope of compelled speech protected against in *Barnette* because the student was not required to "disseminate a particular political or ideological message."[417] The court also noted the importance of the fact that the compelled synopsis was not just a form of punishment but was also designed to educate the student.[418] The court found that because it was

> part of the educational mission of the [school] to instruct veterinary students as to the ethical standards governing the profession, the Dean's requirement in this case is more similar to an academic assignment. In such contexts, First Amendment rights yield more readily because of the First Amendment academic freedoms possessed by school officials themselves.[419]

The *Marinello* court further noted that schools must be allowed to compel speech in some situations so that they can assess whether the student has learned the information

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[414] *Id.* at *5 (quoting a letter from the dean of the college to the student).

[415] *Id.* at *6.

[416] *See id.* at *13-*15 (rejecting the student's compelled speech claim and discussing the importance of ethics in his desired future profession).

[417] *Id.* at *13.

[418] *Id.* at *13-*14.

[419] *Id.* at *14.

necessary for his or her academic program.[420] In this situation, the court found that the school's need to accomplish its educational mission trumped the student's First Amendment protection against compelled speech.[421] Even though *Marinello* deals with the constitutional rights of college students, it is still related to this discussion of compelled student speech because it demonstrates a situation where a school's mandate constitutes both compelled speech as a form of punishment and compelled speech for mandatory education efforts.

The author of this thesis argued in a 2010 law review note that compelled student speech as a form of punishment was distinct from compelled recitations and compelled speech for mandatory education efforts.[422] However, this author also found that compelled speech as a form of punishment is similar to compelled recitations in that both categories of compelled student speech fail to engage the student and allow him or her to arrive at his or her own conclusions.[423] This author argued that courts should adopt a balancing test to assess the constitutionality of compelled speech as a form of punishment based on the test for compelled speech proposed by the Supreme Court in *Wooley*.[424] Under the proposed test, "[t]he court must determine whether the compelled speech [as a form of punishment] raises First Amendment concerns, and then the court must balance those concerns, if any, against the government's interest. In order to pass constitutional

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[420] *Id.*

[421] *Id.*

[422] *See* Sullivan, *supra* note 13, at 559-60.

[423] *Id.*

[424] 430 U.S. 705 (1977).

muster, the government's interest must be 'sufficiently compelling' to outweigh any First Amendment concerns."[425]

Emily Gold Waldman argued that the First Amendment should strongly guard against all after-the-fact punishments of student speech, whether or not the punishment includes a compelled apology.[426] Waldman noted that while schools may constitutionally censor student speech in ways that adult speech cannot be restricted, the justifications for allowing censorship in a school setting do not extend to justifying the punishment of speech that could have been censored.[427]

Waldman found two justifications for recognizing limited First Amendment protections against the censorship of student speech in public high schools. First, she found that the First Amendment is less speech protective in schools because of the need to stop speech that "threaten[s] other students' rights or the functioning of the learning environment."[428] Second, Waldman found that censorship of student speech also was permitted in order to teach students lessons that "relate either to general civility or to specific coursework."[429] She found that neither of these reasons for permitting more censorship in schools logically applied to punishing speech.[430] Punishing speech after the fact, when the student is not given prior notice that his or her speech would be considered impermissible, does not protect other students or the learning environment because the

[425] Sullivan, *supra* note 13, at 569 (quoting *Wooley*, 430 U.S. at 716).

[426] *See* Waldman, *supra* note 174, at 1124-31.

[427] *Id.* at 1120-21.

[428] *Id.* at 1121.

[429] *Id.* at 1122.

[430] *Id.* at 1123.

speech has already been delivered and the damage has been done.[431] Furthermore, Waldman asserted that lessons in civility are best taught through censorship of the objectionable speech followed up by an explanation of why the speech is problematic, rather than through after-the-fact punishment.[432] Waldman, however, did feel that it was acceptable for schools to impose after-the-fact punishments on a student who ignored a school's attempt to censor their speech.[433] Waldman's analysis is useful when considering the following cases in which schools sought to punish students through the compulsion of speech.

Courts' Treatment of the Constitutionality of Compelled Speech as a Form of Punishment

This section analyzes seven cases that address the issue of compelled speech as a form of punishment. The cases have been divided into three categories based on their treatment of the compelled speech issue. The first case does not directly deal with compelled speech as a form of punishment, but does provide a useful discussion, in dicta, of the difference between the application of *Barnette*[434] and the application of the student speech censorship precedents, like *Hazelwood*,[435] to this category of compelled speech. This approach of applying compelled speech precedents is the most protective of students' speech rights. The second set of cases involves situations where a student was

[431] *Id.* at 1122-23.

[432] *Id.* at 1123-24.

[433] *Id.* at 1123. This was the case in *Corder* where the student admitted that she did not provide her principal with a full copy of her speech before graduation because she knew that he would not have approved it. *See* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1223 (10th Cir. 2009).

[434] 319 U.S. 624 (1943).

[435] 484 U.S. 260 (1988).

compelled to issue an apology and the courts analyzed the compelled speech issue based on the student speech censorship precedents. The approach of applying student speech censorship precedents is deferential to school officials. The third set of cases all involve situations where a student was compelled to speak as a form of punishment, but the courts never addressed the constitutionality of the government compulsion of speech. The approach of not conducting a separate inquiry into the constitutionality of the compelled student speech is the most deferential to school officials.

In the first case, *Poling v. Murphy*,[436] the U.S. Court of Appeals for the Sixth Circuit discussed the difference between situations in which *Barnette* should apply and situations in which *Hazelwood* should apply. While not directly on point, *Poling* is relevant for two reasons. The first is that the Sixth Circuit appeared to accept *Barnette* as recognizing that First Amendment protections against compulsion are stronger than First Amendment protections against censorship of student speech. The second is that the Sixth Circuit appeared to find that *Hazelwood* and not *Barnette* was controlling because the case was dealing with the constitutionality of the censorship rather than the compulsion of student speech. In *Poling*, a high school student was disqualified from running for student council president because he delivered a speech that made fun of the school's assistant principal.[437] The punishment of the student in that case did not involve the government compulsion of speech, but rather involved the student's exclusion from running for student council. The student challenged the punishment, claiming that the

[436] 872 F.2d 757 (6th Cir. 1989). While this case does not actually involve compelled speech as a form of punishment, it was included in this chapter because the court was addressing the constitutionality of the punishment of student speech. *See id.* at 761-64.

[437] *Id.* at 759-60.

school could not punish him for his speech under the First Amendment.[438] The Sixth Circuit, however, did find it pertinent to discuss the importance of the fact that the school did not attempt to compel the student to speak as part of his punishment.[439] The court distinguished the facts of *Poling* from *Barnette*, noting that *Poling* was different because the court was not assessing the constitutionality of compelled speech. The Sixth Circuit, citing *Barnette*, explained: "The compulsory flag salute and pledge of allegiance 'require[d] affirmation of a belief and an attitude of mind,' and it seemed to Mr. Justice Jackson in *Barnette*, as it seems to us here, that 'involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.'"[440] The Sixth Circuit ultimately found that the student's speech was school sponsored and, thus, applied *Hazelwood* to assess the constitutionality of the censorship and subsequent punishment.[441] This Sixth Circuit approach of applying different standards to censorship and compulsion cases was not adopted by other courts.

The second set of cases all address the constitutionality of compelled apologies. In each case, the court applied a test derived from the cases dealing with the censorship of student speech to assess the constitutionality of the government compulsion of the apology. Two cases from the U.S. Court of Appeals for the Tenth Circuit fall into this set. In the first, *Seamons v. Snow*,[442] the Tenth Circuit assessed the constitutionality of a

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[438] *Id.* at 761.

[439] *Id.* at 763. The court noted, "It is important to bear in mind, we think, that the school officials made no attempt to compel Dean Poling to say anything he did not want to say." *Id.*

[440] *Id.* (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

[441] *Id.* at 762-63.

