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'DUMPSTER FIRE': FREE SPEECH AND THE CLASSROOM

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I. INTRODUCTION

Even casual observers of American politics know that the fight for control over classrooms continues to rage as one of the most intense proxies of the broader culture war. Across college campuses, many activists make no bones about elevating certain values over the First Amendment, a phenomenon that collapses the boundaries of acceptable speech on campus.[1] Although some on the political

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[1] Commentators in the media demonstrate the controversy between the right and left on the topic. *See* Katy Steinmetz, *The Fight Over Free Speech on Campus Isn't Just About Free Speech*, TIME (Oct. 12, 2017, 6:54 AM), https://time.com/4979235/the-campus-culture-wars/; Bari Weiss,

right have capitalized, rhetorically and politically, on the illiberal bent of this movement, Republican lawmakers have also sought to gain an edge in the struggle for young minds at the expense of the same constitutional safeguards.[2] While this battle is hardly new, parents of school-age children today are rightly vexed by the torrent of outrage-producing headlines, and many are injecting themselves into political debates about education and becoming a force in local elections.[3] Though there are a host of other reasons, perceived indoctrination has contributed to American parents' lack confidence in the public school system.[4]

This article will argue that the scope of students' free speech rights in high school and college classrooms should be expanded, especially "high value" speech, or speech political in nature; and while this expansion surely will not serve as a panacea, it is both constitutionally justifiable and functionally optimal. First, the article will consider underlying First Amendment theory applicable to the classroom setting, and how the current doctrine is ripe for development. Next, it will explore different compelled speech tests used by the Circuit Courts for determining if a student's First Amendment right has been violated, and argue for why a more protective test is necessary. The article will then consider the issue through the lens of public forum doctrine and argue that perhaps the classroom is *the* public forum for the student and thus should be treated as such. Finally, the

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We Got Here Because of Cowardice. We Get Out With Courage—Say No to the Woke Revolution, COMMENTARY (Nov. 2021), https://www.commentary.org/articles/bari-weiss/resist-woke-revolution/ ("[I]n a war, the normal rules of the game must be suspended"); Ben Burgis, *What the Left Keeps Getting Wrong About Free Speech*, THE DAILY BEAST (Apr. 2, 2022, 4:09 AM), https://www.thedailybeast.com/what-the-left-keeps-getting-wrong-about-free-speech (After making the argument that free speech is a leftwing value, the author relents that he is unfortunately "not surprised that some mainstream progressives make excuses for attempts to shut down events on college campuses that offend some students").

[2] *See* Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 641 F.Supp.3d 1218, 1230 (N.D. Fla. 2022) (declaring the State's "Individual Freedom Act," formerly the "Stop W.O.K.E." Act, "positively dystopian"); *see also* Sarah Schwartz & Eesha Pendharkar, *Here's the Long List of Topics Republicans Want Banned From the Classroom*, EDUCATIONWEEK, (Feb. 02, 2022), https://www.edweek.org/policy-politics/heres-the-long-list-of-topics-republicans-want-banned-from-the-classroom/2022/02.

[3] *See* Henry Redman, *Culture War Battles in Local School Boards Aren't Slowing Down*, LA ILLUMINATOR (Mar. 29, 2022, 9:00 AM), https://lailluminator.com/2022/03/29/culture-war-battles-in-local-school-boards-arent-slowing-down/; Stephen Sawchuk, *Why School Boards Are Now Hot Spots for Nasty Politics*, EDUCATIONWEEK (July 29, 2021), https://www.edweek.org/leadership/why-school-boards-are-now-hot-spots-for-nasty-politics/2021/07; Anya Kamenetz, *Why Education was a Top Voter Priority this Election*, NPR (Nov. 4, 2021, 6:00 AM), https://www.npr.org/2021/11/04/1052101647/education-parents-election-virginia-republicans.

[4] *See* Lydia Saad, *Confidence in Public Schools Turns More Partisan*, GALLUP (July 14, 2022), https://news.gallup.com/poll/394784/confidence-public-schools-turns-partisan.aspx ("Americans' confidence in U.S. public schools remains low, with 28% saying they have a great deal or quite a lot of confidence in the institution," nearing the all-time low of 26% measured in 2014).

article will contemplate two variations of a hypothetical, as a means of concretizing for the reader what the expanded right would look like in practice.

II. TRUTH, SELF-GOVERNANCE, AND *BARNETTE*

In *Barnette*, the seminal case on compelled speech in schools, the Supreme Court struck down a West Virginia statute that compelled the flag salute and Pledge of Allegiance in public schools, holding that the legislature and local officials had overstepped "constitutional limitations on their power and invade[d] the sphere of intellect and spirit" that the First Amendment is designed to protect.[5] In so doing, the Court, in lofty, often-quoted prose, explained that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," nor can those officials compel the citizen to express opinions or beliefs they do not hold.[6] The Court noted the unique role played by local officials, due to their proximity to the student, while also recognizing that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms."[7] More than twenty years later, the Court held that while "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," those rights must be considered "in light of the special characteristics of the school environment."[8] For the state official to proscribe certain speech, said the Court, they must show the proscription "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[9]

It is not debatable that the "special characteristics" language featured in *Tinker* has served as a limiting principle for the rights of students in schools in the Court's jurisprudence.[10] However, it is not abundantly clear why, considering

[5] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[6] *Id.*

[7] *Id.* at 637.

[8] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that black armbands worn by students in school as a protest against the Vietnam War were not sufficiently disruptive to warrant proscription by the school authorities).

[9] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)) ("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").

