Guarding the Treasure: Protection of Student Religious Speech in the Classroom

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I. INTRODUCTION

In February 1996, New Jersey first-grader "Z.H." was rewarded for his reading skills. Z.H.'s teacher, Ms. Oliva, allowed students reaching a certain reading proficiency to read a book of their own choosing to the rest of the class.[1] Z.H. chose to read "A Big Family," a story adapted from Genesis included in *The Beginner's Bible*.[2] "However, because of its religious content, Ms. Oliva did not allow Z.H. to read the story to the class. Instead, although the other students were allowed to read their nonreligious stories to the class, he was allowed to read the story only to Ms. Oliva."[3] After unsuccessfully requesting that Z.H. be allowed to read his story to the class, Z.H. and his mother filed suit against the local Board of Education and the State Department of Education alleging a violation of "Z.H.'s rights to Freedom of Expression under the First Amendment."[4] The district court granted the defendants' motions for judgment on the pleadings.[5] The Court of Appeals for the Third Circuit affirmed without comment.

While it is pleasing to recall that students and teachers do not lose their constitutional rights at the schoolhouse gate,[6] we know that students and teachers do not enjoy their constitutional rights as fully within the schoolhouse as when they are outside of it. Within the

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1. C.H. *ex rel.* v. Oliva, 990 F. Supp. 341, 346 (D.N.J. 1997), *aff'd*, 166 F.3d 1204 (3d Cir. 1998) (hereinafter C.H. v. Olivia). "The material was subject to review by Ms. Oliva to ensure that it would be suitable in length and complexity for first grade students." *Id.* at 346 n.2.
2. *Id.*
3. *Id.* at 347.
4. *Id.*
5. *Id.* at 356.
6. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

American schoolhouse, the robust freedoms of religious exercise and of speech are restricted. *C.H. v. Oliva* highlights the difficulty of determining how tight this restriction must be, especially when the conduct at issue is not only within the schoolhouse, but within the elementary school classroom.

Freedom of speech was clearly important to the framers of our Constitution and has remained a valued freedom over the past two centuries. It is understandable that Z.H.'s family would sense that something had gone awry when Z.H. was not allowed to read his story. Although Z.H. does have a right to some protected speech within the classroom setting, it is also clear that the framers valued religious liberty. Part of their plan to protect this liberty was the Establishment Clause of the First Amendment—an effort to leave religious choices within the hands of citizens and out of the reach of government. Thus, it is understandable that the school district may have seen it as the district's constitutional duty to prohibit Z.H. from reading his story. Moreover, it is understandable that many parents would expect the school district to prohibit Z.H.'s presentation, believing that the Constitution preserves the freedom to send their children to public school without fear that the children will be coerced or proselytized. This tension between the Free Speech Clause and the Establishment Clause is not new. Part of the reason why the tension lingers is the lack of clear standards. Judges and attorneys, not to mention students, parents, and teachers, are left to wonder if and when one clause has priority over the other and what the standards are for making such a decision.

Accepting *Oliva* as a paradigm example, this Article attempts to ease the Free Speech Clause-Establishment Clause tension in the context of student religious speech within the public classroom. In Part II, momentarily leaving the Establishment Clause aside, this Article evaluates the degree of freedom which Z.H. and student speakers like him have to speak within the elementary school classroom and asserts that where student expression is not school-sponsored and does not occur in a "nonpublic" forum, *Tinker v. Des Moines Independent Community School District*[7] governs the scope of protection for this expression. In Part III, this Article examines the Establishment Clause defense to determine whether it acts to prohibit religious speech such as Z.H.'s and argues that, guided by *Capitol Square Review &*

7. *Id.*

Advisory Board v. Pinette,[8] courts should not apply the Establishment Clause to student religious expression in the classroom.

This Article makes two observations, both in Parts II and III, that have received insufficient attention in the academic literature and in the courts. First, students in public school classrooms are "captive speakers." Due to compulsory attendance laws, students are "captive" not only when hearing speech, but also when they wish to speak. Adhering to the First Amendment means protecting not only captive listeners, but also captive speakers. Second, in the face of the potential misperception of students that their school endorses the speech of a fellow student, teachers have an extraordinary opportunity to simultaneously disclaim endorsement and teach the fundaments of religious liberty. Rather than treating students as static and incapable of distinguishing between state-sponsored and private religious expression, teachers should explain the distinction, along with the importance the Constitution assigns to religious expression.

II. FREE SPEECH WITHIN THE CLASSROOM WALLS

The first issue of importance is whether, aside from the Establishment Clause, Z.H. had the right to speak freely in his classroom. If he did not have this right—if the school district could curtail his speech for reasons unrelated to the Establishment Clause—the issue of whether the Establishment Clause may restrict student religious speech in the classroom is irrelevant.[9]

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court considered the right of junior high and high school

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8. 515 U.S. 753 (1995).

9. *See, e.g.*, DeNooyer v. Livonia Pub. Sch., 799 F. Supp. 744, 754 n.8 (E.D. Mich. 1992), *aff'd*, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (not reaching the Establishment Clause issue after deciding second-grader's right to speak was not infringed).

Establishment Clause analysis would also be unnecessary if Z.H. colorably alleged a violation of the Free Exercise Clause. Although the *Oliva* court stated that "the complaint clearly alleges deprivation of rights secured by the Constitution—Free Exercise of Religion," the Free Exercise Clause apparently was not directly at issue in the case. *Oliva*, 990 F. Supp. at 352. Because Z.H. had a freedom of speech claim—one constitutional provision that provided him with at least a facial right to religious expression—it is unimportant for the purpose of this article whether he could make a Free Exercise claim as well.

The questioned conduct in *Oliva* might be protected by both the Free Speech Clause and the Free Exercise Clause. The Supreme Court and commentators alike agree that these two clauses somewhat overlap. *See Pinette*, 515 U.S. at 767-68 (plurality opinion); Bd. of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1990); Douglas G. Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 348-52 (1996). However, some commentators suggest that the Free Exercise Clause provides no protection for religious speech that is not otherwise provided by the Free Speech Clause. *See* William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 392-404 (1996).

students to wear black armbands at school in order to protest the hostilities in Vietnam.[10] The Court held that the students had the right to wear the armbands at school and that the school authorities could prohibit speech only when they could reasonably "forecast substantial disruption of or material interference with school activities."[11] Conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[12]

The Court stated:

> The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.[13]

But the Court clarified that its holding did not apply only to silent expression:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[14]

Nearly twenty years after *Tinker*, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court considered the extent to which school officials can exercise control over the contents of a high school newspaper produced as part of the school's journalism class.[15] The Court distinguished the case from *Tinker* primarily in two ways. First,

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10. *Tinker*, 393 U.S. at 504.
11. *Id.* at 514.
12. *Id.* at 513.
13. *Id.* at 507.
14. *Id.* at 508-09 (citing Terminiello v. Chicago, 337 U.S. 1 (1949)).
15. 484 U.S. 260, 262 (1988). Specifically, the school principal banned certain articles concerning divorce and pregnancy from the newspaper. *Id.* at 263-64.

the Court found that the school newspaper was not a "public forum."[16] "Accordingly, school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner. It is this standard, rather than our decision in *Tinker* that governs this case."[17] Second, the *Hazelwood* Court asserted that *Tinker* sets forth the standard for appropriately punishing *student* speech, but not "for determining when a school may refuse to lend *its* name and resources to the dissemination of student expression."[18]

The Court explained:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that *happens to occur* on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities 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 particular knowledge or skills to student participants and audiences.[19]

Thus, the *Hazelwood* Court indicated that the standard it applied is appropriate (and the *Tinker* standard is inappropriate) where the speech in question (1) occurs in a nonpublic forum and (2) is school-sponsored.[20]

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16. *Id.* at 267-70. *See infra* Part II.A. (discussion of forum analysis). The *Tinker* Court made no mention of forum analysis.

17. *Id.* at 270 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

18. *Hazelwood*, 484 U.S. at 277-78 (emphasis added).

19. *Id.* at 270-71 (emphasis added). The Court found that banning the articles in the school newspaper was constitutionally permissible. *Id.* at 276.

20. It is arguable that these two factors are merely two aspects of one inquiry. That is, where an expression is school-sponsored, the location or program in which the expression occurs is not a public forum. Likewise, whatever speech occurs within a nonpublic forum at a school is sponsored by the school. *See* Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis Test*, 12 HASTINGS CONST. L.Q. 529 (1986).

A. Forum Analysis

One's right to speak is subject to numerous qualifications depending on the *content* of the speech.[21] Additionally, the level of protection that speech receives depends upon the *location* of the speaker.[22] The government may curtail private speech depending upon whether the speaker is on government property, what type of government property it is, and the degree of control the government has exercised over access to the property. Under the Supreme Court's "forum analysis," courts decide whether the government property or program at issue is a traditional public forum, a designated public forum, or a nonpublic forum.

A "traditional public forum" is a place "which by long tradition or government fiat ha[s] been devoted to assembly and debate."[23] Thus, the government generally does not establish traditional public fora. Instead, these fora are recognized by the long-held traditions and common practice that surround them. The classic examples of this type of fora are parks and sidewalks.[24] The government may restrict private speech in a traditional public forum on the basis of the speech's content, but only to serve a compelling state interest that the restriction is narrowly drawn to achieve.[25]

In contrast to a traditional pubic forum, a "designated public forum" (also called a "limited public forum") is government property that the government has effectively "open[ed] for indiscriminate public use for communicative purposes."[26] Hence, unlike a traditional public forum, the government must actively create a designated public

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21. The State may curtail, or not protect, speech that is imminently dangerous (*see, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963)); distinctly commercial (*see, e.g.*, Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989)); or of decidedly low value (*e.g.*, obscenity).

22. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939).

23. *Perry*, 460 U.S. at 45; *see also Cornelius*, 473 U.S. at 800 (finding the purpose of this type of forum to be the "free exchange of ideas").

24. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 391 (1993).

25. *See Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 45.

26. *Lamb's Chapel*, 508 U.S. at 392; *see also Hazelwood*, 484 U.S. at 267 ("[T]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum to public discourse."); *Cornelius*, 473 U.S. at 817 (Blackmun & Brennan, JJ., dissenting) (defining this type of public forum as "government property which the government has opened for use as a place for expressive activity for a limited amount of time, or for a limited class of speakers, or for a limited number of topics"); *Perry*, 460 U.S. at 45.

forum. As with a traditional public forum, the government may impose a content-based restriction on speech in a designated public forum only if the restriction serves a compelling state interest and is narrowly drawn to achieve that end.[27]

A "nonpublic forum" (also called a "closed forum") is property that the government has not opened to the public.[28] The government need not have a compelling state interest in order to regulate speech in a nonpublic forum, but subject matter and speaker distinctions must be "reasonable in light of the purpose served by the forum and [must be] viewpoint neutral."[29]

The *Hazelwood* Court said that *Tinker* did not apply because the forum at issue, the school newspaper, was a nonpublic forum.[30] According to the reasoning in *Hazelwood*, in cases involving student expression, the courts must determine whether the location (or program) in which the speech occurred is a nonpublic forum. Several courts have declined to make this determination (or have made it implicitly)—treating forum analysis as irrelevant to student expression on school grounds.[31] This treatment makes sense because there is no question as to whether the student speakers have the right to be at the school.[32] As constitutional scholar Douglas Laycock asserts:

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27. *See Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 45.

28. *See Cornelius*, 473 U.S. at 819 (Blackmun & Brennan, JJ., dissenting) (defining a nonpublic forum as "property that is not compatible with general expressive activity").

29. *Lamb's Chapel*, 508 U.S. at 393 (quoting *Cornelius*, 473 U.S. at 806).

30. *Hazelwood*, 484 U.S. at 267-70.

31. *See* Seamons v. Snow, 84 F.3d 1226, 1237 (10th Cir. 1996) (applying *Tinker* after deciding student speech about hazing incident was not school-sponsored); Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988) (challenge to school district policy requiring approval of all student-written material prior to distribution at high school); Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 988, 492-94 (D.S.C. 1997) (applying *Tinker*); Duran v. Nitsche, 780 F. Supp. 1048, 1053 n.3 (E.D. Pa. 1991) ("The court recognizes the emerging line of cases holding that public forum analysis is not appropriate in all free speech/public school cases. These cases have intimated that public forum concepts are not applicable when the speech is not school sponsored.") (citation omitted), *order vacated, appeal dism'd*, 972 F.2d 1331 (3rd Cir. 1992); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 290 (E.D. Pa. 1991) ("Because *Tinker* merely involved students' personal expression during school hours in a place where the students were entitled to be, *Tinker* and factually similar cases have nothing to do with a school's status as a public forum."); Rivera v. East Otero Sch. Dist. R-1, 721 F. Supp. 1189, 1193 (D. Colo. 1989) ("[W]hether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance."); Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1546 (7th Cir. 1996) (Rovner, J., concurring).

32. Justice O'Connor and Justice Brennan have recognized this point:

> There may be important differences between cases in which citizens have a legal right to be present on government property and those in which "citizens claim a right to enter government property for the particular purpose of speaking." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private*

> When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is particularly appropriate for speech. The various versions of the public forum doctrine address these questions. But public forum analysis is irrelevant when access is not an issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak.[33]

Laycock's assertion is consistent with the Supreme Court's use of public forum analysis. In *Hazelwood* there was no question as to whether the students were allowed access to the school. The issue centered around the scope of their access to the school newspaper. It was the school newspaper, not the school itself, that the Court found to be a nonpublic forum.[34] Moreover, before the Court decided whether the students had the right to publish the specific articles censored by the principal, it considered whether the students had any right at all to "speak" through the newspaper.[35] That is, before the Court decided that school officials were justified in restricting the challenged articles, the Court decided the threshold question of whether the students had an independent right of access to the newspaper. The Court concluded that the students did not—their access to the newspaper was at the indulgence of the school district.[36]

In *Lamb's Chapel v. Center for Moriches Union Free School District*, a church sued a school district, alleging that the district violated the Constitution by denying the church access to school facilities for a religious-oriented film series on child-rearing, when the facilities were otherwise available during nonschool hours for social, civic, recreational, and political uses.[37] As in *Hazelwood*, the Court engaged in forum analysis, but only after it concluded that the

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Speakers, 81 NW. U. L. REV. 1, 48 (1986), *cited in* Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987) (O'Connor, J.). In the former class of cases—into which the instant case falls—the Court has recognized that when citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. *See* Jamison v. Texas, 318 U.S. at 416.

United States v. Kokinda, 497 U.S. 720, 744 n.2 (1990) (Brennan, J., dissenting) (holding that Post Office sidewalk was not traditional public forum and that Postal Service regulations prohibiting solicitation on Post Office premises did not violate Free Speech Clause).

33. Laycock, *supra* note 32, at 48. *But see DeNooyer*, 799 F. Supp. at 752 ("The Supreme Court has not made the 'use' versus 'access' distinction.").

34. *Hazelwood*, 484 U.S. at 268-70.

35. *See id.* at 269 (noting that the students' assertion that "they could publish 'practically anything'" in the newspaper was unfounded).

36. *See id.*

37. 508 U.S. at 387-89.

plaintiffs had no right to access the district's property apart from the district's "opening" of the property.[38]

In *Rosenberger v. University of Virginia*, a student organization that published a Christian newspaper challenged the university's refusal to disperse funds to the group from the Student Activity Fund (SAF), a fund created by the university to pay for a broad range of extracurricular student activities.[39] University policy allowed several of the student groups recognized as Contracted Independent Organizations (CIOs) to get the SAF reimbursement.[40] While the plaintiff student group, Wide Awake Productions, had become a CIO, the university had denied the group SAF funding.[41] As in *Hazelwood* and *Lamb's Chapel*, the Court used forum analysis.[42] But once again, this analysis was appropriate only because the plaintiffs did not have a right to access the university programs apart from the right granted by the university.[43]

Whereas in *Hazelwood*, *Lamb's Chapel*, and *Rosenberger*, the plaintiffs asserting freedom to speak had no independent entitlement to enter and speak upon the property (or program) in issue, this was not the situation in *Tinker*.

> Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech. The Court's requirement that the school show a material and substantial interference with the educational function is addressed to that question.[44]

Unlike in *Hazelwood*, *Lamb's Chapel*, and *Rosenberger*, where the defendants had the right to ban entrance by the plaintiffs (and others)

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38. *Id.* at 391 ("[T]he [School] District need not have permitted after-hours use of its property for any of the uses" allowed by state law). The Court found that since the school district allowed groups with other perspectives on family values and child-rearing to use the facilities, the district had committed viewpoint discrimination and, thus, it was unconstitutional to exclude the church from using the facilities. *Id.* at 394-97.

39. 515 U.S. 819, 823-24 (1995).

40. *Id.* at 823.

41. *Id.* at 825.

42. *Id.* at 829-30. As in *Lamb's Chapel*, the Court actually based its decision upon viewpoint discrimination. *Id.* Viewpoint discrimination is unconstitutional even in a nonpublic forum. *See supra* note 29 and accompanying text.

43. *See id.* at 823 ("CIO status is available to any group the majority of whose members are students, whose managing officers are full-time students, and that complies with certain procedural requirements.").

44. Laycock, *supra* note 32, at 48.

to the government property, the *Tinker* plaintiffs were actually compelled to be on the government property.

Even if sympathetic to the idea of rejecting forum analysis in cases where students speak on *school grounds* generally, forum analysis proponents may charge that student speech in the *classroom* is a category unto itself. While students may have some leeway to "go about their business" during lunch, passing periods, and recreation times, they are not at such leisure in the classroom. In the classroom, students are to be actively learning and participating in a program led by the teacher. Forum analysis proponents may assert that this is not a time for broad discourse, religious or otherwise—especially in an elementary school.

This assertion is mostly, but not completely, accurate. While the student in the classroom and the student on the playground both have unquestioned access to their locations, the student in the classroom does not have the same liberty to speak as does the one on the playground. This is no reason, however, to engage in forum analysis; to the contrary, it is a reason to apply *Tinker*, where the appropriate standard for determining the degree of protection for the speech is to inquire whether the speech in question materially and substantially interferes with the educational function. The standard is responsive to the educational setting: Speech that is not substantially disruptive on the playground may very well be substantially disruptive in the classroom. Under *Tinker*, school officials can censor the latter, but not the former. In both scenarios, though, school officials must be able to substantiate their forecast of disruption.[45] Unfounded fears do not justify censorship in the classroom any more than they do on the playground.[46]

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45. *See Tinker*, 393 U.S. at 509 ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

46. In *Settle v. Dickson County School Board*, a ninth-grade teacher assigned her class a four-source research paper, requiring only that each paper topic be "interesting, researchable and decent." 53 F.3d 152, 153 (6th Cir. 1995). A student sued under the Free Speech Clause when the teacher refused to accept a research paper entitled "The Life of Jesus Christ" and gave the student a "zero" for failing to write on another topic. *Id.* Applying the *Tinker* standard, and asking whether the topic of Jesus materially disrupted classwork or involved substantial disorder, would have made *Settle* a case easily decided for the plaintiff. Instead, applying a categorical "classroom" rule, and based on the flawed conclusion that the *Hazelwood* Court found the school newspaper to be an "open forum," (*cf. Hazelwood*, 484 U.S. at 268-70 (finding that the newspaper was not a public forum)), the *Settle* court concluded that "[w]here learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum." *Settle*, 53 F.3d at 155.