[442] 206 F.3d 1021 (10th Cir. 2000).

school's compulsion of an apology from a high school football player.[443] The football player claimed that when he refused apologize to his teammates after he reported a locker room assault to police, he was told that he could not rejoin the team.[444] The Tenth Circuit, before remanding the case for trial, summarized the relevant law that should apply in the case as follows: "extensive case law . . . support[s] the proposition that school authorities may not penalize students for their speech when that speech is non-disruptive, non-obscene, and not school-sponsored."[445] The *Seamons* court never discussed *Barnette* and instead indicated that the proper analysis in this case was based on the student speech censorship cases.

In *Corder*, where the valedictorian was required to issue an e-mail apology for her graduation speech, the Tenth Circuit applied the *Hazelwood* standard to determine the constitutionality of the school's compulsion of Corder's apology.[446] The Tenth Circuit first found that Corder's graduation speech was school sponsored within the meaning of *Hazelwood* and, applying that standard, found that the school had the power to censor the content of her speech.[447] The court then turned to the constitutionality of the school's compulsion of Corder's apology. The *Corder* court found that the apology, like the graduation speech, was school sponsored because it was disseminated by the principal's

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[443] *See id.*

[444] *Id.* at 1024. The Tenth Circuit heard the appeal in this case after the district court granted the defendants' motion for summary judgment. *Id.* As part of its holding, the Tenth Circuit found that there was a genuine issue of material fact as to whether the student was actually asked to apologize because he reported the incident to police or whether the coach simply made a general "request for a mutual reconciliation" between the student and his teammates. *Id.* at 1027.

[445] *Id.* at 1030 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969)).

[446] Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1231 (10th Cir. 2009).

[447] *Id.* at 1229.

office shortly after graduation and, thus, was properly assessed under the *Hazelwood* standard. The Tenth Circuit reasoned, "[I]f the School District may censor Corder because her speech is school-sponsored rather than private, then so may the School District tell her what to say when she disregards the School District's policy regarding the school-sponsored speech, as long as the compulsion is related to a legitimate pedagogical purpose."[448] The Tenth Circuit justified its application of a censorship standard to compelled speech by noting that "[t]he Supreme Court has long recognized that, for the purposes of the First Amendment, forced speech is no different than censored speech."[449] The *Corder* court then found that the school did not violate the First Amendment by compelling the student's apology because the school's compulsion of the apology was reasonably related to student discipline, a legitimate pedagogical concern.[450]

The U.S. Court of Appeals for the Eighth Circuit, like the Tenth Circuit, looked to student censorship cases when determining whether a school district's compulsion of a student's apology violated the First Amendment. In *Wildman*, a high school athlete who was upset that she was not called up to play on the varsity basketball team issued a letter to her teammates. In the letter, Wildman urged her teammates to "'give [the coach] back some of the bullshit that he has given us.'"[451] The coach, with the support of the school's athletic director and principal, required Wildman to apologize to her teammates within

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[448] *Id.* at 1231.

[449] *Id.* The *Corder* court cited the Supreme Court's decisions in *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), and *Riley v. National Federation of Blind*, 487 U.S. 781 (1988), to support this statement. *Id.* The author of this thesis argued that the Tenth Circuit's reliance on these Supreme Court precedents to support the view that the constitutionality of censorship and compulsion could be assessed under the same standards was misplaced. *See* Sullivan, *supra* note 13, at 544-49.

[450] *Corder*, 566 F.3d at 1231-32.

[451] Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 770 (8th Cir. 2001) (quoting the letter Wildman sent her to her teammates).

twenty-four hours or else she would not be permitted to rejoin the team.[452] Wildman refused to issue an apology and was no longer allowed to play on the team.[453] The Eighth Circuit, recognizing limited First Amendment protection for high school students based on the student speech censorship cases, found that school's actions did not violate Wildman's First Amendment rights.[454] Citing *Fraser*, Eighth Circuit found that it was "well within the parameters of school officials' authority to prohibit the public expression of vulgar and offensive comments and to teach civility and sensitivity in the expression of opinions."[455]

The *Wildman* court found that because the apology was related to disciplining the student for her unprotected speech in the letter, the compulsion of the apology passed constitutional muster.[456] The Eighth Circuit found that "the actions taken by the coaches in response were reasonable," even though there was probably a better way for the school to handle the situation.[457] The *Wildman* court, however, did seem to indicate that the reach of its opinion may be limited to situations where students are precluded from extracurricular activities. The Eighth Circuit stated, "A difference exists between being in a classroom which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for

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[452] *Id.*

[453] *Id.*

[454] *Id.* at 771-72.

[455] *Id.* at 771.

[456] *See id.* at 771-72.

[457] *Id.* at 772. The *Wildman* court noted, "The parties perhaps could have achieved with minimal creativity and flexibility a solution more amicable or less humiliating to the student. However, the school sanction only required an apology." *Id.*

circulating an insubordinate letter."[458] In summary, the Eighth Circuit appeared to find that because the student's initial letter was not protected under the First Amendment, the school could permissibly compel an apology, at least when the alternative to the student apologizing was her exclusion from an extracurricular activity.

The U.S. District Court for the Southern District of Georgia also accepted that student speech censorship cases were applicable to determining the constitutionality of a compelled apology. In *Kicklighter v. Evans County School District*,[459] a high school student was ordered to serve a five-day suspension and apologize to her class after she engaged in a verbal altercation with another student and her teacher.[460] After serving the detention, the student refused to issue the apology and, as a result, sat out of school for the remainder of the school year.[461] The student argued that the school violated her First Amendment rights, as recognized in *Barnette*, when it sought to compel her to issue an apology.[462] The district court found that the student's claim was limited by the Supreme Court's decisions in *Tinker* and *Fraser*, noting that Eleventh Circuit recently had

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[458] *Id.*

[459] 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

[460] *Id.* at 714. The court described the incident as follows:

> Kicklighter got into an inappropriate "exchange of words" with another student before her English class had been called to order. Overhearing the discussion, the teacher, Louise Jones, informed Kicklighter that she would not abide any off-color remarks in the classroom. Plaintiff's retort included an invitation to "check the Declaration of Independence" with respect to free speech rights. Jones then asked Kicklighter to find a seat, but when Plaintiff could not locate one, the teacher sent her to see Defendant Dewey Hulsey, the principal.

Id. (citations omitted) (quoting court documents from the case).

[461] *Id.* at 714-715. The student returned to school immediately after serving the suspension, but when she went straight to class and refused to apologize she was escorted out of school by police officers. *Id.* at 715. Kicklighter was allowed to return to school without apologizing the following year but then she dropped out altogether. *Id.*

[462] *Id.* at 719.

recognized "'exceedingly limited rights of public school students facing school discipline.'"[463] The *Kicklighter* court found that schools were free to "require a simple apology for truculent and disruptive in-school behavior" under *Tinker* and *Fraser* because such discipline "falls well within the ambit of an institution's balanced 'comprehensive authority.'"[464] The court found that the apologies are "lessons [in] the form of disciplinary measures . . . [with an] educational purpose."[465] The U.S. District Court for the Southern District of Georgia, then, found that the student speech censorship precedents like *Tinker* and *Fraser* gave schools wide latitude to punish student speech, even through the compulsion of more speech. Under the approach adopted by the courts in this set of cases, compelled speech should be analyzed under the student speech censorship precedents, which are often deferential to school officials.

The third set of cases is distinct because the courts never addressed the constitutionality of the government compulsion of speech as a form of punishment. The courts in these cases, however, never addressed the constitutionality of the government compulsion of speech for a variety of different reasons. These cases are still important to this discussion of compelled speech as a form of punishment because they demonstrate that some courts may presume the constitutionality of these compulsions. In *Rogers v. Cook*,[466] for example, a high school student was in a school hallway when a fight broke out. As a result, he was suspended from school for five days.[467] When the student

[463] *Id.* (quoting C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996)).

[464] *Id.*

[465] *Id.*

[466] Rogers *ex rel.* Rogers v. Cook, No. 08 C 2270, 2008 WL 5387642 (N.D. Ill. Dec. 23, 2008).

[467] *Id.* at *1.

returned from his suspension, he was required to sign a "behavior contract."[468] While the specifics of the contract were not discussed in the U.S. District Court for the Northern District of Illinois's opinion, it is unclear if the student raised any First Amendment claims,[469] and the court failed to address First Amendment concerns related to the compulsion, the case still demonstrates different types of compelled speech used as form of punishment.