[10] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007) (holding that school officials can constitutionally proscribe speech in schools that could reasonably be regarded as encouraging illegal drug use); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably

several theories undergirding free speech, the "characteristics" referenced by the Court should not be reason for *more*—rather than *less*—constitutional protection. Whatever else, one could argue that two relevant purposes of a classroom are (1) to sift through ideas in a formal setting, and (2) to produce the informed citizenry essential to a functioning democratic republic. These functions are imperative to the wider market of ideas, and to the notion of self-governance, two highly regarded justifications for the strict protection of speech.

Oliver Wendell Holmes famously wrote in his *Abrams* dissent that the "best test of truth is the power of the thought to get itself accepted in the competition of the market."[11] For the notoriously skeptic Holmes, absolute truth was a risky concept that had incidentally led to much suffering in the world.[12] His defense of the civil liberties of socialists persecuted under the Espionage Act was based in his principled belief that ideas should be tested, and every social interest afforded the chance to gain acceptance.[13] Thus his First Amendment jurisprudence is best thought of as a protection of ideas, rather than of individuals.[14] As a society that values the free exchange of ideas, we should expect consumers of ideas not to uncritically accept propositions.[15] We also expect that consumers of ideas will engage with propositions with which they are unfamiliar or that even repulse them. Indeed, the social value of "ideas lies to a large extent in how their production and consumption generates benefits over time for persons other than the immediate producers and consumers."[16] This ripple effect of positive externalities is simply not possible if, when initially brought to market, the idea is forbidden and thus not allowed to compete.

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related to legitimate pedagogical concerns," in case involving the school officials who prohibited the publication in the school newspaper certain materials they found objectionable).

[11] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[12] *See* Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 24, 1930), *reprinted in* HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935, 1291 (Mark De Wolfe Howe ed., 1953) ("I detest a man who knows that he knows"); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 14 (2004) (Holmes "displayed an instinctive aversion to assertions of 'absolute' truth"); Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918) ("Certitude is not the test of certainty. We have been cock-sure of many things that were not so").

[13] *See* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 65 (2001) ("Holmes thought socialism was a silly doctrine"); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way").

[14] MENAND, *supra* note 13, at 65 ("[H]e thought only in terms of aggregate social forces; he had no concern for the individual").

[15] Blasi, *supra* note 12, at 11. Of course, this expectation often does not play out in the public sphere.

[16] *Id.*

One of the philosophers who influenced Holmes most, John Stuart Mill, wrote passionately about the need to protect "against the tyranny of the prevailing opinion and feeling," against the inclination of society to impose, under threat of penalty, its own orthodoxy upon its members.[17] For Mill, there is great danger to society in disallowing the dissemination of an idea, correct or not: "If right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[18] Like Holmes, Mill instinctively rejected the notion of static Truth, outside of subjective experience, that is outside the bounds of inquiry.[19] Whenever orthodoxy is insulated from examination, intellectual growth is stultified.[20]

The classroom is as practical a place as any for Holmes' metaphoric market*place* of ideas to manifest. The high school or college student who is presented with an idea in the classroom then turns out to the world, searching for the best way to express their newfound thought. If the new idea is not sufficiently tested at the point of discovery, it is less likely that the holder will convey it elsewhere with any degree of sophistication. Thus, it is more likely to be misunderstood later. Furthermore, ideas that are introduced in a classroom are then amplified by the student consumers; thus, it follows that those ideas which are disallowed will be disadvantaged in the greater market.

Of course, it is the university, historically, that has been thought of as the place where knowledge is produced and honed.[21] A cursory review of the history of ideas proves that yesterday's orthodoxy is often vehemently cast aside for new a perspective.[22] By way of example of how this phenomenon expresses itself legally,

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[17] JOHN STUART MILL, ON LIBERTY, 9 (Curtis Weyant & Martin Pettit eds., Project Gutenberg 2011) (1859) (eBook).

[18] *Id*. at 19.

[19] *Id*. at 21-37 ("There is no such thing as absolute certainty….Very few facts are able to tell their story, without comments to bring out their meaning").

[20] *Id.* at 63 ("Where there is a tacit convention that principles are not to be disputed; where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable").

[21] *See* Bowman v. White, 444 F.3d 967, 978 (8th Cir. 2006) ("[A] university's mission is education and the search for knowledge. . ."); Nicole Yeatman, *What is the Purpose of Universities?* BIG THINK (Jan. 8, 2012) https://bigthink.com/thinking/jonathan-haidt-campus/.

[22] *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Univ. of Chicago Press et al eds., 4th ed. 1996) (arguing that, periodically, science undergoes revolutions, or paradigm shifts, where underlying assumptions are cast aside for new ways of thinking); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (Linda J. Nicholson ed., 1st ed. 1990) (arguing that gender is something that an individual repeatedly performs, not an essential component of their identity based on an intractable truth). *See also* Robert M. Hazen, *The Heliocentric Theory: Nicolas Copernicus and Galileo Galilei*, WONDRIUM DAILY (Mar. 9, 2021) https://www.wondriumdaily.com/the-heliocentric-theory-nicolaus-copernicus-and-galileo-galilei/.

the Supreme Court notoriously upheld a Georgia law that criminalized sodomy after an adult gay man was charged under the statute in 1986,[23] only to pronounce that the Constitution confers the right to marry to same-sex couples less than thirty years later.[24] There is no reason to think this process has reached its conclusion. Much of knowledge production today still takes place in the university, and this special characteristic is reason for the highest level of constitutional protection to apply. But public high schools are feeders for universities around the country, obviously, so it is unclear why a high school classroom should not be treated with similar constitutional protections. There is very little difference between the seventeen-year-old high school junior, and the eighteen-year-old first-year college student, in terms of their ability to engage with ideas. Both markets should be protected equally. Furthermore, many Americans will never obtain a college degree, marking high school, for a subset of this group, as the last formal setting dedicated to ingesting ideas and learning.[25]

But perhaps a different philosophical justification for free speech is more salient to any discussion about constitutional protections in classrooms. James Madison, in a rebuke to the Alien and Sedition Acts of 1798, wrote that in a democratic republic such as the United States, "The People, not the Government, possess absolute sovereignty."[26] This language of the Founding Generation has been echoed in many forms, but perhaps never more eloquently then by Justice Brandeis: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties….That the greatest menace to freedom is an inert people."[27] Self-governance, or a democracy with rights guaranteed by a Constitution, is a *means* of securing autonomy, happiness, and contentment. The education of the individual is essential to this scheme.[28] It is the educational system that should "attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore,

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[23] *See* Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

[24] *See* Obergefell v. Hodges, 576 U.S. 644, 651 (2015). This change in constitutional law can be seen as a reflection of the paradigmatic change in society's view towards those living non-heterosexual lifestyles.