B. School Sponsorship

A second issue to consider in determining whether to apply *Tinker* or *Hazelwood* is whether the speech was sponsored by the school. Importantly, the *Hazelwood* Court acknowledged that there is speech that merely "happens to occur" at school.[47] An example of this speech, the Court noted, was the wearing of armbands by the *Tinker* students in the classroom.[48] The Court contrasted this "happening" with "activities that students, parents, and members of the public might *reasonably* perceive to bear the imprimatur of the school."[49] An example of school-sponsored speech is a publication or a theatrical production.[50] By the Court's reasoning, nonschool-sponsored and school-sponsored student expression are two distinguishable situations that call for two different standards. The distinction would be meaningless if one of the scenarios swallowed the other. Despite how little we may know about the parameters of each category, we know definitely that neither category encompasses the other. Thus, even if parents, members of the public, or fellow students were to perceive that *Tinker*-like student expression is sponsored by the school, this perception would not be reasonable and *Tinker*, rather than *Hazelwood*, should control the extent to which school officials may regulate student expression. Even so, three further concerns merit discussion.

1. Compulsory Attendance

Some argue that the fact that students are compelled by law to be in the classroom creates *per se* school sponsorship of whatever speech occurs there.[51] Yet the *Hazelwood* Court showed that this conclusion is incorrect. Despite compulsory school attendance, the Court said that student expression that merely "happens" at school is not sponsored

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

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.*

51. *See, e.g.*, Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 371 (1996) ("In those school settings accompanied by compulsory attendance requirements, state-sponsored religious exercises infringe the religious liberty of those coercively required to attend. With or without coercion, neutrality is impossible in these settings; majority religion and favored sects will always dominate the enterprise."); Leah Gallant Morgenstein, Note, *Board of Education of Westside Community Schools v. Mergens: Three "R's" + Religion = Mergens*, 41 AM. U. L. REV. 221, 230 n.50 (1991) ("Compulsory attendance laws, the impressionability of young students, and the potential perception of school sponsorship combine to make the public school a sensitive forum for equal access considerations.").

by the school.[52] Indeed, the Court's example of a nonschool-sponsored expression—the students wearing armbands in *Tinker*—occurred in a classroom full of students compelled to be in that classroom.[53] While compulsory attendance may be problematic in other ways,[54] it is not a reason to treat all student speech within the classroom as school-sponsored speech.

2. Aggregate Number of Speakers

Some also might argue that a school sponsors student expression when the aggregate number of speakers from a particular viewpoint is especially high. That is, when the vast majority of a classroom expresses the same ideas, the school sponsors that expression de facto. Admittedly, as a practical matter, a standard more stringent than the *Tinker* standard might be desirable where, for example, eighteen of twenty third-graders in a Texas school read Bible stories during their respective turns to "show and tell." The substantial disruption standard might be insufficient to completely protect the lone Buddhist student in the class. This scenario is problematic on a personal and social level, which I address below.[55] However, this scenario is not problematic on the constitutional level.

As a constitutional matter, the Free Speech Clause protects *each* student speaker. The protection is an individual right. It would be unreasonable[56] to diminish an individual student's protection because he sought to exercise his right in close proximity of time or space to other students exercising the same right. For example, we would not say that people protesting as a group deserve less Free Speech protection because they might persuade or intimidate those against whom they protest. Moreover, reducing speakers' protection because they all come from one viewpoint would be a form of viewpoint discrimination, a clear violation of the Free Speech Clause.[57]

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

53. *See Tinker*, 393 U.S. at 516 (Black, J., dissenting) ("Here the constitutional right to 'political expression' asserted was a right to wear black armbands during school hours and at classes.").

54. *See infra* Part II.D. (discussion of captive audience) and Part III (discussion of Establishment Clause).

55. *See infra* Part II.C. (discussion of emotional harm to young listeners).

56. *See Hazelwood*, 484 U.S. at 271 ("expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school").

57. *See Rosenberger*, 515 U.S. at 829. This is not to mention the administrative difficulty of the school deciding when several speakers come from "one" viewpoint.

As the *Hazelwood* Court noted, a finding of school sponsorship may be based on a reasonable perception by students.[58] The schools are in a great position to clarify for students what is or is not sponsored by the school. Even if there is a large number of speakers with the same viewpoint, a teacher can explain in simplified terms that the Constitution protects each student's right to speak.

3. Age

A third concern is that, because of their youth and immaturity, elementary school children often mistake "pure" student expression for school-sponsored student expression. As the *Oliva* court noted,

> At this age [first grade], it is quite reasonable to assume that these children could have been easily confused whether or not Z.H.'s teacher merely let Z.H. read his book, or if she approved of its message. Presenting the book to the teacher for approval was part of the standard procedure of that class activity; consequently, the books that were allowed to be read were those approved by the teacher. It is likely that some first-grade students would not fully understand all of the reasons why something could be unsuitable for use in a school activity and could instead believe that the books Ms. Oliva allowed to be read were those books that she liked or those with which she personally agreed.[59]

This concern is intensified when it is combined with the above two concerns. When especially *young* students are *compelled* to be at school and *many student speakers* express the same view, it may be even more likely that listening students misperceive that the speakers' expression is sponsored by the school.

It is important to remember, however, that this perception of school sponsorship is based on confusion and *mis*understanding. The erroneous perception of a young child, or anyone for that matter, cannot transform speech that happens at school into speech that the school promotes and stands behind. The perception would be inaccurate and unreasonable.[60] There is no reason to allow the

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

59. *Oliva*, 990 F. Supp. at 355. *See also DeNooyer*, 799 F. Supp. at 747 (defendants argued "that second graders might not have the maturity to understand the context in which the [Christian] song was presented, that the students might assume that the School District endorsed the message of the song").

60. If not instructive or clarifying, it is at least interesting to note the *Hazelwood* Court's ambiguity, in a mere four sentences, as to what constitutes "school-sponsored" student expression. First, the Court says that it is not "a student's personal expression that happens to occur on the school premises." *Hazelwood*, 484 U.S. at 271. Rather, it includes "expressive activities that

subjective perception of one child (or of several children) to define the scope of the constitutional right of another child.

Moreover, as previously noted, school officials, above all, are in an extraordinary position to curb erroneous perception. Schools can clarify for students what expression is or is not sponsored by the school. Teachers can explain that a plurality of opinions and beliefs exist in the world, especially in our country, and even in the classroom. There is no reason for this fundamental lesson of civics not to take root in the elementary school. Justice Brennan made this point sharply in his dissent in *Hazelwood*:

> The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the armbands in *Tinker*, "happens to occur on the school premises." Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.
>
> But "[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, . . . or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong.[61]

C. Age as an Independent Objection to Tinker

Even if a court were to conclude that the student speech at issue occurred in something other than a nonpublic forum and that the speech was not school-sponsored, there is an objection to applying the *Tinker* standard in the elementary school context that is independent of the concern that young children are more likely to misperceive school sponsorship. The concern is that student speakers may

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students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* Thus, it is only reasonable perception that can render expression "school-sponsored." Yet, "[e]ducators are entitled to exercise greater control over [school-sponsored] student expression to assure . . . that the views of the individual speaker are not erroneously attributed to the school." *Id.*

61. *Hazelwood*, 484 U.S. at 288-89 (Brennan, J., dissenting) (citations omitted).

emotionally harm student listeners.[62] The court in *Muller v. Jefferson Lighthouse School* expressed this concern in the midst of discussing whether the student speech occurred in a public forum:

> Declaring the elementary school classroom, hallway, or playground forums for unfettered student communication would require either a severe incursion into the critical educational mission of the elementary school or a substantial contraction of the First Amendment protections afforded speech in a public forum. Perhaps both. But neither alteration is necessary on the facts before us. In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that may hurt. But it makes no sense to say that the

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62. A variation on this theme is represented by *Baxter v. Vigo County Sch. Corp.*, in which an elementary school student alleged that she had a right under *Tinker* to wear confrontational T-shirts (stating, *e.g.*, "Unfair Grades," "Racism"). 26 F.3d 728, 730, 736 (7th Cir. 1994). The court held that the school principal had qualified immunity. *Id.* at 738; *see also* Harless v. Darr, 937 F. Supp. 1339, 1350 (S.D. Ind. 1996) (finding school officials immune from constitutional challenges to the officials' prohibiting elementary school student from passing out religious tracts at school). The court based its reasoning upon the fact that the plaintiff "was at least seven years younger than the youngest student in *Tinker*." *Baxter*, 26 F.3d at 738.

> [G]iven the indications in [*Bethel School District v. Fraser*, 478 U.S. 675 (1986),] and [*Hazelwood*] that age is a relevant factor in assessing the extent of a student's free speech rights in school, in addition to the dearth of caselaw in the lower federal courts, we are unable to conclude that the Baxters have demonstrated that the right [the principal] is alleged to have violated was "clearly established."

Id. Yet the court's analysis is confused. First, the court quoted the *Fraser* Court's statement that "[i]t does not follow . . . 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 public school." *Id.* (internal quotation marks omitted) (quoting *Bethel Sch. Dist.*, 478 U.S. at 682). Yet, this is consistent with *Tinker*. While an adult may be allowed a measure of offensiveness in his speech, *Tinker* curtails similar speech by a student when it substantially disrupts the classroom.

Second, the *Baxter* court quoted the *Hazelwood* Court's statement that "a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive student topics." *Baxter*, 26 F.3d at 738 (internal quotation marks omitted) (quoting *Hazelwood*, 484 U.S. at 272). Yet the *Hazelwood* Court was addressing the standard for regulating *school-sponsored* speech. The *Baxter* court offers no analysis of how it perceived—or how the plaintiff's fellow students reasonably could have perceived—the plaintiff's confrontational T-shirts to be sponsored by the school.