Similar to *Rogers*, in *Doninger v. Niehoff*,[470] the U.S. Court of Appeals for the Second Circuit dealt with a case where a student was compelled to speak as a form of punishment. In *Doninger*, a member of the student council sent out an e-mail to members of the school community urging them to call the superintendent to object to the school's decision to change the date of a battle-of-the-bands contest.[471] After calls flooded the superintendent's and the principal's offices, the principal informed the student that she planned to cancel the battle-of-the-bands contest.[472] In response to the student's conversation with the school's principal, the student posted on her blog. In the blog post, the student told people that the battle-of-the-bands had been canceled by the

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[468] *Id.*

[469] *See id.* The case against the school administrators eventually was voluntarily dismissed by the student. *See* Stipulation of Dismissal for Rogers *ex rel.* Rogers v. Cook, No. 108CV02270 (N.D. Ill. May 19, 2009), *available at* 2009 WL 4683055.

In at least one instance, a parent, rather than a child, objected to being forced to sign an agreement. In *Doe v. Banos*, No. 10-2164, 2010 WL 4846055 (3d Cir. 2010), a parent challenged the requirement that he sign a permission slip in order for his daughter to play on the high school lacrosse team. *Id.* at *1. The parent specifically objected to the provision in the permission slip that required the parent to acknowledge that the student may be punished under the school's 24/7 drug and alcohol policy. *Id.* The Third Circuit found that this case did not involve government compulsion of speech because "the First Amendment does not protect a parent's right to sign a school permission form 'under duress' while still mandating that the school allow his or her child to participate in the underlying activity." *Id.* at *3.

[470] 527 F.3d 41 (2d Cir. 2008).

[471] *Id.* at 44.

[472] *Id.* at 44-45.

"'douchebags in the central office'" and asked people to "'write something or call [the principal] to piss her off more.'"[473] The school officials ultimately chose to allow the event to go forward, but when they discovered the student's blog, they sought to punish her. The principal required that the student submit a written apology to the superintendent, show her mother the blog post, and withdraw her candidacy for senior class secretary.[474] The Second Circuit analyzed the student's First Amendment claim, which focused on the argument that the school could not punish her for the blog post.[475] The court never addressed the constitutionality of the compelled apology, perhaps because the student did not raise the issue as part of her First Amendment claim. Despite the fact that the *Doninger* court did not tackle the constitutionality of the compelled apology, the case is still worth noting. *Doninger* demonstrates that some student plaintiffs do not raise a claim even when it is clear that the government has compelled their speech and shows that some courts do not raise any concerns about the potential First Amendment issues with the government's compulsion of apologies.[476]

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[473] *Id.* at 45 (quoting the student's "publicly accessible blog, which was hosted by livejournal.com").

[474] *Id.* at 46.

[475] *See id.* 47-53 (discussing Doninger's claim that the school impermissibly punished her for the blog post that she created outside of school and ultimately finding that the school could punish her because the post was likely to cause a substantial disruption at school).

[476] Another case where the court did not address the constitutionality of compelled speech as a form of punishment was not included in this discussion because the case involved college students. *See* Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 941 (D. Kan. 1987). In that case, college football players were told that they would have to issue an apology through the media to the university as well in person to their teammates if they wanted to rejoin the team. *Id.* at 943. The apologies were required after some players boycotted practice to protest what they believed were racially discriminatory practices by the university. *Id.* at 942-43.

Conclusions on the Constitutionality of Compelled Speech as a Form of Punishment

The category of compelled speech as a form of punishment consists of compelled apologies and other types of compelled speech designed to allow a student to demonstrate his or her understanding that his or her conduct was wrong. The author of this thesis has previously researched this category of compelled speech and argued that the standard presented in the compelled speech case of *Wooley v. Maynard* should be applied in these cases. However, a review of the nine cases relevant to a discussion of compelled speech as a form of punishment demonstrates that no court has adopted this approach. One court, however, did accept that there is a distinction between the compulsion and censorship of student speech and that courts should apply different precedents based on that distinction.

Two cases revealed that there is a fourth, hybrid category of compelled student speech. In those cases, the government compulsion of speech was a form of punishment and also part of education efforts. This type of compelled speech, because it has many of the qualities of compelled speech for mandatory education efforts may be less offensive from of a First Amendment perspective. In *Miller*, a district attorney sought to compel students to complete an education class as part of a plea agreement.[477] While the court recognized that the lessons in the proposed education class were important, the court was troubled by the fact that the juvenile criminal justice system was attempting to teach the students these lessons.[478] The *Miller* court's analysis seems limited to programs imposed by the prosecutors and, thus, it appears that an education program imposed by a school as

[477] Miller v. Mitchell, 598 F.3d 139, 144 (3d Cir. 2010).

[478] *Id.* at 152.

a punishment for some type of misbehavior may pass constitutional muster. The *Marinello* court, on the other hand, found that a university could compel a student to write about how his actions violated the code of ethics for his future profession.[479] In *Marinello*, the court even characterized the compelled written synopsis as "similar to an academic assignment."[480] The written synopsis in *Marinello* seems similar to compelled speech for mandatory education efforts because it was part of the school's mission to teach students professional standards for their future careers[481] and the assignment was designed to "actively nurture[] the evaluative and deliberative capacities of [the] student"[482] by requiring him to write about his behavior in relation to the ethical code provisions.

The seven remaining cases dealing with pure compelled speech as a form of punishment were divided into three categories: (1) a case that provides useful discussion in dicta about the difference between situations when *Barnette* and *Hazelwood* should apply to this category of compelled speech; (2) four cases where the court applied student speech censorship precedents to the assess the constitutionality of the government compulsion of speech; and (3) two cases where the court never addressed the presence and/or constitutionality of the compelled apologies present in the fact patterns. The conclusions that can be drawn from each set of cases will be discussed in the following section.

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[479] Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410, at *12-*15 (N.D. Miss. Nov. 1, 1996), *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

[480] *Id.* at *14.

[481] *Id.* at *9 (noting that the "students should expect nothing less from an institution charged with the task of preparing them for professional life").

[482] Blasi & Shiffrin, supra note 92, at 458.

The first category consisted of only one case that provided a discussion of the distinction between *Barnette* and *Hazelwood*. In *Poling*, the Sixth Circuit did not directly address the constitutionality of compelled speech as a form of punishment. The court's analysis was useful, however, because it pointed to the idea that *Barnette* requires a greater level of First Amendment protection against the compulsion of speech than the level of First Amendment protection provided against the censorship of student speech.[483] *Poling* was also relevant because it demonstrated the Sixth Circuit's finding that *Barnette* is controlling in cases dealing with the compulsion of speech and that student speech censorship cases are controlling in cases dealing with the censorship of student speech.[484] This approach differs from the approaches adopted by courts in the next set of cases.

In the second set of cases, courts looked to the cases dealing with the censorship of student speech to analyze the constitutionality of compelled apologies.[485] This approach appears to be less protective against compelled speech than the approach represented in *Poling*. In *Seamons*, the Tenth Circuit cited three student speech censorship cases when it determined that there was a genuine issue of material fact as to whether the compelled apology violated the high school football player's First Amendment rights.[486] The Tenth Circuit in *Corder* further explained that schools could

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[483] *See* Poling v. Murphy, 872 F.2d 757, 763 (6th Cir. 1989) (approving of the portion of *Barnette*, 319 U.S. 624, 633 (1943), where the Court explained that "'involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence'").

[484] *See id.* (distinguishing *Poling* from *Barnette* because the "school officials made no attempt to compel Dean Poling to say anything he did not want to say").