[25] *See* Shirin Ali, *Why a Growing Number of Young Americans Aren't Interested in College*, THE HILL (Aug. 10, 2022), https://thehill.com/changing-america/enrichment/education/3596211-why-a-growing-number-of-young-americans-arent-interested-in-college/.

[26] JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS AMENDMENT I (SPEECH AND PRESS) (Gaillard Hunt ed., Univ. of Chicago Press) (Jan. 1800).

[27] Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., dissenting).

[28] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. BAR FOUND. R. J. 521, 556 (1977); *see also* Brown v. Board of Ed., 347 U.S. 483, 493 (1954) (education is "the very foundation of good citizenship); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence").

the dignity of a governing citizen."[29] Part of good citizenship, of course, is being civically engaged, and the benefits derived from formal schooling are important to this aim. But dissent is also essential to citizenship: in a representative democracy, adversarial voices and opinions are necessary to disturb unjust orthodoxy.[30]

For the citizen to emerge from the student, and for this theory to have maximum practical effect, the classroom must be a place where different ideas are digested, where debate is open, and where disagreement abounds. These values, again, are desirous as a means towards cultivating a full citizen who will then substantively participate in democracy; but they are also *ends* unto themselves: democracy necessarily entails the digestion of ideas and debate where disagreement is sure to result. Students should be made to reckon with political ideas and arguments they find objectionable, as this is proper civic training and cultivates critical thinking. Anything less is insufficient.[31] Seen through this lens, it is proper to extend First Amendment protections, both in scope and reach, to students high school age and up. Whether greater constitutional protection is based on a marketplace of ideas theory, or predicated on the training of the individual citizen, these special characteristics of the classroom demand that debate not be foreclosed upon, and that students' speech rights are protected at a high level.

III. *OLIVER* AND PRETEXTS FOR COMPELLED SPEECH

A recent decision out of the Fifth Circuit Court of Appeals raises important questions about the First Amendment right of students to be free from compelled speech in a classroom. The complaint was brought by Mari Oliver, a high school senior, against several teachers and administrators at Klein Oak High School in Texas for an alleged violation under 42 U.S.C. §1983.[32] Summary judgment was granted to all defendants under a qualified immunity theory except Oliver's sociology teacher, Benji Arnold.[33] Arnold immediately appealed this denial, and it

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[29] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, n. 113, at 257 (1984).

[30] *See, e.g.*, paramount "test cases" such as *Brown*, 347 U.S. 483 (1954) (overruling the legality of "separate but equal" public schools); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the fundamental right of privacy).

[31] *See* Letter from Jenny S. Martinez, Dean of Stanford L. Sch., to the Stanford L. Sch. Cmty. (March 22, 2023) (on file with the Stanford Law School Library) (emphasis added) (arguing that condemning or excluding speakers who hold views with whom many in the Stanford Law School community disagree "can lead to creating and enforcing an institutional orthodoxy that is not only at odds with our core commitment to academic freedom, but also…create[s] an echo chamber that *ill prepares* students to go out into and act as effective advocates in a society that disagrees about many important issues").

[32] *See* Oliver v. Klein Indep. Sch. Dist., 448 F.Supp.3d 673, 680 (S.D. Tex. 2020); 42 U.S.C. §1983.

[33] *Klein Indep. Sch. Dist.*, 448 F.Supp.3d at 704.

was upheld by a split three-judge panel.[34] A subsequent petition for a rehearing *en banc* was denied, albeit by a close, ten to seven margin, and evinced strongly divergent views indicative of the broader judicial disagreement on this subject matter.[35]

Arnold required his students to transcribe the Pledge of Allegiance and listen to the Bruce Springsteen song "Born in the U.S.A.," ostensibly to teach students "that people sometimes recite things every day out of habit and without thinking about what they are actually saying."[36] Oliver, a young Black woman, refused to complete this particular assignment, stating that "she feels that the portion declaring America to be a nation 'under God' fails to recognize many religious and does not match her personal religious beliefs," and that, contrary to aspirational words of the Pledge, "there is not 'freedom and justice for all' in America because she and other black people continue to experience widespread racial persecution."[37] And though school officials had specifically warned Arnold to respect Oliver's speech rights,[38] as her position on the Pledge was well-known by teachers and administration alike, Arnold proceeded to tell Oliver in front of the entire class that he would give her a zero on the assignment.[39] Arnold next launched into a harangue that seems to have been triggered by Oliver:

> [Y]ou can have all the beliefs, and resentment, and animosity that you want… [but] if you can tell me two countries you'd rather go to, I will pay your way there if they're communist or socialist. Most of Europe is socialist and it's crumbling. Or it's communism. But if you ever come back you have to pay me twice what it cost me to send you there. You know there's a lot of things I complain about. So when it comes time in November I go vote, or I protest in writing, in legal. Those are the ways we do it in America. Where a country will crumble is when people coming into a country do not assimilate to that country. That doesn't mean you forget Day of the Dead, and whatever cultures, you maintain your language. That doesn't mean that. But you're not gonna [sic] drive on the left side of the road, and you're not gonna [sic] impose Sharia law. Because it's not. This. Country. But what is happening, and I can say it a lot more than you because I've lived longer. It's almost as [if] America's assimilating to THOSE countries.[40]

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[34] Oliver v. Arnold, 3 F.4th 152, 155 (5th Cir. 2021), *reh'g denied en banc*, 19 F.4th 843 (5th Cir. 2021).