As the *Baxter* court alludes, some courts and commentators are concerned that young students are not sufficiently mature to handle a broad freedom to speak. *See* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1072 (1995). Yet maturity is not a prerequisite to free speech protection. Under the First Amendment, it is assumed initially that all Americans, even students, enjoy free speech protection. "[N]othing in the [F]irst [A]mendment postpones the right of religious speech until high school." *Baxter*, 26 F.3d at 738 (quoting Hedges v. Wauconda Community Sch. Dist. No. 18, 9 F.3d 1295, 1298 (7th Cir. 1993)). This Article, and cases such as *Tinker* and *Hazelwood*, wrestle with where to draw the lines of protection of student speech, based not on the maturity of the speaker, but upon the competing rights of those whom the speaker affects.

> overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate, no matter the impact. Racist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth.[63]

The court's conclusion controls its analysis. Finding that classrooms are "forums for unfettered student communication" cannot be right, the court says, because this "could crush a child's sense of self-worth," a presupposed constitutional evil. Yet, as precious as a child's self-worth is and as much as it should be protected, damage to a child's self-worth is not necessarily equivalent to material and substantial disruption of the educational environment. While the *Muller* court concludes that it never makes sense to allow "the overly zealous" child to tell another that he is going to hell (i.e., "no matter the impact"), in *Tinker* the Supreme Court made clear that, for the sake of the First Amendment, those within the schoolhouse may have to experience some measure of "the discomfort and unpleasantness that always accompany an unpopular viewpoint."[64]

Still, one might assert that there is doctrinal support for valuing a child's emotional health above another child's right to speak. For example, while the courts protect symbolic speech under the First Amendment, they do not protect violent acts that may very well also be symbolic speech.[65] Short of actual violence, "fighting words" are not protected.[66] Yet *Tinker* itself accounts for excessive intimidation by student speakers. If one student's statement that another is going to hell is part of an open and peaceful exchange, under *Tinker*, the speech likely should be protected. If, however, the statement disrupts the class, *Tinker* addresses the situation.

> [T]he *Tinker* standard is flexible enough to account for the differences in maturity between elementary school and older children. Given their youth, it is more likely that unrestricted speech in any given circumstances would be more likely to "substantially disrupt" the school's normal operation where younger students are involved. But this does not mean that school officials need not have

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63. Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1539-40 (7th Cir. 1996) (holding that a school district code requiring predistribution review and nonschool-endorsement disclaimer on materials was constitutional).

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

65. *See* H.C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 414-15 (4th ed. 1995).

66. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

facts on which to base their fear of disruption before restricting speech.[67]

D. Captive Audience Exception

Just as there is a concern about student age that is independent of the concern about school sponsorship, there is an independent concern about compulsory attendance.[68] The concern is that the *listening* students may not want to hear the expression of student speakers. Admittedly, part of maturing and learning social skills is encountering people and expression that we either dislike or with which we disagree. Yet one usual option for the "unreceptive listener" is to physically distance oneself from the speaker or the speech. If it is an obnoxious phone salesman, we can hang up the phone. If it is a disagreeable pastor, we can leave the pew. If it is an aggressive protester, we can walk away. When we do not have the option to remove ourselves from speech coming our way, the courts have often held that the speech is not protected by the First Amendment.[69]

In the classroom, students usually do not have an opportunity to remove themselves from expression they dislike or with which they disagree. Because they are compelled to be in the classroom, they must endure whatever speech occurs there. Some may argue that this is reason to apply a "captive audience" exception to free speech protec-

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67. Sekulow, et al., *supra* note 62, at 1072. As of yet, there are no "decisions of the Courts of Appeals applying *Tinker*-based speech right to the elementary school setting." *Muller*, 98 F.3d at 1538. *But see* Johnston-Loehner v. O'Brien, 859 F. Supp. 575, 580-81 (M.D. Fla. 1994) (applying *Tinker* where elementary school student challenged school district policy "requiring that students obtain the review and approval of school officials prior to distributing any written material").

Phillips v. Anderson County School District Five demonstrates how courts can apply *Tinker* effectively. 987 F. Supp. 488 (D.S.C. 1997). In *Phillips*, a middle school student alleged that he had a right to wear a jacket that looked like the Confederate battle flag. *Id.* at 490. The middle school's student body was about three-fourths white and one-fourth black, and in the five years prior to the time that school officials prohibited the plaintiff from wearing his jacket, the school had experienced at least five incidents of violence or near violence caused by student display of a Confederate flag. *Id.* The court concluded as a matter of law that school officials had a reasonable basis for determining that the plaintiff's jacket would likely result in another substantial disruption at the school. *Id.* at 493.

68. *See supra* Part II.B.1.

69. Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 456 ("Courts have held that offensive speech may not be regulated in public forums such as streets and parks where a listener may avoid the speech by moving on or averting his eyes, but the regulation of otherwise protected speech has been permitted when the speech invades the privacy of the unwilling listener's home or when the unwilling listener cannot avoid the speech.").

tion in the classroom—one that allows schools great latitude in regulating student speakers when they speak to unreceptive classmates.[70] Looking at the listeners alone, and assuming that they are, in fact, "unreceptive,"[71] the argument seems persuasive.

Yet one cannot look at the listeners alone. Unlike the speakers in the traditional "captive audience" cases, in the classroom, the speakers are also compelled to be there.[72] Whereas the phone salesman, the pastor, and the protester have thousands of people to whom they can express themselves, the student speaker, compelled to be in school six to eight hours a day, does not have that option. If he is to express himself at all during those six to eight hours, the student speaker will have to do it in the classroom. Thus, the classroom is unlike virtually any other place of expression: the listener has no escape and the speaker has no other forum for expression. If one student wants to speak and another does not want to hear it, one must budge.

Three reasons, taken together, justify the combination of applying the *Tinker* standard and not applying a captive audience exception in this context. First, the right to freedom of speech (or the right to have the government not impede free speech) is specifically enumerated in absolute terms.[73] Even if on a practical basis we cannot accept the absolute nature of the Free Speech Clause,[74] the absolute language should carry weight.[75] In contrast, the captive audience exception is

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70. *See Muller*, 98 F.3d at 1541 ("Children in public schools are a captive audience that school authorities acting in loco parentis may protect.") (internal quotation marks omitted) (quoting *Bethel*, 478 U.S. at 684); *but cf.* Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996) (in discussing substantive due process: "Compulsory attendance laws for public schools, however, do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school.").

71. This requirement could be the source of administrative difficulty. In captive audience cases, the exception to free speech protection is based upon a finding that the listeners are not receptive. Even if one accepts that the captive audience exception ought to apply in this context, it does not necessarily follow that the school should be able to "apply" the exception without first verifying that the listening students are unreceptive, as opposed to genuinely interested or, at least, willing to listen.

72. *See* Sekulow, et al., *supra* note 62, at 1019.

73. U.S. CONST. amend. I.

74. Justice Black often attempted to stick to the absolutist sense of the text. But even Justice Black found this approach unworkable. *See, e.g.*, *Tinker*, 393 U.S. at 515 (Black, J., dissenting). *See also* John M. Beahn, *Reno v. ACLU: The Communications Decency Act Hits a Red Light on the Information Superhighway*, 47 CATH. U. L. REV. 333, 333 (1997) ("Although the language of the First Amendment appears absolute, the Supreme Court never has held the First Amendment to confer an absolute right to free speech.").

75. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1745 (1990) (book review) ("The proper standard for implied exceptions to absolute rights should be something like the compelling interest test. An implied exception to a textually absolute right should be an extraordinary thing.

a court-made adjustment to the Free Speech Clause.[76] While the exception makes sense where the speaker has other places for expression,[77] no such leeway exists in the classroom. To accommodate the unreceptive listener effectively would require placing the scope of the student speaker's right to speak within the listener's discretion. Any lack of receptivity by a fellow student would act as a prohibition of the speaker's right to speak while at school—the captive audience would be allowed the "heckler's veto." In this situation, it is reasonable that the constitutional clause, rather than the exception, should prevail.

Second, unreceptive listeners have the tool of counterspeech. Where this opportunity exists, counterspeech, rather than prohibition of the original speech, is the better option.[78] Unreceptive listeners can employ counterspeech to protect themselves, to defend truth, and to dilute speech with which they disagree. In contrast, if the captive audience exception were applied, student speakers would be left with no comparable tool to balance the situation. They would have to dilute their speech enough to not elicit an "unreceptive" response from a fellow student.

Third, the *Tinker* standard itself mitigates unfairness to unreceptive listeners. It is likely that in situations in which listeners will be genuinely unreceptive (*e.g.*, where the speech is unusually loud or aggressive), the speech in question will be substantially disruptive, especially in an elementary school classroom.[79] If regular listeners

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We have learned from experience that 'no law' cannot literally mean no law. But 'no law' should mean hardly any law—as few laws as possible.").

76. Arguably, it is merely the proper interpretation of what the Free Speech Clause actually means.

77. *See, e.g.*, *Frisby*, 487 U.S. at 484-87 (finding that city ordinance limiting speech served narrowly tailored government interest and that captive audience exception was applicable where "ordinance permits the more general dissemination of a message" and "preserves ample alternative channels of communication"). Additionally, the captive audience exception is more favored when the unwanted speech invades the listener's home, "the last citadel of the tired, the weary, and the sick." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 775 (1994) (internal quotation marks omitted) (quoting *Frisby*, 487 U.S. at 484).

78. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 672 (1994) ("Under the First Amendment there is no such thing as a false idea, the fitting remedy for evil counsels is good ones." (internal quotation marks omitted) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); Washington v. Vote No! Comm., 135 Wash. 2d 618, 626, 957 P.2d 691, 696 (1998) ("Instead of relying on the State to silence false political speech, the First Amendment requires our dependence on even more speech to bring forth truth.") (citations omitted).

79. *See* Sekulow, et al., *supra* note 62, at 1072.