[485] *See generally* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219 (10th Cir. 2009); Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 (8th Cir. 2001); Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000); Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

[486] *Seamons*, 206 F.3d at 1028, 1030.

compel a student to apologize for speech that the school had the ability to censor.[487] The *Corder* court found that the *Hazelwood* test was appropriate to assess the constitutionality of the government compulsion of speech that was school sponsored and, that under *Hazelwood*, discipline was a legitimate pedagogical concern.[488] In summary, under the Tenth Circuit's approach, any compelled speech as a form of punishment that could be considered school sponsored would pass constitutional muster so long as the speech was reasonably related to disciplining the student. As previously mentioned in Chapter III, the *Hazelwood* standard for determining what speech is school sponsored is broad[489] and, in practice, the *Hazelwood* standard is extremely deferential to schools.[490] For this reason, the *Corder* court approach would permit schools to compel apologies in almost any situation except, perhaps, in a case like *Seamons* where it may have been unconstitutional to discipline the student in the first place.[491] The Eighth Circuit in *Wildman* and the U.S. District for the Southern District of Georgia in *Kicklighter* also lent support to the Tenth Circuit's approach of recognizing limited First Amendment protections against compulsion of speech as well censorship of speech through the Supreme Court's student speech censorship cases.[492]

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[487] *Corder*, 566 F.3d at 1231.

[488] *Id.* at 1231-32.

[489] *See supra* pp. 86-87 (discussing the broad range of speech that is considered "school-sponsored" within the meaning of *Hazelwood*).

[490] *See supra* pp. 84-85 (noting the fact that when the *Hazelwood* standard is applied, the school officials almost always prevail).

[491] *Seamons*, 206 F.3d at 1023-24 (discussing the facts of a case where it was possible that the school compelled a student athlete to apologize for reporting a locker room assault to the police).

[492] *See* Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 771-72 (8th Cir. 2001); Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712, 718-20 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

The third set of cases represent the approach that is the most permissive of the government compulsion of speech. In these cases, the courts did not separately analyze the constitutionality of the compelled speech. In *Rogers*, the U.S. District Court for the Northern District of Illinois did not discuss the constitutionality of requiring a student to sign a behavior contract before he could return to school.[493] In *Doninger*, the Second Circuit declined to discuss the constitutionality of a school's compulsion of an apology from a student who posted comments about her school's principal on her blog.[494] While these courts may have failed to assess the First Amendment protection against compelled speech as a form of punishment, the cases are still pertinent to this study because they demonstrate that compelled speech claims are not always addressed by courts when they arise and that some courts decline to note that there might be a separate constitutional issue raised by the compulsion of speech as a form of punishment.

This study of compelled speech as a form of punishment reveals three different approaches as well as an overlap between two categories of compelled student speech. The first approach to assessing the constitutionality of compelled student speech is to apply the compelled speech precedents. This approach was advocated by the author of this thesis in a law review note and also seemed to be adopted by the Sixth Circuit in *Poling*. This approach is the most protective against compelled speech because *Barnette* and other compelled speech precedents are less deferential to the government than the student speech censorship precedents. The second approach to assessing the constitutionality of compelled speech as a form of punishment is to apply student speech

[493] *See* Rogers *ex rel.* Rogers v. Cook, No. 08 C 2270, 2008 WL 5387642, at *1 (N.D. Ill. Dec. 23, 2008).

[494] Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008).

censorship precedents. This approach, adopted by the Eighth and Tenth Circuits and the U.S. District Court for the Northern District of Georgia, is less protective against compelled speech than the previous approach. It is less protective because the student speech censorship precedents recognize a lower level of First Amendment protection for students in public schools and, in some instances, the tests derived from those cases are extremely deferential to school officials. The third approach, reflected by the decisions from the Second Circuit and the U.S. District Court for the Northern District of Illinois, were the least protective against compelled speech as a form of punishment. In those cases, the court did not analyze the compelled speech as raising separate First Amendment concerns.

CHAPTER V

CONCLUSIONS AND PROPOSED FRAMEWORK FOR ADDRESSING COMPELLED SPEECH IN PUBLIC HIGH SCHOOLS

This review of the nineteen cases addressing the constitutionality of compelled speech in public high schools[495] demonstrates that there are four categories of compelled student speech: (1) compelled recitations;[496] (2) compelled speech for mandatory education efforts;[497] (3) compelled speech as a form of punishment;[498] and (4) compelled speech that is both a form of punishment and part of mandatory education efforts.[499] This study confirmed and examined more fully the first three categories of compelled student

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[495] One case in which a compelled speech claim was raised, but the court ultimately found that speech was not actually compelled, was not included in this sample. *See* C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 189 (3d Cir. 2005) (holding that students who completed a survey on attitudes regarding topics like sex and alcohol use were not compelled to speak because there was no consequence for refusing to fill out the survey and the students were not required to select specific answers if they did complete the survey).

[496] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004); Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969); Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

[497] *See* Head v. Bd. of Trs. of Cal. State Univ., 315 F. App'x 7 (9th Cir. 2008); Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2005).

[498] *See* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219 (10th Cir. 2009); Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 (8th Cir. 2001); Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989); Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998); Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007), *aff'd,* 527 F.3d 41 (2d Cir. 2008); Rogers *ex rel.* Rogers v. Cook, No. 08 C 2270, 2008 WL 5387642 (N.D. Ill. Dec. 23, 2008).

[499] *See* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410 (N.D. Miss. Nov. 1, 1996), *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

speech, each of which had been previously recognized in the literature.[500] A new category of compelled student speech, speech that is compelled to punish and educate, was recognized through this study.

An analysis of the court opinions addressing each category of compelled speech revealed that the students always prevailed in the compelled recitation cases. In contrast, the school officials always prevailed when speech was compelled for mandatory education efforts. Courts assessing the constitutionality of compelled speech as a form of punishment adopted different approaches with different outcomes. In some cases, courts declined to assess the constitutionality of the government compulsion of student speech; this approach was the most deferential to school officials. In other cases, courts applied First Amendment tests derived from student speech censorship cases to compelled speech; this approach was still deferential to school officials, but not as deferential to school officials as the previous approach. In the last set of cases addressing compelled speech as a form of punishment, courts applied First Amendment tests derived from Supreme Court compelled speech cases; this approach was the most protective of student speech rights.

This chapter discusses the major findings from this study and then proposes a framework for how courts should assess the constitutionality of compelled speech in public high schools. First, this chapter defines the four categories of compelled student speech. Second, this chapter summarizes the courts' treatment of the constitutionality of compelled speech for each one of these categories. Finally, this chapter discusses what

[500] Compelled recitations and compelled speech for mandatory education efforts were first recognized by Vincent Blasi and Seana Shiffrin. *See generally* Blasi & Shiffrin, *supra* note 92. Compelled speech as a form of punishment was first recognized by the author of this thesis in a 2010 law review note. *See generally* Sullivan, *supra* note 13, at 569-70.

should be the proper level of First Amendment protection against each category of compelled student speech and, based on this discussion, presents a framework that courts can apply in future cases dealing with the constitutionality of the compulsion of speech in public high schools. The proposed framework provides courts with a more consistent and speech protective approach than the one currently used.

Types of Compelled Speech in Public High Schools

Four categories of compelled student speech, compelled recitations, compelled speech for mandatory education efforts, compelled speech as a form of punishment, and compelled speech that is both a form of punishment and part of mandatory education efforts, were discussed in this study. This section defines each category of speech based on the case law and scholarly literature.

Compelled recitations are government-mandated reiterations of specific words and government-mandated participation in activities that amount to implicit expression. Requiring a student to recite the Pledge of Allegiance is an example of a compelled recitation.[501] Compelled recitations also occur when students are commanded to participate in activities that communicate implicit expression. Examples of this type of compelled recitations include requiring students to stand at attention during the Pledge[502] and forcing students to choose between standing or leaving the room during the Pledge.[503]

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[501] *See Barnette*, 319 U.S. 624; *Holloman*, 370 F.3d 1252.

[502] *See* Lipp v. Morris, 579 F.2d 834, 835 n.2 (3d Cir. 1978) (citing N.J. STAT. ANN. § 18A:36-3); Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 303 n.3 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971).

[503] *See* Goetz v. Ansell, 477 F.2d 636, 636 (2d Cir. 1973).