[35] Oliver v. Arnold, 19 F.4th 843, 843 (5th Cir. 2021) (Ho, J., concurring in denial of rehearing en banc).

[36] *Klein Indep. Sch. Dist.*, 448 F. Supp. 3d at 697; *see also* BRUCE SPRINGSTEEN, BORN IN THE U.S.A. (Columbia Records 1984) (The popular refrain and namesake evoke a sense of patriotism that the remainder of the song seemingly contradicts).

[37] *Arnold*, 3 F.4th at 155-56.

[38] *Id.* at 157.

[39] *Klein Indep. Sch. Dist.*, 448 F. Supp. 3d at 687 (whether this amounts to retaliation against protected speech, and thus is constitutionally infirm, hinges on the validity of the assignment).

[40] *Id.* at 697-98 (cleaned up).

Writing for the majority of the panel, Judge Dennis reiterated that Arnold's contention, that the Pledge assignment was given for pedagogical purposes, was disputed and that there was enough evidence to the contrary, given the warning given Arnold and subsequent rant, among other things, to defeat summary judgment in his favor.[41] Judge Duncan, in dissent, criticized the majority's approach, reasoning that a written assignment like a transcription of the Pledge, has never been held to be violative of the First Amendment, regardless of the teacher's motives for giving the assignment.[42] For the dissent, allowing §1983 claims to go to trial based on student objections to a written assignment, centered on questions about the teacher's motive for giving it, is a slippery slope towards an unacceptable amount of litigation.[43]

The petition for rehearing was met with forceful disagreement. Judge Ho, concurring with the denial of the rehearing, acknowledged that a school may obviously compel some speech, but "that no legitimate pedagogical interest is served by forcing students to agree with a particular political viewpoint, or by punishing those who refuse."[44] Considering the evidence, especially Arnold's remarks, Ho wagered that "a jury could reasonable conclude that the Pledge assignment served no legitimate pedagogical purpose, and that Arnold was engaged in nothing more than viewpoint discrimination" towards one of his students.[45] In no uncertain terms, Judge Elrod responded that never before has a teacher been held liable for giving an in-class writing assignment, in the Fifth Circuit or elsewhere.[46] For Elrod, "[f]ederal judges should not be in the business of policing the lesson plans of public-school teachers,"[47] and the majority panel and concurrence erred in considering the subjective motive of the teacher in a compelled speech case, where such an inquiry should rest upon objective reasonableness of the compelled act.[48] This impure motive test, argues Elrod, is not only out of step with the jurisprudence of the Fifth Circuit, but creates a standard that will ultimately be more difficult for the student claimant to overcome.[49] Judge Duncan again dissented, expanding upon

[41] *Arnold*, 3 F.4th at 162 ("It is immaterial that, under the facts we must accept here, the required pledge was a written oath rather than an oral one and that the consequence for noncompliance was an academic penalty rather than an overt disciplinary action.").

[42] Id. at 164 (Duncan, J., dissenting).

[43] *Id.* at 165.

[44] *Oliver*, 19 F.4th at 845 (Ho, J., concurring in denial of rehearing en banc).

[45] *Id.* at 848 (Ho, J., concurring in denial of rehearing en banc). For Ho, it is certainly possible that a reasonable jury could also conclude otherwise. But this is the point: the factual record is hazy enough to warrant further proceedings.

[46] *Id.* at 854 (Elrod, J., dissenting in denial of rehearing en banc).

[47] *Id.* at 855 (Elrod, J., dissenting in denial of rehearing en banc). Of course, this article argues exactly the opposite, in effect, but prefers to couch it as enforcing the constitutional rights of students rather than "policing teachers."

[48] *Id.* at 857 (Elrod, J., dissenting in denial of rehearing en banc).

[49] *Id.*

his earlier disagreement, and arguing that what he perceived as a deviation from the Circuit's decisional law at least warrants *en banc* review.[50]

Other cases spanning the range of Circuit Courts do vindicate the *Oliver* dissenters, partially, in that the test for identifying compelled speech in schools is unclear, often less strict, and that Oliver's claim would likely come out differently elsewhere. In a recent case out of the Fourth Circuit, the court considered a compelled speech challenge to coursework materials in an eleventh-grade world history course.[51] Paired with a small unit in the course entitled "The Muslim World," the teacher required the students to complete a worksheet summarizing the lesson on Islam, whereby students would fill in the blanks on a worksheet as a means of testing their memorization of the Five Pillars of Islam.[52] The court held that the assignment did not subject Wood to government compelled speech, reasoning that although a student may advance their right against compelled speech in a public school in certain circumstances, "that right has limited application in a classroom setting which a student is asked to study and discuss materials with which she disagrees."[53] Importantly, the court focused on the fact that students were not asked to recite the phrase out loud, nor were they required to engage in any kind of devotional custom.[54]

In an earlier Third Circuit case, the court considered the compelled speech claim by students based on a survey that asked about students' experience with drugs and alcohol, as well as sexual activity, rendered in an effort to improve health in the community.[55] Holding that no constitutional right had been infringed, the court reasoned that "this particular right is necessarily different in the public school setting," and that "the educational process itself may sometimes require a state actor to force a student to speak when the student would rather refrain."[56] In the Ninth Circuit, the court held that the *Hazelwood* standard of review should apply to curricular as well as *extrac*urricular speech, and that educators may require a student to comply with the terms of academic assignments without running afoul

[50] *Id.* at 859 (Duncan, J., dissenting in denial of rehearing en banc) ("[o]ur law in this area is, in other words, a dumpster fire. . . .[w]e should have taken this case en banc to put it out.").