(*i.e.*, outside the school setting) had the protection *Tinker* affords, the captive audience exception would be less needed.[80]

Some may argue that counterspeech will be of no help in the hands of elementary school children—they are too young to effectively counter another's speech.[81] But surely one youngster can effectively counter the speech of another youngster. On average, both will be equally youthfully inarticulate, disorganized, and rambling. Some may also argue that counterspeech will be ineffective where there is a large aggregate number of same-viewpoint speakers. While this is worthy of concern, counterspeech from a lone dissenter can be effective. In particular, if several speakers share the same viewpoint, the veracity of their claims can be dealt with singularly. It is only one viewpoint that must be opposed. The real discomfort here is the intimidation that the lone dissenter might face. *Tinker* will curb part of that intimidation. Any intimidation that exists beyond the scope of the *Tinker* standard is part of the cost of the Free Speech Clause.[82]

E. Applying Tinker to Oliva

One might ask whether applying *Tinker*, instead of *Hazelwood*, would actually make a difference. Would the *Tinker* standard allow for greater student religious speech within the classroom? On the doctrinal level, the answer is yes.[83] Under *Tinker*, school officials can prohibit student speech only when they "forecast substantial disruption of or material interference with school activities" or an "invasion of the rights of others."[84] Under *Hazelwood*, "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as

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80. *See Frisby*, 487 U.S. at 486 ("The type of picketers banned by the [city] ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt.").

81. *See, e.g.*, *Muller*, 98 F.3d at 1538 ("The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression.").

82. *See supra* note 62 and accompanying text.

83. The words "allow for" are important here. The argument here is not that if courts apply *Tinker* to student speech in the classroom a greater quantum of student religious speech will result. Rather, it is that the First Amendment protects an individual's right to speak, if he so chooses, and that *Tinker* better protects that choice.

84. *Tinker*, 393 U.S. at 513-14.

to require judicial intervention to protect students' constitutional rights."[85]

In review, *Oliva* also demonstrates the effect of *Tinker*. The first decision to be made is whether *Tinker* or *Hazelwood* applies. If the student speech occurs in a nonpublic forum and is sponsored by the school, *Hazelwood* applies. If not, *Tinker* applies. The *Oliva* court quoted the *Hazelwood* statement that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations."[86] The court then summarily concluded that "[i]t is clear that Z.H.'s school and classroom were not public forums."[87] The only support the court relied upon was "the fact that Z.H.'s teacher reserved the right to inspect and reject each child's reading selection before it was presented to the class."[88]

The court's reasoning is flawed. There is, in fact, no elementary school classroom that is open for "indiscriminate use by the general public." Where the issue is whether a member of the public has a right to speak in the school, this fact is important. In cases such as *Oliva*, however, the issue is the degree of freedom a *student* has to speak. As discussed above, when a person is in a place he is entitled—or compelled—to be, *as to that person*, the place cannot reasonably be considered a "closed forum."[89]

Even if student expression occurs in a nonpublic forum, as the *Oliva* court concluded, the expression still must be school-sponsored in order for *Hazelwood* to apply. Yet the *Oliva* court gave no consideration to the issue of school sponsorship before applying the *Hazelwood* standard.[90] While later in the opinion, the court did discuss potential misperception by Z.H.'s classmates,[91] the court offered no explanation of why this perception would be reasonable or why Ms. Oliva, in Justice Brennan's words, could not have employed the "[d]issociative means short of censorship [that were] available to the school."[92]

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85. *Hazelwood*, 484 U.S. at 273 (citation omitted).
86. *Oliva*, 990 F. Supp. at 352 n.16 (quoting *Hazelwood*, 484 U.S. at 267).
87. *Id.* at 352 n.16.
88. *Id.*
89. *See supra* Part II.A.
90. *See Oliva*, 990 F. Supp. at 352-53.
91. *See supra* Part II.B.3.
92. *Hazelwood*, 484 U.S. at 289 (Brennan, J., dissenting).

Assuming that the *Oliva* court should have applied *Tinker*, what would be the result of doing so? According to the court, "because of its religious content, Ms. Oliva did not allow Z.H. to read the story to his class."[93] Is this reason sufficient under *Tinker*? One can argue that issues of religion often profoundly divide people, and that it is likely that a religious story would offend another student to the extent that classroom activities could be substantially disrupted. Yet the *Tinker* Court stated that

> [i]n order for . . . school officials to justify prohibition of a particular expression of opinion, [they] must be able to show that [their actions were] caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[94]

Ms. Oliva made no determination that Z.H.'s speech would cause a material or substantial disruption. Rather, "Z.H. was not allowed to read the book to his classmates during class time because it was The Bible, a religious book that constitutes the very foundation for a number of, but obviously not all, religions."[95] Ms. Oliva banned Z.H.'s speech to avoid the discomfort that accompanies a potentially divisive viewpoint—an impermissible act according to the Supreme Court in *Tinker*.[96]

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93. *Oliva*, 990 F. Supp. at 347.

94. *Tinker*, 393 U.S. at 509 (citation omitted). The Court further proclaimed that

> undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.

Id. at 508. *See also* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 872 (2d Cir. 1996) ("[A]llowing the Walking on Water Club to guarantee that three of its prayer leaders will be Christians does not constitute 'substantial and material interference' with the School's mission of educating and disciplining.").

95. *Oliva*, 990 F. Supp. at 354.

96. This is not to mention that banning the Bible, or religious books generally, from the reading program was likely viewpoint discrimination, itself a violation of the Constitution. *See Rosenberger*, 515 U.S. at 829.

III. THE ESTABLISHMENT CLAUSE

During the discussion of the Free Speech Clause, undoubtedly many readers waited for the other shoe to drop. Even if *Tinker* should apply in cases such as *Oliva*, and student speech such as Z.H.'s should be protected under *Tinker*, one must still take account of the Establishment Clause.

Courts and commentators agree that the Establishment Clause restricts government action.[97] Thus, for example, if Microsoft began including in Windows 98 a screen saver that displays Bible verses, many of the computer users "compelled" to use Windows 98 might not like the screen saver, but they would have no Establishment Clause claim based on the inclusion of the Bible verses. The Establishment Clause cannot reach Microsoft's expression because the expression is private and not "of" the government. In order for the Establishment Clause to apply to a situation, it must be one in which the government acts.

The difficulty in the context of religious expression in the classroom is deciding when the expression is, in fact, private and when it is of the government. The Establishment Clause does not reach the former; it greatly limits the latter. When a teacher or school official speaks about religion or in a religious mode (*e.g.*, prayer), the Establishment Clause clearly is at issue because the government, through its agent, has spoken. Then the question for the court becomes whether this government speech constitutes an "establishment"—*i.e.*, whether the Clause is violated. Since it is obvious that applying one of the Supreme Court's Establishment Clause tests[98] is the task at hand, a court need not go through the mental exercise, much less the written exercise, of noting that the government has acted.

How should courts assess the constitutionality of religious expression *by a student*? Like Microsoft's expression, the student expression is made by a private citizen, not a government agent. Nevertheless, some courts reason that if the school permits student religious speech, that act of permission may violate the Establishment Clause.[99] In assessing the validity of this approach, it is useful to

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97. *See Pinette*, 515 U.S. at 766 (plurality); *id.* at 779 (O'Connor, J., concurring).

98. *See* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278-79 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996) ("The Fifth Circuit has identified three tests that the Supreme Court has used to determine whether a government action or policy constitutes an establishment of religion": the Lemon, coercion, and endorsement tests).

99. *See, e.g.*, *Oliva*, 990 F. Supp. at 353 (discussing "endorsement" concerns).

first take note of both the text of the First Amendment and how the framers of the Constitution viewed religious liberty.

A. The First Amendment Text

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."[100] The first relevant observation is that the text states, "*Congress* shall make no law." While the Supreme Court long ago decided that the Fourteenth Amendment makes the First Amendment equally effective upon state governments,[101] it is important to remember that it is government action with which the amendment is concerned.

Second, the First Amendment does not designate any priority among the Establishment, Free Exercise, and Free Speech Clauses. As a purely textual matter, each clause has equal weight and it is reasonable that each clause has a function independent from the other First Amendment clauses.

Third, the First Amendment text does not indicate what the term "speech" encompasses. However, it is clear that "speech" includes religious speech. Speech does not lose the protection of the Free Speech Clause because the speech is religious.[102] Moreover, because the First Amendment text directs that Congress shall make no law prohibiting the free exercise of religion, speech that is part of the free exercise of religion is twice protected, once by the Free Speech Clause and once by the Free Exercise Clause.[103]

Fourth, as with the word "speech," the text does not clarify the meaning of "establishment." "Establishment" often connotes something permanent or institutionalized,[104] and some have argued that the Establishment Clause prohibits only founding a national religion or preferring one religious sect over another.[105] Others have

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100. U.S. CONST. amend. I.

101. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

102. *Pinette*, 515 U.S. at 760 ("a free-speech clause without religion would be *Hamlet* without the prince").

103. Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 796 (1996); *see also supra* note 9.

104. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 778 (1986).

105. Chief Justice Rehnquist has asserted that

> [i]f one were to . . . construe the [First] [A]mendment in the light of what particular "practices . . . threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent

argued that the Clause forbids any law that even tends toward an "establishment."[106]

B. The Framers' View of Religious Speech

"Religious speech is central to the First Amendment because religion is central to the First Amendment."[107] The framers made religion central to the First Amendment because of their considered commitment to religious liberty.[108] This commitment grew out of three primary realizations. First, government attempts to suppress unpopular religious views had caused vast suffering in Europe and, though to a lesser degree, in the colonies.[109] Second, religious beliefs are of unparalleled importance to the individual. Thus, it is best to leave religion in the hands of those who care about it most: individuals themselves.[110] Third, religious beliefs ultimately are of little

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> the establishment of a national religion or the governmental preference of one religious sect over another.

Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring)).

106. In refuting Chief Justice Rehnquist's view, Justice Souter has asserted that "[t]he Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general." Lee v. Weisman, 505 U.S. 577, 614 (1992) (Souter, J., concurring).

> Some commentators have suggested that by targeting laws respecting "an" establishment of religion, the Framers adopted the very nonpreferentialist position whose much clearer articulation they repeatedly rejected. Yet the indefinite article before the word "establishment" is better seen as evidence that the Clause forbids any kind of establishment, including a nonpreferential one. If the Framers had wished, for some reason, to use the indefinite term to achieve a narrow meaning for the Clause, they could far more aptly have placed it before the word "religion."