Compelled speech for mandatory education efforts is government-forced speech and expressive activities as part of in-class exercises and related homework assignments. Compelled speech for mandatory education efforts always is designed to "actively nurture[] the evaluative and deliberative capacities of students to help them arrive at conclusions that are truly their own."[504] Requiring a theater student to perform scripts verbatim[505] and requiring an education major to take a class stressing the importance of multiculturalism[506] are both examples of compelled speech for mandatory education efforts.

Compelled speech as a form of punishment is speech that a student is required to declare as a consequence for his or her prior actions or speech. Students who refuse to deliver the compelled speech as required face additional and usually more severe punishments, such as being held back from advancing in school, suspension, or expulsion. A common example of compelled speech as a form of punishment occurs when school officials, perceiving that student has done something wrong, compel the student to apologize.[507] In other situations, this category of compelled speech may take on other forms, like requiring a student to sign a "behavior contract."[508]

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[504] Blasi & Shiffrin, *supra* note 92, at 458-59.

[505] *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1282 (10th Cir. 2004).

[506] *See* Head v. Bd. of Trs. of Cal. State Univ., 315 F. App'x 7, 8 (9th Cir. 2008).

[507] *See, e.g.,* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1222-23 (10th Cir. 2009); Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 769-70 (8th Cir. 2001).

[508] *See* Rogers *ex rel.* Rogers v. Cook, No. 08 C 2270, 2008 WL 5387642, at *1 (N.D. Ill. Dec. 23, 2008).

Compelled speech that is both a form of punishment and part of mandatory education efforts is the final category of compelled student speech.[509] This type of compelled speech, thus, is required in order to discipline the student and also designed to teach the student how his or her actions were wrong. Compelling a student to produce a writing assignment discussing how his or her behavior violated the ethical rules of his or her future profession is one example of this hybrid category of compelled speech.[510]

Courts and scholars have not advanced a uniform approach for assessing the constitutionality of these different types of compelled student speech. The next section will address the various First Amendment concerns raised by each type of compelled speech and the various tests applied by courts.

First Amendment Standards for Compelled Speech in Public High Schools

Courts addressing the constitutionality of compelled student speech have not parsed cases based on the categories of speech described in this thesis. These categories, however, are useful because different categories of compelled student speech raise different First Amendment concerns. An analysis of these cases using the lens of the four categories demonstrates not only what courts are doing, but also provides insight into what standards courts should apply in order to protect students' First Amendment rights against compelled speech. This section will summarize the different First Amendment standards applied by courts and advocated by scholars for each category of compelled student speech. This section will first address the category of compelled recitations, then

[509] *See* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410 (N.D. Miss. Nov. 1, 1996), *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

[510] *See Marinello*, 1996 WL 671410, at *5.

compelled speech for mandatory education efforts, then compelled speech as a form of punishment, and finally compelled speech that is designed both to punish and educate.

Compelled recitations were first recognized as a distinct category of compelled student speech, deserving of special First Amendment protections, by Vincent Blasi and Seana Shiffrin.[511] Blasi and Shiffrin argued that compelled recitations are particularly offensive under the First Amendment because they leave the student who does not agree with the message of the compelled speech with two troubling options: deliver the speech as mandated by the government even though it does not reflect his or her true beliefs or refuse to deliver the compelled speech and, thus, be forced to expose his or her true beliefs.[512] Shiffrin also found that compelled recitations raised unique First Amendment concerns because recitations do not "show respect for the judgments and attitudes of students" nor do they engage the student speakers in order to allow them to reach their own conclusions about a particular matter.[513] Shiffrin argued that the Court found in favor of the students in *West Virginia Board of Education v. Barnette*[514] because that case involved a compelled recitation rather than some other category of compelled speech.[515]

No court has expressly adopted Blasi and Shiffrin's view that compelled recitations is a distinct category of compelled speech, the compulsion of which always violates the First Amendment. While no court has clearly stated that it distinguishes

[511] *See generally* Blasi & Shiffrin, *supra* note 92.

[512] *Id.* at 456.

[513] Shiffrin, *supra* note 63, at 884.

[514] 319 U.S. 624 (1943).

[515] Shiffrin, *supra* note 63, at 884. Shiffrin specifically distinguished compelled recitations from compelled speech for mandatory education efforts. She argued that the Court's holding in *Barnette* was based on the fact that compelled recitations, unlike compelled speech designed to educate, do not respect the individual thought processes and judgments of the student speaker. *Id.*

between compelled recitations and other types of compelled speech, courts did address the constitutionality of compelled recitations six times since *Barnette*, and each time the student speakers prevailed.[516]

Three key points, each pointing to robust First Amendment protection against compelled recitations, were distilled from a review of the cases dealing with the constitutionality of compelled recitations.[517] The first is that there are numerous justifications in addition to those presented by Blasi and Shiffrin for recognizing strong First Amendment protections against compelled recitations in public high schools. Several courts found that compelling recitations interferes with the student speaker's right to express him or herself.[518] One lower court also found that the compelled recitations and the resulting punishments imposed on students who refused to participate in the recitations has a potential chilling effect on the speech of other students in the audience.[519] The second key point from the cases is that First Amendment protection against compelled recitations should be extremely strong in a school setting. For example, the Supreme Court noted that compelling speech that is not designed to engage and teach students runs counter to the schools' purpose in society, educating children and creating an informed citizenry.[520] The U.S. Court of Appeals for the Eleventh Circuit found that protection against government compulsion of speech may need to be

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[516] *See supra* pp. 55-65 (discussing the six lower court, compelled recitation cases).

[517] Another key point was identified in Chapter II; that key point was the fact that compelled recitations include situations beyond those where students are required to actually speak. That key point is not discussed in this section because it was addressed earlier in the discussion of the definition of compelled recitation. *See supra* pp. 43-44, 67.

[518] *See supra* note 302 and accompanying text.

[519] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1269 (11th Cir. 2004).

[520] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *Holloman*, 370 F.3d at 1269.

particularly strong in a school setting because of the inherent power imbalance between students and teachers.[521] The third key point, which is applicable to all the categories of compelled speech, is the distinction made by some courts between situations where *Barnette* controls and situations where *Tinker v. Des Moines Independent Community School District*,[522] *Hazelwood School District v. Kuhlmeier*,[523] and other student speech censorship precedents should apply. Courts found that *Barnette* applies when determining the constitutionality of the compelled recitation whereas *Tinker* applies when determining whether the action that the student undertook instead of participating in the compelled recitation was protected by the First Amendment.[524] The courts applying *Barnette* to compelled recitations did not distill a specific test from that case, but each court that relied on *Barnette* found that the compelled recitation violated the First Amendment.[525] Each of the key points identified in the compelled recitation cases supports the notion that First Amendment protection against the government compulsion of high school student speech should be strong.

Blasi and Shiffrin were also the first scholars to recognize compelled speech for mandatory education efforts as a distinct category of compelled speech. The scholars argued that compelled speech for mandatory education efforts was not troubling from a First Amendment perspective because this type of compelled speech shows respect for a student's individual beliefs and, in fact, encourages a student to use critical thinking to

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[521] *Holloman*, 370 F.3d at 1269.

[522] 393 U.S. 503 (1969).

[523] 484 U.S. 260 (1988).

[524] Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 295 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971); Frain v. Baron, 307 F. Supp. 27, 30 (E.D.N.Y. 1969).

[525] *See supra* note 315 and accompanying text.

develop his or her own beliefs.[526] Furthermore, Shiffrin found that schools utilizing compelled speech for mandatory education efforts do not violate the First Amendment because this type of compelled speech is a necessary tool that teachers need in order to educate students.[527] Courts have not expressly adopted Blasi and Shiffrin's view that compelled speech for mandatory education efforts should be treated as a special category of compelled speech, but the courts appear to accept the notion that this type of compelled speech does not violate the First Amendment.

The two courts assessing the constitutionality of compelled speech for mandatory education efforts have found in favor of the schools officials. In both cases the court applied the *Hazelwood* standard to determine if the government compulsion of speech violated the First Amendment.[528] The *Hazelwood* standard, derived from a student speech censorship case, is extremely deferential to school officials.[529] Under the U.S. Court of Appeals for the Tenth Circuit's articulation of how the *Hazelwood* standard applies to compelled speech, schools are free to compel any speech that is school sponsored so long as the compulsion is "reasonably related" to learning and not a pretext for discrimination.[530] The courts' acceptance that the *Hazelwood* standard should apply

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[526] Blasi & Shiffrin, *supra* note 92, at 458-59.