[51] *See* Wood v. Arnold, 915 F.3d 308, 312 (4th Cir. 2019).

[52] *Id.* at 318 ("[i]ncluded in that assignment was the statement: 'There is no god but Allah and Muhammad is the messenger of Allah"). The two words represented here by their underlining here were blank on the worksheet, and students were required to fill them in.

[53] *Id.* at 319. Though the *Oliver* dissenters may be correct that their case would have turned out differently in the Fourth Circuit, this paper argues that plaintiffs, in challenging assignments where local officials compel students to transcribe dogma, as here, should be able to prove their case by showing "memorization" is a pretext, not a legitimate pedagogical purpose.

[54] *Id.* This paper emphatically argues that *Barnette* should extend to written assignments, not just verbal recitations where students are compelled to engage in physical acts of devotion.

[55] *See* C.N. v. Ridgewood Bd. Of Educ., 430 F.3d 159, 161 (3rd Cir. 2005).

[56] *Id.* at 186-87 (e.g., a "student may also be forced to speak or write on a particular topic even though the student might prefer a different topic").

of the First Amendment, as long as the their actions are reasonably related to legitimate pedagogical concerns.[57]

These decisions all imply that the well-established right of individuals to be free from government compelled speech should somehow be subordinate to the interest of maintaining an orderly educational forum, that the latter interest is to be given greater weight.[58] If the *Hazelwood* standard is to be construed narrowly, school officials may easily transgress the constitutional rights of their students. The degree of deference is too great. Clearly, in a case like Oliver's, when the teacher can point to the assignment in question and proffer memorization as the purpose, reviewing courts will not question the teacher's justification and the assignment will likely be accepted as reasonably serving such a legitimate pedagogical end. This lax standard, coupled with qualified immunity, which limits § 1983 claims to those where the government official violates a *clearly established* law,[59] makes it is unlikely that a student will ever be able to assert their rights outside the most blatant and egregious instances of overreach.[60]

Other circuit courts construe the *Barnette-Tinker* right a bit more liberally and have developed standards that are more protective of students. In a Tenth Circuit case, the court considered whether a Mormon acting student's free speech right was violated when, pursuant to her role in certain plays, she was required by her teachers to utter words that were offensive to her religious practices.[61] Interestingly, the *Axson-Flynn* court adopted the *Hazelwood* framework for speech that occurs in a university classroom as part of class curriculum,[62] but stressed that "[a]ge, maturity, and sophistication level of the students will be factored in determining whether the restriction is 'reasonably related to legitimate pedagogical concerns.'"[63] Crucially, however, the court stated that though "we do not second-guess the pedagogical wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal

[57] *See* Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).

[58] The latter interest is already served by the doctrine of qualified immunity, which tries to balance the conflicting interests. The constitutional right need not be shrunk in order to strike the proper balance.

[59] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 740 (2011). The idea is, of course, that in order to not chill government officials from carrying out their duties, liability is only warranted when the illegality of the official's behavior is beyond debate.

[60] *See* Morgan v. Swanson, 755 F.3d 757, 760 (5th Cir. 2014) ("educators are rarely denied immunity from liability arising out of First Amendment disputes").

[61] Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004) (Axson-Flynn, a university student, refused "to say the word 'fuck' or take God's name in vain during classroom acting exercises").

[62] As opposed to a high school extracurricular activity, like the school newspaper.

[63] *Axson-Flynn*, 356 F.3d at 1289 (quoting *Hazelwood*).

or pedagogical concern was pretextual."[64] Thus, the court concluded, it may override an educator's proffered pedagogical concern or method when it was a "sham pretext for an impermissible ulterior motive."[65] But this is the exactly the kind of "policing of teachers" that the *Oliver* dissenters and the above courts were loath to partake in.[66] It is also arguably a misreading of *Hazelwood*, because the court considers the subjective intent of the educator, rather than sticking to the objective reasonableness of the assignment or state action in question. The Sixth Circuit also considered, in an earlier case, the subjective intent of the teacher in grading an assignment, reasoning that federal courts should not interfere with the teacher discretion unless it is shown to be a "pretext for punishing the student for her race, gender, economic class, religion, or political persuasion."[67]

The doctrine of qualified immunity poses yet another stringent burden on plaintiffs seeking damages in cases against state and federal officials.[68] As per this judicially crafted rule, plaintiffs who file a 42 U.S.C. §1983 complaint must not only plead facts showing that an official violated a statutory or constitutional right, they must show that "the right was clearly established at the time of the challenged conduct."[69] Furthermore, this clearly-established-law standard necessitates that the relevant constitutional right be established at a low level of generality and requires a tight fit between the particular conduct and the narrowly specified right.[70] Precedent must establish, "beyond debate," that the official's action was illegal, and that a "reasonable official would have understood" that his action violated a constitutional right.[71]

Though it is not surprising, considering this exacting standard, that "educators are rarely denied immunity from liability arising out of First

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

[65] *Id.* at 1293. The court found that summary judgement for the defendants was inappropriate, as there was a genuine issue of material fact as to whether their justification for script adherence was truly pedagogical or whether it was an impermissible pretext alleged by Axson-Flynn; namely that her teacher's demands that she utter the words in an acting class that were necessitated by the script were really motivated by anti-Mormon sentiment.

[66] Though it is the position of this paper that courts are abdicating their duty by not considering teachers' proffered motives in First Amendment claims.

[67] Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995).