Id. at 615 (citations omitted). *See also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991).

How one answers the question of what the Establishment Clause prohibits does not alter the first two of the above observations: the First Amendment restricts government action and it gives no priority to any one of its clauses. However, one's answer may very well affect the third observation: the First Amendment protects religious speech. If the Establishment Clause prohibits only some sort of national religion or preference among sects, religious speech may not be very problematic. For example, Z.H.'s speech alone, even if promoted by his teacher, would not nationalize religion. On the other hand, if the Establishment Clause requires the government to be neutral toward religion—to neither encourage nor discourage religion—religious speech, if promoted by the government, is problematic.

107. Laycock, *supra* note 103, at 797.

108. *See* Laycock, *supra* note 9.

109. *Id.*; *see also* Engel v. Vitale, 370 U.S. 421, 432 (1962) ("[A] purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.").

110. Laycock, *supra* note 9, at 317; *see also Engel*, 370 U.S. at 432 ("The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil

importance to civil government—problems due to lack of national religious uniformity pale in comparison to those that arise from attempts to impose such uniformity.[111] Because of their commitment to religious liberty, the framers believed that to the extent that any class of speech is worth protecting, religious speech is clearly within that class.

In light of the framers' high valuation of religious speech because of its religious content, the framers would have contradicted themselves if they had restricted it more than other sorts of high-value speech *because of* religious speech's nonsecular content. That is, if religious speech is highly valuable, it may be as restricted as other high-value speech, but not for the very reason for which it is thought valuable. Moreover, if the framers sought to protect religious liberty in order to avoid the suffering that usually attends the government imposition of religious uniformity, it would be counterproductive to allow less religious speech than other high-value speech. Likewise, because the framers thought that religion matters most to individuals and that it is not worthwhile for government to impose religious uniformity, it would not make sense to write an amendment that first doubly protects religious speech—through the Free Exercise and Free Speech Clauses—but then simultaneously voids the right to engage in that speech.

C. *Distinguishing Private Speech from Government Speech*

1. Recent Cases

The Supreme Court's most recent effort to distinguish private and government expression under the Establishment Clause is *Capitol Square Review & Advisory Board v. Pinette*.[112] In *Pinette*, the review board charged with regulating public access to the plaza surrounding the Statehouse in Columbus, Ohio, denied an application by the Ku Klux Klan to place an unattended cross in the plaza for two weeks during the Christmas holidays.[113] Looking to the Free Speech Clause, a majority of the Court found that when the KKK applied to erect the cross, it sought to engage in "constitutionally protected expression" and that the Statehouse plaza was a "full-fledged public forum."[114] The majority began its analysis by stating bluntly that

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magistrate.").

111. *See* Laycock, *supra* note 9, at 317.

112. 515 U.S. 753 (1995).

113. *Id.* at 758.

114. *Id.* at 761.

the KKK's religious display was "private expression,"[115] but it did not explain how it reached this conclusion. The Court did explain that it viewed the case before it as being like *Lamb's Chapel v. Center for Moriches Union Free School District*[116] and *Widmar v. Vincent*,[117] in that in all three cases "[t]he State did not sponsor [the speaker's] expression."[118] A plurality in *Pinette* refused to apply any Establishment Clause test to the KKK's challenged speech, finding neither "expression by the government itself," nor "government action alleged to discriminate in favor of private religious expression or activity."[119]

There are two primary differences between *Pinette* and *Oliva*. First, the speech in *Oliva* was a book rather than a symbol. Second, the location of the speech in *Oliva* was a public school classroom rather than state capitol grounds. The first distinction is of little consequence. There is no indication in *Pinette* that the Court's analysis would have differed significantly had the form of speech been different.[120] The second distinction matters. One might argue that allowing Z.H. to read his story would violate the Establishment Clause because those who would have received the speech were a captive audience—students forced to attend school; whereas in *Pinette*, those who saw the cross were free to come and go from the capitol grounds.

In *Lee v. Weisman*, the Supreme Court considered a public high school student's challenge to a school district policy that allowed principals to invite clergy to offer prayers at middle school and high school graduations.[121] The Court held that a religious exercise may not be "conducted at a graduation ceremony where, as we have found, young graduates who object are induced to conform."[122] The Court's holding was controlled, in part, by a finding of compulsory attendance: "Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored

115. *Id.* at 760.

116. 508 U.S. at 384 (holding that school district violated church members' Free Speech rights by denying church access to district's facilities based solely on viewpoint church wished to present).

117. 454 U.S. 263 (1981) (holding that public university violated Free Speech Clause by excluding student religious group from facilities open to other student groups).

118. *Pinette*, 515 U.S. at 763.

119. *Id.* at 764.

120. *See id.* at 786 (Souter, J., concurring) ("When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.").

121. 505 U.S. at 581.

122. *Id.* at 599.

religious activity are in a fair and real sense obligatory."[123] The Court's holding was equally dependent upon its finding that

> [s]tate officials direct[ed] the performance of a formal religious exercise . . . The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. . . . [F]rom a constitutional perspective it is as if a state statute decreed that the prayers must occur.[124]

The pervasive government involvement stemmed from the fact that the school principal "decided that an invocation and a benediction should be given" and "chose the religious participant"; both choices were "attributable to the State."[125]

Four years after *Lee*, in *Ingebretsen v. Jackson Public School District*, the Fifth Circuit considered an appeal from a district court's decision to enjoin enforcement of Mississippi's School Prayer Statute, which allowed prayer at compulsory and noncompulsory school events.[126] Similar to the *Lee* Court's finding of extensive government involvement, the *Ingebretsen* court found that "[t]he statute will inevitably involve school officials in determining which prayers are 'nonsectarian and nonproselytizing' and in determining who gets to say the prayer at each event."[127] The court also noted more than once that "students will be a captive audience that cannot leave without being punished by the state or School Board for truancy or excessive absences."[128]

In contrast to *Pinette*, where the plurality did not even apply one of the Establishment Clause tests, the courts in *Lee* and *Ingebretsen* tested for, and found, an Establishment Clause violation. How is this contrast reconciled? One possible answer is that *Lee* and *Ingebretsen*

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123. *Id.* at 586.

124. *Id.* at 586-87.

125. *Id.* at 587. *See also* American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (en banc) (student-initiated prayer at graduation violates the Establishment Clause).

126. 88 F.3d 274, 277 (5th Cir. 1996). Specifically, "[t]he district court enjoined enforcement of the statute in its entirety with the exception of the portion which permits prayers to take place at graduation ceremonies in accordance with *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 972 (5th Cir. 1992) (Jones II)." *Id.* at 278.

The statute at issue read in part: "[I]nvocations, benedictions or nonsectarian, nonproselytizing student-initiated prayer shall be permitted during compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related events." *Id.* at 277.

127. *Id.* at 279.

128. *Id.* at 279-80.

involved public schools, while *Pinette* did not. Yet, presumably, adults and children in the general public (*i.e.*, those who might see the cross in *Pinette*) are equally as protected as students in public schools. More accurately, whatever "establishment" the Establishment Clause prohibits, the Clause applies equally in and out of the public schools. But the school/nonschool answer does strike near another more plausible answer: *Lee* and *Ingebretsen* involved captive audiences, while *Pinette* did not. The *Pinette* plurality did not refer to the lack of a captive audience. Rather the plurality stated that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, announced and open to all on equal terms."[129]

However, this does not mean that the captive audience answer is without merit. Perhaps the *Pinette* Court would have engaged the Establishment Clause had the case involved a captive audience. It is hard to imagine how a captive audience could have existed in *Pinette*, given the open nature of the state capitol grounds upon which the religious expression occurred. But, for illustration, we might vary the *Pinette* facts. First, suppose that the religious expression consisted of a group of "speakers" with hand-held crosses rather than a large, free-standing cross. With this variation, the *Pinette* holding should remain the same: the government merely "watches on," but neither speaks itself nor discriminates in favor of the speech. Second, suppose further that the capitol grounds were extremely crowded (*e.g.*, on the Fourth of July) and that because of the extreme crowd many of the people "receiving" the religious expression were effectively unable to distance themselves from the expression. Now a captive audience might exist. Does the *Pinette* holding change? If it does change—if the Establishment Clause is now at issue—something more fundamental has also changed: the government has become a speaker or a promoter of the speech.

Thus, we should ask whether the existence of a captive audience transforms what would otherwise be private expression into government expression. In our present *Pinette* example, it is arguable that the speakers have less protection for their speech in the face of a captive audience.[130] Yet the government (the review board) *acts* no more

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129. *Pinette*, 515 U.S. at 770. As to the students compelled to be there, classrooms cannot be considered nonpublic fora. *See supra* Part II.E. Rather, as to those students, the classrooms are "open to all on equal terms." If a classroom were not open to all on equal terms—*e.g.*, if Z.H.'s teacher allowed Z.H. to command the class's attention, but allowed no other student to do the same—the Establishment Clause would clearly be at issue.

130. *See supra* Part II.D.

when the audience is captive than it does when the audience is not captive. Captive audience or not, the review board merely holds open the plaza for public use, accepts applications by public users, and processes those applications based upon criteria such as safety and sanitation.[131] With no further government action in our captive audience version of *Pinette* than in the actual *Pinette* case, there is no reason to test for an Establishment Clause violation in our example when the plurality did not do so in *Pinette*. Captive audience does not mean government expression.