[527] Shiffrin, *supra* note 63, at 882.

[528] Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2005); Head v. Bd. of Trs. of Cal. State Univ., No. C 05-05328 WHA, 2006 WL 2355209, at *6 (N.D. Cal. Aug. 14, 2006), *aff'd*, 315 F. App'x 7 (9th Cir. 2008).

[529] *See, e.g., Axson-Flynn*, 356 F.3d at 1292-93 (discussing the court's refusal to "second-guess" the educators' mission in compelling the speech). *See also* Pond, *supra* note 64, at 157 ("Perhaps the greatest danger that *Hazelwood* presents to compelled speech claims is its 'substantial deference' to the administrative decisions of educators.").

[530] *Axson-Flynn*, 356 F.3d at 1292-93.

to any compelled speech that is considered school sponsored is troubling because of the broad range of speech that encompasses.[531] As one scholar explained:

> Just about any aspect of school sponsored activity (newspapers, career days, elective courses) conducted anywhere in the school (classrooms, hallways) is considered to be . . . subject to the reasonableness standard of *Hazelwood*. Even extracurricular activities that appear to be associated with the school may fall under the rubric of "sponsorship," broadly defined.[532]

A standard that is deferential to school officials may be appropriate when student speech is compelled in order to fulfill the schools' mission of educating young people. A standard that is deferential to school officials, however, is not appropriate for all the speech that is considered school sponsored.[533] Rather, the category of compelled speech for mandatory education efforts as defined in this thesis accurately outlines the limited situations where First Amendment protections should be relaxed in public schools in order to allow teachers and school officials to compel student speech as part of the educational process.

The notion that compelled speech as a form of punishment should be recognized as a distinct category of compelled student speech was first advocated by the author of this thesis in a 2010 law review note.[534] The author of this thesis argued that all compelled student speech except compelled recitations and compelled speech for mandatory education efforts should be assessed using the First Amendment standard

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[531] *See supra* pp. 86-88 and accompanying text.

[532] Salomone, *supra* note 381, at 316.

[533] For example, the author of this thesis argued that the Tenth Circuit inappropriately applied the *Hazelwood* standard to a compelled apology in *Corder v. Lewis Palmer School District*, 566 F.3d 1219 (10th Cir. 2009). *See generally* Sullivan, *supra* note 13. The *Corder* court applied this standard because the court found that the apology was related to the content of a student's graduation speech and, thus, was school sponsored. *Corder*, 566 F.3d at 1231.

[534] *See* Sullivan, *supra* note 13, at 561-65.

from *Wooley v. Maynard*.[535] The *Wooley* standard requires courts to determine whether the government's interest in compelling the speech is "sufficiently compelling" to overcome the student's First Amendment interest in being free from government compulsion of speech.[536] The *Wooley* Court noted that even if the government has a "legitimate and substantial" interest in compelling speech, "'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.'"[537] The *Wooley* standard, thus, is less deferential to school officials than the student speech censorship precedents.[538] The *Wooley* standard requires a tighter fit between the means and the ends – between the government's means of compelling student speech and the government's ultimate goal in compelling the speech.[539] It appears that government compulsion of student speech as a form of punishment is more difficult to justify under *Wooley* than under the student speech precedents because school officials may impose many alternative forms of punishment that do not raise First Amendment concerns.[540]

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[535] *Id.* at 567-70.

[536] *Id.* at 568-69 (discussing the application of the *Wooley* standard in compelled student speech cases).

[537] Wooley v. Maynard, 410 U.S. 705, 716-17 (1977) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[538] *See* Sullivan, *supra* note 13, at 565-70 (contrasting the *Wooley* standard with the student speech censorship precedents and discussing that *Wooley* requires a more searching analysis of the government's interests).

[539] *Id.* at 570 (quoting *Wooley*, 430 U.S. at 716).

[540] *Id.* at 556-58 (noting that schools could avoid the compulsion of student speech by making "a notation in [a student's] permanent record or require[ing] [a student] to complete detention for violating a school policy").

A study of the cases addressing compelled speech as a form of punishment reveals that courts have adopted one of three approaches when assessing the constitutionality of that speech. In the first approach, one court found that *Barnette* should control when determining the constitutionality of compelled speech and *Hazelwood* should control when determining the constitutionality of the censorship of student speech.[541] The approach adopted by this court recognized the strongest First Amendment protection against compelled student speech. In the second approach, courts applied tests derived from the student speech censorship cases, like *Hazelwood*, to determine if the government compulsion of speech violated the First Amendment.[542] This approach is more deferential to school officials than the approach of applying compelled speech precedents because the Supreme Court has recognized limited First Amendment protections against censorship for public high schools students.[543] In the third approach, courts discussed the compulsion of speech as a form of punishment in the fact patterns but never analyzed the constitutionality of compelling student speech.[544] This approach is obviously the most deferential to school officials because the courts did not undertake an independent review of schools' actions. This review of the cases

[541] *See* Poling v. Murphy, 872 F.2d 757, 763 (6th Cir. 1989).

[542] *See generally* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219 (10th Cir. 2009); Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 (8th Cir. 2001); Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000); Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

[543] *See supra* pp. 7-9, 27-30 (discussing the Supreme Court's holdings in the student speech censorship cases and the Court's increasing willingness to limit the First Amendment protections against censorship of student speech).

[544] *See generally* Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008); Rogers *ex rel.* Rogers v. Cook, No. 08 C 2270, 2008 WL 5387642 (N.D. Ill. Dec. 23, 2008).

discussing compelled speech as a form of punishment demonstrates the need to have a more uniform approach to assessing the constitutionality of compelled student speech.

Finally, a review of the compelled student speech cases reveals a fourth, hybrid category of compelled student speech. The cases in this category dealt with the constitutionality of the government compelling speech that was both a form of punishment but also part of a mandatory education effort.[545] The courts in these cases did not announce a specific First Amendment standard that should apply to this type of compelled speech, but one court found this type of speech to be outside the scope of that protected in *Barnette*.[546] This court instead reasoned that because the compulsion of speech was related to the school's educational mission, the school did not violate the student's First Amendment rights.[547] Although the courts did not expressly state this, it appears that compelling speech that falls into this hybrid category is unlikely to violate the First Amendment for the same reasons that compelling speech for mandatory education efforts is permissible. A clearer standard, however, would help future courts assess the constitutionality of this category of compelled student speech.

Proposed Framework for Courts Addressing Compelled Speech in Public High Schools

This study shows that courts have not expressly adopted a comprehensive framework for addressing the constitutionality of the government compulsion of student speech in public high schools. While no court has expressly adopted the view that each

[545] *See generally* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410 (N.D. Miss. Nov. 1, 1996), *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

[546] *See Marinello*, 1996 WL 671410, at *13.

[547] *Id.* at *14.

of the four categories of compelled student speech discussed in this thesis requires the application of a different First Amendment standard, it appears that courts' opinions do reflect some recognition of the differences between the types of compelled speech. For instance, in all the cases dealing with the constitutionality of compelled recitations, the students prevailed; in all cases dealing with the constitutionality of compelled speech for mandatory education efforts, the schools prevailed. In cases dealing with compelled speech as a form of punishment, however, courts adopted three different approaches, each granting a different degree of deference to school officials. Neither court addressing the constitutionality of speech that was compelled both as a form of punishment and as part of a mandatory education effort announced a clear approach.

This section will present a framework, utilizing the four categories of compelled student speech, that affords what the author of this thesis believes to be the appropriate level of First Amendment protection against compelled student speech. First, this section discusses the need for strong First Amendment protection against compelled recitations, like that found in Supreme Court's decision in *Barnette*. Second, this section presents a test for compelled speech as part of mandatory education efforts that is deferential to school officials, but that includes an exception for compulsion that is a pretext for discrimination.[548] Third, this section argues that the *Wooley* standard is appropriate for assessing the constitutionality of compelled speech as a form of punishment. Fourth, this section argues that the *Wooley* standard also should apply to compelled speech that is both a form of punishment and part of mandatory education efforts. Finally, this section

[548] This exception is derived from the Tenth Circuit's opinion in *Axson-Flynn v. Johnson*. *See* 356 F.3d 1277, 1292-93 (10th Cir. 2005).

presents a summary of the framework that courts should use in future compelled student speech cases.