[68] *See al-Kidd*, 563 U.S. at 735.

[69] *Id.* (quotations excluded) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[70] *See* Procunier v. Navarette, 434 U.S. 555, 562 (1978). *E.g.*, *Barnette*'s "fixed star in our constitutional constellation" that no petty official can prescribe orthodoxy, arguably exists at such a high level of generality as to render it inoperable for qualified immunity purposes; *See generally* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (arguing that the Court's expansion of qualified immunity "transformed nominally 'qualified' immunity into something closer to absolute immunity).

[71] *al-Kidd*, 563 U.S. at 740-41.

Amendment disputes,"[72] it is no less troubling. For the reasons outlined above, however, classrooms should be spaces where First Amendment protections apply forcefully, not where public officials readily invoke the near-absolute shield of qualified immunity. In addition, there is no textual basis in the statute for the clearly-established-law standard.[73] Furthermore, one of the justifications for qualified immunity is that "the fear of litigation chills public officials from lawfully carrying out their duties."[74] But this is a perverse framing in the context considered here, for the First Amendment is "concerned about the *government chilling the citizen*—not the other way around" (emphasis added).[75] And while this doctrine may have some utility in the policing context, where, by nature of their job, an officer is forced to make a split-second decision under duress, "why should university [or high school] officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer" who operates in a dangerous setting?[76] Conversely, the fear of litigation should be *imposed* upon school officials in this context, not removed.

Contrary to Justice Thomas's assertion that the nation's First Amendment jurisprudence is moving away from *Tinker*,[77] the truth is that the direction is unclear and different circuits are steering away from each other. Nonetheless, the law *should* be building and expanding upon *Barnette* and *Tinker*, not the opposite. Of course *Barnette* should apply to written assignments. Courts should employ a dual-pronged approach in its review of challenged school actions under §1983. To be successful, claimants should be able to show that, by either an objective reasonable *or* subjective intent test, the teacher or administrator has taken an action that does not serve a pedagogical purpose. Such a both-and scheme is necessary to truly balance the interests in play and temper the advances of qualified immunity regime.[78] It will, at least, enable plaintiffs to defeat summary judgment and more fully make their case after proper discovery.

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[72] Morgan v. Swanson, 755 F.3d 757, 760 (5th Cir. 2014).

[73] *See* 42 U.S.C. § 1983. The only limiting principle in the entire statute states that "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." It is silent on qualified immunity. Nor does the original statute, as originally enacted in 1871, support the proposition. *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50 (2018).

[74] Horvath v. City of Leander, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment part and dissenting in part).

[75] *Id.* at 802.

[76] Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (Thomas, J., respecting denial of cert.).

[77] *See* Morse v. Frederick, 551 U.S. 393, 417 (2007) (Thomas, J., concurring). For Thomas, the First Amendment, "as originally understood, does not protect student speech in public schools," so it is easy to see why he wishes to see the law move in a more regressive direction. *Id.* at 410-11.

[78] If qualified immunity is to persist as a shield against First Amendment claims, which the paper argues it should not, courts should adopt, or *clearly establish*, this more liberal standard by which claimants may plead their case.

IV. THE SCHOOL AS THE STUDENT'S PUBLIC FORUM

Another way to ensure greater First Amendment protections in classrooms is by expanding public forum doctrine, and designating schools as public forums for students who are lawfully enrolled. In 1939, the Court recognized the rights of the citizenry to use streets and parks "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[79] Almost three decades later the Court, in overturning a Louisiana case where five black protestors were prosecuted for waging a sit-in in a public library, held that the First Amendment protects the right to peacefully protest in public places.[80] In doing so, however, the Court made clear that states may regulate the use of libraries and other public facilities, provided it does "so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality."[81] The Court then upheld an ordinance which prohibited political activity on the property of Fort Dix, rejecting the principle that "whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment."[82] Because it is the "business of a military installation like Fort Dix to train soldiers, not to provide a public forum," the respondent had "no generalized constitutional right to make political speeches or distribute leaflets" on the grounds of the base.[83]

In *International Society for Krishna Consciousness v. Lee*, the Court considered whether an airport terminal operated by a public entity constitutes a public forum.[84] The Court noted that under the forum approach to the First Amendment, "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny," surviving only if it is "narrowly drawn to achieve a compelling state interest."[85] However, regulation of speech in non-public fora "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[86] The Court then went on to fashion a test for determining

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[79] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[80] *See* Brown v. Louisiana, 383 U.S. 131, 143 (1966).

[81] *Id*. *See also* Schneider v. State, 308 U.S. 147 (1939); Clark v. Comm. for Creative Non-Violence, 468 U.S. 288 (1984). The government cannot regulate speech in public places forums based on content; if it does, then strict scrutiny applies. It can, however, impose reasonable, content-neutral time, place, or manner restrictions, and a reviewing court will apply an intermediate level of scrutiny to such speech proscriptions.

[82] Greer v. Spock, 424 U.S. 828, 836 (1976).

[83] *Id.* at 838.

[84] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 674 (1992).

[85] *Id*. at 678.