2. Government-Created Captive Audience?

Many will argue, however, that the above example differs greatly from cases such as *Oliva*, because in the latter cases the government itself creates the captive audience via compelled classroom attendance. Where the government makes an audience captive by force of law, the argument goes, religious speech directed at that audience implicates the Establishment Clause. Yet in most cases like *Oliva*, the party claiming an Establishment Clause violation does not challenge the government's compulsory attendance law. Rather, the party takes compulsory attendance as a given and challenges the school's allowance of religious speech or conduct within the classroom.[132]

Because the Establishment Clause is implicated only if the government acts, we should ask whether compulsory attendance is sufficient to make religious expression in the classroom "attributable to the State."[133] This question is similar to one addressed above in the discussion of the Free Speech Clause: Does compulsory attendance in the classroom create *per se* school sponsorship of whatever speech occurs there?[134] In that context, the answer is no; compelled class-

131. *See Pinette*, 515 U.S. at 757-58.

132. *See, e.g., Oliva*, 990 F. Supp. at 353 (discussing "endorsement" concerns).

133. *Lee*, 505 U.S. at 587.

134. *See supra* Part II.B.1. The difference between the two questions is this: Under the Free Speech Clause, we ask whether compulsory attendance *allows* school officials the discretion to censor student speech for any valid educational purpose (*see Hazelwood*, 484 U.S. at 273), as opposed to regulating the speech only when the officials forecast that the speech will substantially disrupt or materially interfere with school activities or invade the rights of others (*see Tinker*, 393 U.S. at 513-14). Under the Establishment Clause, we ask whether compulsory attendance *requires* school officials to censor student speech that is religious.

In the Free Speech discussion, the question was also asked whether the fact that a listener is "unreceptive" should create an exception to speech protection in the classroom. *See supra* Part II.D. The answer is no. Of course, regarding the hypothetical drawn from *Pinette* (not a classroom setting), the traditional captive audience exception might well apply. That is, a court might not reach the Establishment Clause because it decides that the speakers' protection is limited when speaking to the unreceptive listeners.

room attendance does not necessarily mean school sponsorship. The reasoning for this answer is based, in part, on the Supreme Court's recognition in *Hazelwood* that some student expression merely "happens to occur" in the classroom, as opposed to being sponsored by the school.[135]

While the *Hazelwood* Court made its assertions in the context of the Free Speech Clause, it is reasonable that the Court's analysis should also apply in the Establishment Clause context. That is, despite compulsory attendance, there is at least some student speech in the classroom not attributable to the government—speech that should not implicate the Establishment Clause. However, one might argue that while compulsory attendance should not be enough to create "government sponsorship" in the Free Speech context, it should be enough under the Establishment Clause. There are at least two rationales for this argument.

a. A Broad Reading of the Establishment Clause

The first rationale is that the Establishment Clause is concerned with *any tendency* toward an establishment of religion, and when the government compels classroom attendance and then allows religious speech or conduct there, an establishment of religion is begun. This justification is flawed. Even if the Establishment Clause prohibits the slightest move toward establishing religion, we are still left with the difficulty of determining the meaning of "establishment." The solution under the present rationale would be simply to prohibit religious speech and conduct in the classroom. That is, although we are not sure what an establishment of religion looks like, we can probably avoid it through categorical prophylactic measures. Yet, in contrast to the uncertainty regarding "establishment," we do know that religious speech and conduct are valued under our Constitution.[136] It is inconsistent with the Constitution to root out any trace of religion.

b. Maximum Liberty

One might also assert that finding "government sponsorship" under the Establishment Clause based solely on compulsory attendance (and not doing so under the Free Speech Clause) is consistent with maximizing individual liberty. That is, while finding government

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135. *See Hazelwood*, 484 U.S. at 270-71. It is noteworthy that this recognition is secondary to the recognition that there is, in fact, private student expression in the school setting, as opposed to only government-sponsored student expression.

136. *See supra* parts III.A-B.

sponsorship under the Free Speech Clause means *less* protection for the student speaker, finding government sponsorship under the Establishment Clause means *more* protection for all students against the State getting into the religion business. Yet the latter would maximize liberty in only one scenario: if it were agreed that religious speech and conduct are oppressive and undesirable. Even if finding government sponsorship based upon compulsory attendance basically eradicated religion in the classroom, this outcome is justified because courts would be protecting citizens against a bad thing. But it is far from agreed that religion is undesirable. To the contrary, the framers in the 1790s and the federal courts in the years since have accorded religion high priority. Indeed, the Constitution protects religious practice via the Free Exercise Clause and the Free Speech Clause. The effect of "easily" finding government sponsorship is to transform the Establishment Clause's function from preventing the establishment of religion to that of prohibiting religion.

c. Government Action Required

To find that the government acts when student speech occurs in a classroom in which the government has compelled attendance misassigns responsibility for the speech. When the government compels attendance, it clearly acts. This action, like any government action, should be subject to Establishment Clause scrutiny. Yet the fact that the government acts by compelling attendance does not mean that no student speaks unless prompted by the government. Even though the government compels attendance in the classroom, it does not have control over all that is spoken there.[137] Nor should it be "charged" with control over all that is spoken there. The effect of charging the government with this control would be to make any religious speech occurring in the classroom subject to the full force of the Establishment Clause. Students would have no more right to religious speech than a government agent (*e.g.*, the class teacher) would have. In effect, the classroom would be a "religion-free" zone. The classroom, where our public school children spend the better part of the day for 170 days a year, would become a place from which religion is banished instead of a place where religion is cherished. This result would contradict the framers' belief that religious discourse is valuable

137. For example, teachers often place broad requirements on the type of expression required to fulfill an assignment. *See, e.g.*, *Oliva*, 990 F. Supp. at 346 (teacher allowed students "to read a book of their own choosing to the rest of the class").

and it would prioritize the Establishment Clause above the Free Speech Clause, despite the lack of textual support for this priority.

This result is additionally problematic because it contradicts one of the framers' core intents for the Establishment Clause: preventing the imposition of uniformity in religious belief. The Clause should protect students and others from the government deciding the most important issues in life. As a corollary, it should not preempt citizens' independent ability to prevent the government from deciding these issues. That is, the Clause should not silence speakers who counter the government's position on what the speakers believe to be issues of vital importance.[138] Yet this is what happens when a court calls student speech in a compulsory attendance classroom "government action." By being assigned responsibility for student religious speech—which is then restricted by the Establishment Clause—the government silences religious speakers. There must be student religious expression in the classroom that is private, neither the product of government action nor sponsored by the government.

This conclusion is consistent with both *Lee* and *Ingebretsen*. While each court found an Establishment Clause violation where attendance was compelled, each court's holding also depended upon the conclusion that the religious speech was "state-sponsored" and "state-directed."[139] In *Lee*, this result was due to the finding that a government agent, the school principal, decided that prayers should be given and then chose who should give those prayers.[140] This government action was equivalent to a statute prescribing prayer.[141] In *Ingebretsen*, the government-sponsorship stemmed from the inevitability of school officials having both to distinguish sectarian and nonsectarian prayers and to choose who would pray.[142] If either court had considered compulsory attendance *alone* sufficient to create government sponsorship, then once the court noted the compulsory attendance, it could have foregone further reasoning as to why it found government sponsorship.

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138. *See* Sekulow, et al., *supra* note 62, at 1020 ("To deny students the right to express views contrary to those the state wishes to impose would turn the public schools into indoctrination centers in which students would be force-fed only that which the state wanted them to hear. School officials, in effect, would be prescribing orthodoxy.").

139. *See Lee*, 505 U.S. at 586-87; *Ingebretson*, 88 F.3d at 279.

140. *Lee*, 505 U.S. at 587.

141. *Id.* at 586-87.

142. *Ingebretsen*, 88 F.3d at 279.

D. The Endorsement Test

Some disagree with the assertion that the Establishment Clause should not even be an issue in cases involving student religious speech in the classroom. They argue that if the government has not acted problematically, applying the Establishment Clause will reveal this truth. In *Pinette*, four Justices chose to forego Establishment Clause analysis.[143] Four of the other five Justices applied a version of the "endorsement test."[144] Justice O'Connor, joined by Justices Breyer and Souter, asserted that "the endorsement test asks the right question . . . even where a neutral state policy toward private religious speech in a public forum is at issue," and found no constitutional violation.[145] Justices Ginsburg and Stevens did find a violation.[146] Under the endorsement test, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[147] At first blush, it may seem that this test addresses what this Article wrestles with in Part III: whether the government "acts" when it allows student religious expression in the classroom. Yet the endorsement test is an unacceptable test to apply to speech such as Z.H.'s.

In *Pinette*, Justice O'Connor emphasized that she is unlikely "to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly."[148] Her disagreement with the plurality resulted from her belief "that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism."[149] For example, Justice O'Connor noted, the distinction between government speech endorsing religion and private speech endorsing religion made

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143. *Pinette*, 515 U.S. at 753 (Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas).

144. *See id.* at 772 (O'Connor, J., concurring, joined by Souter & Breyer, JJ.) (applying endorsement test); *id.* at 783 (Souter, J., concurring, joined by O'Connor & Breyer, JJ.) (same); *id.* at 799 (Stevens, J., dissenting) (same). Justice Ginsburg based her brief opinion on the assumption that "the aim of the Establishment Clause is genuinely to uncouple government from church." *Id.* at 817 (Ginsburg, J., dissenting) (citing Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).

145. *Pinette*, 515 U.S. at 772 (O'Connor, J., concurring).

146. *Id.* at 797 (Stevens, J., dissenting); *id.* at 817 (Ginsburg, J., dissenting).

147. County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 624-25 (1989) (O'Connor, J., concurring) (citations omitted).

148. *Pinette*, 515 U.S. at 775 (O'Connor, J., concurring).