The first category of compelled student speech, compelled recitations, should be assessed under *Barnette*. There are several inherent problems with compelled recitations that support applying *Barnette*, including the fact that compelled recitations: fail to engage the student in order to develop his or her critical thinking skills, disregard the true beliefs of the speaker, force students who disagree with the recitation to participate or expose their real thoughts, and may have a chilling effect on the speech of other students.[549] Furthermore, compelled recitations are particularly problematic in a school setting because of the schools' important societal role of educating young people and preparing an informed electorate. The courts appear to agree that there is strong First Amendment protection against compelled recitations, but these courts have failed to articulate a clear standard for assessing the constitutionality of this type of compelled speech.

Courts should explicitly find that *Barnette* controls when assessing the constitutionality of the government compulsion of recitations, both in the form of actual speech and actions that constitute "implicit expression," in public high schools. It appears that all compelled recitations in a school setting are unconstitutional under *Barnette*. The *Barnette* Court itself could not name any exceptions to its rule,[550] and no court since has recognized one.[551] If any limit exists, it must satisfy the *Barnette* Court's qualification that the government may not "prescribe what shall be orthodox in politics,

[549] *See* discussion *supra* pp. 66-67.

[550] *Barnette*, 319 U.S. at 642.

[551] *See supra* note 315 and accompanying text.

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[552] Under this language, perhaps the government may constitutionally compel speech or implicit expression that does not deal with "politics, nationalism, religion, or other matters of opinion," although the last catchall phrase makes it difficult to determine what would fall outside of this description. Regardless of this speculative exception, it appears clear that the First Amendment strongly protects against government compulsion of recitations in public schools, as recognized by the Supreme Court in *Barnette* and lower courts in six subsequent opinions. Future courts should continue this trend, but should be explicit about how they reach their decision by parsing the different categories of compelled student speech and clearly discussing the standard that they are applying.

The compulsion of the second category of speech, compelled speech for mandatory education efforts, does not violate the First Amendment unless the government is compelling the speech as a method of discriminating against the speaker. There are a number of reasons why school officials should be granted deference to compel speech that helps them fulfill their educational mission. For example, a school may need to compel students to speak in order to ensure that students have learned what they are required to know before advancing them to the next grade.[553] Schools may also compel students to adopt a particular viewpoint in order to develop critical thinking skills.[554]

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[552] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[553] Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410, at *14 (N.D. Miss. Nov. 1, 1996) *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

[554] *See* discussion *supra* pp. 72-74.

Courts addressing the constitutionality of compelled speech for mandatory education efforts have correctly ruled in favor of the schools, but they erroneously have applied the *Hazelwood* standard, a student speech censorship test, to reach their conclusions.[555] There are four major problems with applying student speech censorship tests to compelled speech. First, compelled speech raises unique speaker-, listener-, and society-based harms that censored speech does not raise.[556] Second, compulsion of speech provides the speaker with fewer reasonable alternatives than the censorship of speech does.[557] Third, the language in *Barnette* indicates that the Supreme Court found that speech could be compelled in more limited situations than speech could be censored.[558] Fourth, the student speech cases define categories of speech, such as "school-sponsored" speech from *Hazelwood*, and use those categories to determine the proper level of First Amendment protection. The problem is that the categories of student speech for censorship purposes do not translate correctly when applied to compelled speech. For example, under *Hazelwood*, school-sponsored speech is any

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[555] Some courts reviewing other categories of compelled student speech have accepted that the student speech censorship cases control when censorship is the issue and *Barnette* and other compelled speech precedents control when compulsion is the issue. *See generally* Poling v. Murphy, 872 F.2d 757, 762-63 (6th Cir. 1989); Banks v. Bd. of Pub. Instruction, 314 F. Supp. 285, 295-96 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971); Frain v. Baron, 307 F. Supp. 27, 31 (E.D.N.Y. 1969).

[556] For a review of the literature discussing the unique harms caused by the government compulsion of speech, see *supra* pp. 22-26.

[557] *See* Sullivan, *supra* note 13, at 556. "A censored party has the option to remain silent or reframe his or her point to comply with the censorship restrictions; a compelled party is required to make statements that reflect the beliefs or opinions of another party and has no alternative." *Id.*

[558] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943). The Court explained:

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.

Id.

speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[559] Courts have found that a wide range of speech, including speech outside of regular classroom exercises and homework assignments, is school sponsored and, thus, subject to the *Hazelwood* standard, a test that is extremely deferential school officials.[560] Applying a standard that is deferential to school officials to all compelled speech that is considered school sponsored fails to take into account the strong First Amendment protections against compelled speech. While it is true that schools need some leeway in order to carry out their mission, compulsion of speech should be permitted in more limited situations than the *Hazelwood* standards allows.

Courts should consider whether compelled speech is part of a mandatory education effort instead of whether the speech is school sponsored. Compelled speech for mandatory education efforts is limited to speech that is compelled as part of an in-class exercise or related homework assignment and is designed to "actively nurture[] the evaluative and deliberative capacities of students to help them arrive at conclusions that are truly their own."[561] Compelled speech for mandatory education efforts, unless imposed for a discriminatory purpose, does not violate the First Amendment. Under a proper analysis, once a court has determined that the government-compelled speech is part of a mandatory education effort, the court should "investigate whether the educational goal or pedagogical concern was pretextual."[562] If the government's goal is

[559] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[560] *See* discussion *supra* notes 86-88 and accompanying text.

[561] Blasi & Shiffrin, *supra* note 92, at 458-59.

[562] Axson-Flynn, 356 F.3d 1277, 1293 (10th Cir. 2005) (emphasis omitted).

not a "sham pretext for an impermissible ulterior motive,"[563] the court should find that the school officials did not violate the First Amendment.

The third category of compelled speech, compelled speech as a form of punishment, should be evaluated under the *Wooley* standard. The government may compel student speech as a form of punishment in some situations without violating the First Amendment, but courts should not afford broad deference to schools in such situations. Schools may punish students in a number ways without compelling speech, such as through detention and expulsion.[564] These available alternatives support the notion that a test that is extremely deferential to school officials is inappropriate when assessing compelled speech as a form of punishment. Unlike situations where schools must be permitted to compel speech as part of mandatory education efforts, schools can obtain their goal of disciplining students without compelling speech and should strive to do so.

No court, however, has applied the *Wooley* standard when addressing the constitutionality of compelled speech as a form of punishment; instead courts have adopted one of three approaches: (1) finding that compelled speech precedents like *Barnette*, and not student speech censorship precedents, apply; (2) applying student speech censorship precedents; or (3) never evaluating the constitutionality of the compelled speech in the case.

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[563] *Id.*

[564] *See* Sullivan, *supra* note 13, at 556-58 (discussing the importance of the available alternatives when determining the appropriate standard for First Amendment protection).

While one court, in dicta, advocated the application of *Barnette* to compelled speech as a form of punishment,[565] *Barnette* is not the appropriate standard. As previously discussed, the *Barnette* standard is extremely protective of student speech rights.[566] In some situations, however, it may be constitutionally permissible for a school to compel speech as a form of punishment in light of the Supreme Court's consistent recognition that schools must be able to discipline students as a means of controlling the school environment.[567] While compelling speech may not be the best way to punish a student in most situations, it is conceivable that there are situations when it would be necessary for a school compel student speech as a form of punishment in order to avoid some serious consequence; for example, a school may require a student to apologize for something he or she said in order to calm down a riotous crowd. While the First Amendment protection against compelled speech as a form of punishment should be strong, *Barnette* is not the proper standard because it fails to account for the fact that the compulsion of speech may be necessary in some limited situations.