[86] *Id*. at 679.

if a public place should be considered a "public forum" for First Amendment purposes. Imperative to whether public property should be considered a traditional public forum is whether the "free exchange of ideas" has been a "principal purpose" of the property in question.[87] Additionally, the government does not create, or designate, a public forum by inaction, but by deliberately opening a nontraditional forum to public discourse.[88]

As the *Tinker* Court made clear, students inside school buildings are "persons under our Constitution," "possessed of fundamental rights which the State must respect."[89] Furthermore, the Court held that such students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[90] Not only is the classroom itself "peculiarly the marketplace of ideas,"[91] but "the *principal use* to which schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities," chief "[a]mong those activities is personal *intercommunication among the students*" (emphasis added).[92] That a principal use of public schools is to accommodate communication between student enrollees should satisfy *Lee*.[93] The *Tinker* Court even presages the time, place, or manner restriction rule that would later attach to public forums when it contemplates the power of school administrators to limit the "time, place, or type of behavior" of students such that the speech or conduct does not materially disrupt classwork or invade the rights of other students.[94]

School grounds, including classrooms, should be considered public forums for student enrollees, as it is where most intellectual growth takes place, and where many students learn to express their speech and associational rights. Consider one district court's description of a local high school:

> [t]he vast majority of episodes involving the speech at issue were indistinguishable from the typical background noise of high school. Students testified that they whispered and passed notes in class, occasionally shouted "Gay Pride" in the hallways, wrote "GP" and "Gay Pride" on their bodies, created signs

[87] *Id.*

[88] *Id.* at 680 (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985)).

[89] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[90] *Id.*

[91] *Id.* at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

[92] *Id.*

[93] The *Lee* public forum test is quite strict, undoubtedly by design. If public schools are unable to satisfy *Lee*, the *Lee* test should be amended or abrogated completely.

[94] *Id.* at 513.

> and posters supporting gay rights, circulated petitions, and debated and argued about gay rights. These activities…occur on a daily basis at Ponce de Leon.[95]

In this regard, Ponce de Leon is a typical American high school. School is *the* place where many high school students develop relationships and foster political identities. It is where they become conscious of their fundamental rights. Indeed, the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class,"[96] but requires the "personal intercommunication among the students" to which the *Tinker* Court was attuned.[97] As discussed above, it is the business of the public school to provide a physical space for the competition of ideas, and to train its students in the ways of citizenship. Schools already are a public forum for the student, if not officially designated as such. Of course, public school grounds are not, nor should they be, public forums for non-students.[98] Nor would the recognition of schools as traditional public forums for student enrollees preclude officials from imposing content-neutral time, place, or manner restrictions on speech.[99] It would, however, both create greater legal protections for students and settle the law in an area recently described as a "dumpster fire" by a Circuit Court judge.[100]

V. THE EXPANDED RIGHT IN PRACTICE

This article will now analyze two different classroom hypotheticals. The first will consider two versions of a similar scenario and how an expansion of *Barnette* might affect the outcomes.[101] The second hypothetical will be considered through the lens of the public forum doctrine.

A. Ms. Ryan and Ms. Bryant

In the first variation this hypothetical, Ms. Ryan teaches AP United States History to high school juniors and seniors. Ms. Ryan is a contemplative person, and

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[95] Gillman v. Sch. Bd. for Holmes Cty., 567 F. Supp. 2d 1359, 1373 (N.D. Fla. 2008); *Id.* at 1374 (reasoning that the "nation's high school students, some of whom are of voting age, should not be foreclosed from the national dialogue" regarding LGBT rights).

[96] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

[97] *Tinker*, 393 U.S. at 512.

[98] See Rivera v. E. Otero Sch. Dist., 721 F. Supp. 1189, 1193 (D. Colo. 1989) ("whether 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.").

[99] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[100] *Oliver*, 19 F.4th at 845 (Duncan, J., dissenting).

[101] Contrary to Judge Duncan's dissent in the Fifth Circuit panel's decision in *Oliver*, imagining a world where this expanded right has taken root is as joyful as it is fruitful. *See* Oliver v. Arnold, 3 F.4th 152, 155 (5th Cir. 2021) (Duncan, J., dissenting) ([o]ne can imagine where this approach might lead….It is not a happy place).

believes deeply in the idea that one is best served, intellectually, by closely examining arguments with which they disagree. She is careful not to disclose her political and philosophical beliefs to her students, not because she is averse to argument, but because in her experience many students fashion their comments and assignments in a way that comports with what they believe she, as the individual who controls their grades, wants to hear. She is Socratic in style, often using dialogue in class as the engine of driving discussion, and frequently requires students to assume different sides of an argument.

In 2017, during a unit on the latter half of the twentieth century about social and legal movements, Ms. Ryan devises an assignment about abortion. All students are required to write about the topic from the opposite perspective of theirs. They must argue points that they do not believe in. Ms. Ryan is careful not to belittle either side of the debate, nor does she indicate how she personally comes down on the issue. Several times while giving directions, she recognizes the difficulty in requiring students to write about such a spirited topic, but insists that the point of the assignment is to better understand ideas and arguments that are historically fraught. Though the assignments will not be anonymous, in terms of grading, Ms. Ryan makes clear that students should respect the privacy of their peers, and that incivility will not be tolerated. Several students do raise concerns about the assignment, but are assured their grade will only reflect their ability to make the argument in a coherent and sophisticated manner.

In the second version of this hypothetical, imagine a different teacher named Ms. Bryant. Like Ms. Ryan, Ms. Bryant teaches AP United States History. However, as an activist, she does not believe in hiding her personal politics in the classroom and encourages students to engage in political debate during class time, as the curriculum she teaches often lends itself well to political discussion. Her classroom is adorned with a large Rosie the Riveter poster and other feminist regalia.

In the spring of 2022, after the *Dobbs* decision is leaked,[102] Ms. Bryant is first shellshocked, then angry. Luckily, the leak coincides with a unit she happens to be teaching her seniors at the time about late twentieth century social and legal movements. As such, she devises an assignment whereby students would be required to argue the abortion position opposite to what they actually believe. She

[102] *See* Politico Staff, Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade, Politico (May 2, 2022, 9:20 PM) https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504. *See also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). There was much speculation about the motive of the leaker and whether the final published opinion would substantively accord with the draft. Ultimately, the Court's opinion did not change much from the draft, and it did in fact overturn *Roe*.

comes to school donning her Notorious RBG shirt in honor of Justice Ginsburg.[103] Though she is loath to require pro-choice students to write from a pro-life perspective, especially at a time like this, she is convinced that requiring pro-life students to inhabit a pro-choice argument will teach them a valuable lesson, and will force them to see the harm being unleashed upon women's rights.