149. *Id.* at 774.

by the plurality in *Board of Education of Westside Community Schools v. Mergens*[150] was dependent, in part, upon concluding that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[151] Justice Souter made the same point, noting that in *Widmar v. Vincent*,[152] "[i]t was relevant that university students 'should be able to appreciate that the University's policy is one of neutrality toward religion,' that students were unlikely, as a matter of fact, to 'draw any reasonable inference of University support from the mere fact of a campus meeting place.'"[153] Thus, Justices O'Connor and Souter indicated that where school students do not understand that their school does *not* support student religious speech, but merely permits it on a nondiscriminatory basis, the Establishment Clause imposes upon the government an affirmative obligation "to take steps to avoid being perceived as supporting or endorsing a private religious message."[154]

Assuming that in *Oliva*-like cases the elementary school students do not understand that their school does not endorse the private religious message, what "steps" can school officials take to adhere to the endorsement test interpretation of the Establishment Clause? One option would be for schools to refrain from compelling classroom attendance either altogether or during periods of private religious expression. This option, however, surely would be unpopular and would raise a number of administrative difficulties. A second option is for the class teacher to censor the private religious message.

Does the Establishment Clause mandate censoring students? Justice O'Connor's and Justice Souter's concurrences in *Pinette* are not decisive on this point, but they seem to indicate that (1) if students misperceive endorsement,[155] and (2) no other options exist, the Establishment Clause imposes an "affirmative obligation" to avoid the misperception.[156] This result is unfortunate, one might argue, but it

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150. 496 U.S. 226 (1990) (holding that the Equal Access Act does not violate the Establishment Clause).

151. *Pinette*, 515 U.S. at 774-75 (internal quotation marks omitted) (quoting *Mergens*, 496 U.S. at 250 (plurality)); *see also id.* at 788 (Souter, J., concurring) (quoting same passage from *Mergens*).

152. 454 U.S. 263 (1981) (holding that public university violated Free Speech Clause by excluding student religious group from facilities open to other student groups).

153. *Pinette*, 515 U.S. at 791 (Souter, J., concurring) (quoting *Widmar*, 454 U.S. at 274 n.14).

154. *Id.* at 777 (O'Connor, J., concurring).

155. *See supra* notes 148-54 and accompanying text.

156. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

is, especially in the context of the elementary school classroom, merely a part of the price that must be paid for a constitutional guarantee that the government will not impose religious uniformity.

Yet adopting the second option (censoring the religious expression) is more than unfortunate; it is wrong for reasons addressed above and revisited here. First, it is wrong because it allows the Establishment Clause to trump the Free Speech Clause so that although the religious speaker's expression is protected by the Free Speech Clause,[157] it is then muted by the Establishment Clause. There is no textual support for this subordination of the Free Speech Clause.

Second, and related, the result is wrong because it relegates private religious speech—usually considered high-value speech—to a level of less protection than other private high-value speech. For example, while a student is allowed to give a nondisruptive presentation about his trip to the Libertarian National Convention, he is not allowed to read a story out of Genesis. This devaluation of religious speech contradicts the framers' support for religious liberty and the First Amendment's double protection for religious speech.

Third, it is unreasonable to make the scope of one citizen's constitutional right subject to the erroneous perception of another citizen.[158] To do so belies the very conception of a constitutional right as a civil liberty of the highest order, curtailed only in the most pressing of circumstances.

Some will argue that these three assertions fall short because of the unique context of the topic at hand: one involving young, impressionable, immature individuals. The Establishment Clause is perhaps most needed by vulnerable elementary school students. Yet no court or

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157. This assumes that the student expression is permissible under the *Tinker* standard, as detailed in Part II.

158. Chief Justice Burger addressed this issue in his dissent in *Bender v. Williamsport Area School District*:

> The Court of Appeals agreed that the Establishment Clause prohibited [the student-initiated club] from meeting on school premises because to allow it to meet could have been misinterpreted by other students as active state support of religion. Under that analysis, because an individual's discussion of religious beliefs may be confused by others as being that of the State, both must be viewed as the same. Yet the several commands of the First Amendment require vision capable of distinguishing between state establishment of religion, which is prohibited by the Establishment Clause, and individual participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform individual expression of religious belief into state advancement of religion.

475 U.S. 534, 553 (1986) (Burger, C.J., dissenting).

commentator has explained persuasively why the Free Speech Clause is not also needed by elementary school students. That is, why are the "captive speakers" not at risk, as well? Although young and articulate, elementary school students are entitled to express their views about the fundamental issues of life and to resist an educational environment devoid of religious explanations of reality. It is the case that young citizens *equally* need, and deserve, the rights afforded by *both* the Establishment Clause and the Free Speech Clause. It is also the case that, unlike in any other context, in the public school classroom, there is no room for either right to "budge."

E. A Better Option

In addition to either waiving compulsory attendance or censoring private student speech, there is a third option for school officials faced with misperception by student listeners: teaching. Justice Brennan pointed to this option in his *Hazelwood* dissent: "Dissociative means short of censorship are available to the school."[159] Rather than viewing the relationship between the Establishment Clause and the Free Speech Clause as a "zero sum game" (where a gain for one clause is necessarily a loss for the other) educators and lawyers alike would do well to view the "tension" as an opportunity for an overall gain in understanding. Even in the elementary school classroom, a teacher can begin to explain the fundaments of religious liberty. For example: "Each family chooses what religion, if any, it will follow. The school doesn't interfere with that. Not everyone believes what Z.H. believes, but the school doesn't take sides. This story is important to Z.H., and whether we agree or disagree with him, we're going to listen to him politely."

For those such as Justices O'Connor and Souter, who believe the Establishment Clause requires the government to take affirmative "steps to avoid being perceived as supporting or endorsing a private religious message,"[160] this type of disclaimer should be sufficient. If cases such as *Oliva* require Establishment Clause scrutiny—a conclusion with which this Article disagrees—the scrutiny must be of the government action, not the student speech. If the Establishment Clause requires a remedy, the burden of the remedy should fall on the school: an earnest attempt to correct misperception should be enough. It is doctrinally untenable to ban otherwise protected student speech just because the school is unsuccessful in curing misunderstanding.

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159. *Hazelwood*, 484 U.S. at 289 (Brennan, J., dissenting).

160. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

For those such as the Justices in the *Pinette* plurality, a "teaching disclaimer" by the school, in the name of the Establishment Clause, will be doctrinally unnecessary. Yet this group would have no constitutional objection to the practice. The practical benefits of the disclaimer would be more religious liberty and better understanding by students.

In *Oliva*, the speech at issue was "private"—*i.e.*, Z.H.'s speech, not the government's. Although Z.H.'s proposed expression occurred in a classroom in which he and his classmates were compelled to be, the classroom and the reading program were open and accessible to all the students in the classroom. With no valid reason to attribute Z.H.'s speech to the government, the Establishment Clause should not have curtailed protection provided by the Free Speech Clause. At most, the Establishment Clause required only that Ms. Oliva disclaim endorsement by the school.

IV. CONCLUSION

Cases such as *C.H. v. Oliva* are difficult because they involve tension within the First Amendment that is not easily resolved by text, history, or logic. Both parties wave the banner of religious liberty and both parties point to the First Amendment to justify their claims. The proper first step of analysis in these cases, however, is not specific to religious liberty. The first step is to determine whether the protection afforded to the student's speech (religious or not) is broad enough to make unconstitutional the school officials' restriction of the speech. If the scope of protection is not broad enough, the school officials' restriction is permissible and there is no colorable need for Establishment Clause analysis.

Under *Hazelwood*, if student expression occurs in a "nonpublic forum" and is sponsored by the school, school officials can reasonably regulate the expression for any educational purpose. If not, under *Tinker*, officials can censor the speech only if they reasonably forecast that the expression will lead to a substantial disruption, a material interference with the educational function, or an invasion of the rights of others. While a public school classroom certainly is not open for indiscriminate use by the public, as to the students compelled by law to be in the classroom, the classroom is not a nonpublic forum because there is virtually no restriction upon these students' access to the classroom.

Similarly, under *Hazelwood*, student expression that merely happens to occur at school is not "school-sponsored." This result is not changed by the presence of compulsory attendance, a large number

of speakers with the same viewpoint, or the young age of elementary school students. School sponsorship is dependent upon a reasonable perception that the expression bears the school's imprimatur. None of this is to say that students have free reign in the classroom. To the contrary, the *Tinker* standard—substantial disruption—will be met more easily in the classroom than, for example, on the playground, where it is hard to disrupt an educational function. The *Tinker* standard will also be met more easily in the elementary school than in secondary schools, given that self-discipline is more rare among younger students.

The second fundamental step of analysis in cases such as *Oliva* is specific to religious liberty. When school officials restrict student religious speech in the classroom in a way that is impermissible under *Tinker*, the question becomes whether the Establishment Clause justifies the officials' actions. Because the Establishment Clause restricts only government action, in order to violate the Clause, student religious expression (or the promotion of it) must somehow be attributable to the government. While the Supreme Court and federal appellate courts have found Establishment Clause violations where compulsory attendance and government sponsorship exist, these courts have not found that compulsory attendance necessarily creates government sponsorship. Moreover, such a finding would make all student classroom speech attributable to the government and, hence, subject to being prohibited by the Establishment Clause. Testing for a violation via the "endorsement test" would lead to a similar result if that test is interpreted to give weight to the *mis*perception of student listeners.

By devaluing religious speech and potentially creating a "religion free" public classroom, each of these approaches would contradict the intent of the framers of the Constitution and the First Amendment text. The better approach is suggested by the plurality in *Pinette*, which held that religious expression cannot violate the Establishment Clause when it is private and occurs in a forum open to all on equal terms. Where school officials merely allow student religious speech in the same manner that they allow other (*i.e.*, "secular") speech, the Establishment Clause is not implicated.

The First Amendment should flourish as fully as possible in the public elementary school classroom. While students (and their parents) undoubtedly deserve the Amendment's protection against religious indoctrination, the Amendment protects only against indoctrination by the government. Simultaneously—and perhaps equally as vital to resisting government indoctrination—the First

Amendment allows students to make their own attempts at persuasion by expressing their beliefs about matters of fundamental concern. By applying *Tinker*, courts can allow this high-value, private proselytizing, while ensuring that the expression does not unduly disrupt the educational environment. By following *Pinette*, courts can guard against eradicating private religious expression in the classroom.