The second approach adopted by courts addressing the constitutionality of compelled speech as a form of punishment, applying the student speech censorship precedents to the compulsion, also is not the appropriate standard because it is too deferential to school officials. As previously mentioned, there are four major problems with applying student speech censorship standards, like the one derived from *Hazelwood*,

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[565] *See* Poling v. Murphy, 872 F.2d 757, 763 (6th Cir. 1989).

[566] *See supra* notes 228-44 and accompanying text; *supra* pp.129-30.

[567] *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

to compelled speech.[568] The discussion of the Tenth Circuit's ruling in *Corder v. Lewis Palmer School District* demonstrates the problem with applying the *Hazelwood* standard to compelled student speech. In *Corder*, the court found that it was appropriate to apply *Hazelwood* because the compelled apology, a consequence for the student mentioning Jesus in her graduation speech, was school sponsored.[569] Essentially, the court found that if a school can censor a student's speech, then the school can also require that a student issue an apology.[570] This approach fails to recognize the differences between the First Amendment concerns raised by compelled speech and those raised by censored speech. Schools can discipline students without compelling speech and, if possible, should strive to do so. If they do choose to punish a student through the compulsion of speech, then the constitutionality of that compelled speech should be assessed under a standard that is less deferential to school officials.

The final approach adopted by courts was to avoid assessing the constitutionality of the compelled speech as a form of punishment. This approach, which basically grants school officials free reign to compel speech, is inappropriate because it does not take into account that the government compulsion of speech raises First Amendment concerns. This approach fails to recognize that the Supreme Court has found that the First Amendment protects an individual's right to decide "both what to say and what *not* to say."[571]

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[568] *See supra* pp. 131-32.

[569] Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1231-32 (10th Cir. 2009).

[570] *Id.* at 1231.

[571] Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 797 (1988) (emphasis in original).

The *Wooley* standard is the proper analysis for assessing the constitutionality of compelled speech as a form of punishment because it strikes the appropriate balance between protecting the First Amendment rights of students and ensuring that schools are able to carry out their educational mission. Under the *Wooley* standard, a court must determine "whether the State's countervailing interest is sufficiently compelling to justify"[572] compulsion of the student's speech as a form of punishment. This standard should apply in all cases addressing the constitutionality of compelled speech as a form of punishment.

The *Wooley* standard also is appropriate in cases dealing with the fourth category of compelled student speech, speech that is compelled as a form of punishment and as part of mandatory education efforts. This category of compelled student speech will usually pass constitutional muster under the *Wooley* standard because the government's interest in educating young people is likely to be "sufficiently compelling" to justify the compulsion of speech. The deferential standard that is appropriate in pure compelled speech for mandatory education efforts cases, however, is not appropriate for the cases in this category because there are alternative ways to punish students that do not raise First Amendment concerns. The existence of these available alternatives always supports courts engaging in a more active assessment of the government's interest in cases dealing with compelled speech as a form of punishment.

The need for a clearer standard in cases where speech is compelled as a form of punishment and also as part of mandatory education efforts is exemplified in *Marinello v. Bushby*. In *Marinello*, a school compelled a student to provide a written synopsis

[572] Wooley v. Maynard, 430 U.S. 705, 716 (1977).

explaining how his actions violated the ethical rules for his future profession.[573] In this case, the school sought to punish the student for his behavior, but chose to do so in a way that also taught the student an important lesson, how his actions were unprofessional. In *Marinello*, the student objected to the writing requirement, claiming the First Amendment protected him against being compelled to declare that he violated the ethical rules.[574] The U.S. District Court for the Northern District of Mississippi correctly found that the school in *Marinello* should be permitted to compel the student to provide a written synopsis because teaching students about the professional ethical code was part of the school's mission.[575] If the court had applied the *Wooley* standard, it would have yielded the same result, but it would have been more clear how the court reached its conclusion. The *Marinello* court explained, "this court finds that while [the student] does possess a First Amendment right 'not to speak,' the right of school officials to fulfill the educational mission of the [school] justifies the imposed restrictions upon that right in this case."[576] While it appears that the court did balance the student's First Amendment rights against the school's interest in compelling the speech, applying the *Wooley* standard would have clarified how strong the school's interest needs to be in order to override the student's rights. Courts should apply the *Wooley* standard to the compulsion of speech that is both a form of punishment and part of mandatory education efforts in order to make it more clear how much weight is given to the student's rights and the school's interests.

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[573] *See* Marinello v. Bushby, No. CIV. A.1:95CV167-D-D, 1996 WL 671410, at *5 (N.D. Miss. Nov. 1, 1996), *aff'd*, 163 F.3d 1356 (5th Cir. 1998).

[574] *Id.* at *12-*13

[575] *Id.* at *14. The *Marinello* court, however, never explicitly stated which First Amendment standard it did apply to the facts in that case.

[576] *Id.* at *15.

Furthermore, *Wooley* is always the appropriate standard when speech is compelled as a form of punishment because of the existence of available alternate forms of discipline.

A review of the scholarly literature and nineteen cases addressing the constitutionality of compelled speech has highlighted the need for a comprehensive framework that courts can apply to ensure that students' First Amendment rights are protected. In the future, courts should apply the following framework to compelled student speech cases. First, courts should determine whether the compelled student speech at issue in the case is a compelled recitation, compelled speech for mandatory education efforts, compelled speech as a form of punishment, or compelled speech that is both a form of punishment and part of mandatory education efforts. Second, courts should apply the following standards to each category of compelled speech. Courts should apply *Barnette* to compelled recitations and find that the school violated the First Amendment. One possible exception exists to this general rule; *Barnette* may only apply to compelled recitations that deal with "politics, nationalism, religion, or other matters of opinion."[577] Courts should examine the government's interests in cases dealing with compelled speech for mandatory education efforts. The schools should prevail in these cases unless the government's stated goal is a "sham pretext for an impermissible ulterior motive,"[578] such as discrimination. Courts assessing the constitutionality of compelled speech as a form of punishment and compelled speech that is both a form of punishment and part of mandatory education efforts should apply the *Wooley* standard. Under the *Wooley* standard, courts should determine whether the government's interest in the

[577] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[578] Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2005).

compulsion of the speech is "sufficiently compelling" to overcome the student's First Amendment protection against compelled speech. Adopting this comprehensive framework will ensure that schools are able to carry out their educational mission without trampling on the First Amendment rights of their students.

Suggestions for Further Research

The framework proposed in this thesis is applicable to compelled high school student speech. Further research could focus on the appropriate standards for compelled student speech in a college setting because some courts and scholars have recognized different levels of First Amendment protections for college students and high school students. This research may be especially important in light of the fact that some courts have applied high school student speech censorship standards to compelled speech in colleges.[579]

Future research also could focus on the different situations where courts addressing the constitutionality of compelled speech have applied the rule in *Barnette* and where courts have distinguished the case at hand from *Barnette*. In *Marinello*, the U.S. District Court for the Northern District of Mississippi found that *Barnette* did not apply in that case because "First Amendment protection against compelled speech has been found only in the context of governmental compulsion to disseminate a particular political or ideological message."[580] The Tenth Circuit expressly rejected this approach in *Axson-Flynn*. The Tenth Circuit explained, "First Amendment protection does not hinge on the

[579] *See id.* at 1285; Head v. Bd. of Trs. of Cal. State Univ., No. C 05-05328 WHA, 2006 WL 2355209, at *6 (N.D. Cal. Aug. 14, 2006), *aff'd*, 315 F. App'x 7 (9th Cir. 2008). For more information on the controversy surrounding applying First Amendment protections for high school student speech in a college setting, see *supra* note 335.

[580] *Marinello*, 1996 WL 671410, at *13.

ideological nature of the speech involved."[581] Research focusing on different courts' approaches to applying *Barnette* would be useful, especially given these conflicting opinions.

[581] *Axson-Flynn*, 356 F.3d at 1284 n.4. First Amendment scholar Rodney Smolla agreed with the Tenth Circuit's reasoning. *See* SMOLLA, *supra* note 24, at § 17:1.50. Smolla explained:

> The First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry. The constitutional harm — and what the First Amendment prohibits — is being forced to speak rather than to remain silent. This harm occurs regardless of whether the speech is ideological.

Id.

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