T.C., a student to whom Ms. Bryant has previously expressed disagreement, raises her hand and declares she will not complete the assignment, as it conflicts with her deeply held value system informed by her religion. Ms. Bryant, exasperated, responds that T.C. will indeed receive a "zero" if she fails to complete her work. The teacher then voices her extreme displeasure with the current state of the Court, and with "fascist Alito" who "is destroying women's rights." This assignment, she maintains, is important for "people to understand the importance of the hard-fought rights" the class is currently learning about. Several students audibly agree with Ms. Bryant while she is speaking.

Under a deferential *Hazelwood*-like standard,[104] where regulations of student speech are permitted if reasonably related to a legitimate pedagogical concern, it would be difficult for T.C. to make compelled speech claim against Ms. Bryant.[105] As one Circuit has put it, "the educational process itself may sometimes require a state actor to force a student to speak when the student would rather refrain."[106] Ms. Bryant's proffered purpose in giving the assignment, an attainment of greater understanding of one of the unit's core issues, is very likely a legitimate pedagogical concern under any objective measurement. But it is exactly this kind of classroom transgression that students should be protected from by *Barnette*. As Judge Ho considered of Arnold's assignment in *Oliver*, a "reasonable jury could conclude" that Ms. Bryant's assignment "served no legitimate pedagogical purpose," and was actually a pretext to impose orthodoxy on certain students.[107] Again, this article strongly argues that there is no legitimate pedagogical end served by compelling students to adopt a particular viewpoint, or by disciplining those who refuse. But the potentially impure motive can only be inferred by considering the subjectivity of the individual who created the assignment. Here, Ms. Bryant voiced

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[103] *See* IRIN CARMON AND SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015).

[104] *See* Hazelwood, 484 U.S. at 273. Not every Circuit has explicitly adopted *Hazelwood* for curricular speech, but the majority do adhere to a similarly deferential approach for both school-sponsored and curricular speech.

[105] This article will not consider any potential Establishment or Free Exercise claims, as it is outside the scope of its thesis.

[106] Ridgewood, 430 F.3d at 187. *See also* Li, 308 F.3d at 953 (a "teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write opinions showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question. . .Such requirements are part of the teachers' curricular mission to encourage critical thinking").

[107] *Oliver*, 19 F.4th at 845 (Ho, J., concurring).

her discontentment and anger towards the *Dobbs* decision. Her position on the matter was explicit, and during the exchange several students were moved to agree with her reasoning. Under this impure motive test, there is enough for a reasonable jury to conclude that there was indeed a specific orthodoxy established, and that the teacher retaliated against a student for chaffing against it. T.C.'s claim would be more likely to defeat summary judgement.

On the other hand, it would be difficult to make the same case against Ms. Ryan. She, unlike Ms. Bryant, was careful not to disclose to the class her own position on the matter. The assignment was not given immediately after the *Dobbs* leak, and she never wore clothing that indicated her political bent. Additionally, Ms. Ryan implored the students to respect the privacy of each other regarding the sensitive topic, and there was no pressure from peers in the classroom. Under the impure motive test, it would be challenging for a student to make a claim that Ms. Ryan, contrary to her purported reason for giving the assignment, was impermissibly imposing orthodoxy on the class.

B. Nakba Day

For this hypothetical, imagine a high school senior named Sam. Sam is a second-generation Palestinian-American, though his maternal grandparents were both born in what was, at the time of their birth, Mandatory Palestine. On May 15, 2021, Sam wears a black t-shirt to school with the words "Nakba Day" adorned in red, black, and green.[108] In his first class that morning, sociology, Sam stands up, draws attention to himself, and proceeds with an "announcement." He begins by assuring his classmates and teacher, who looks on quizzically, that he means "no disrespect to anyone in the class," and that he "just wants to let everyone know about Nakba Day," which he believes has been given short shrift in the Western press. Sam proceeds to explain the meaning of the remembrance day, and notes the "ongoing Palestinian diaspora." His whole "announcement" lasts for about sixty seconds.

In Sam's chemistry class the following period, which is peopled almost entirely by a different group of students, he stands up and starts with the same "announcement." This time, before he is halfway through, Sam's chemistry teacher commands that he cease speaking that instant, or he will suffer consequences. Undeterred, Sam powers through the rest of his canned speech, over the objection of the teacher. Sam is written up for disturbing the class, and is given detention.

[108] "Nakba" is Arabic for "disaster." In 1998, then-Palestinian Authority president, Yasir Arafat officially decreed that May 15, the day after Israeli Independence Day, would thereafter be known as Nakba Day, the Palestinian day of remembrance. The Day commemorates the 1948 displacements of hundreds of thousands of Palestinians. *See* Rick Gladstone, *An Annual Day of Palestinian Grievance Comes Amid the Upheaval*, N.Y. TIMES (May 15, 2012) https://www.nytimes.com/2021/05/15/world/middleeast/nakba-day.html. The white, black, green and red color scheme evokes the Palestinian flag.

Imagine, for purposes of this note, that public forum doctrine applies to classrooms when the speaker is a lawfully enrolled student. The question then becomes whether the chemistry teacher's speech regulation is content-based or not. In a 2015 case, the Court noted that although "government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant" form of content discrimination, it is "well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." (quotations removed).[109] Thus, the Court held, "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[110] Here, even if the chemistry teacher's speech regulation is designed to eliminate all political speech and not just that of a specific political perspective with which he disagrees, it is likely content-based.[111] Therefore, strict scrutiny would apply.[112]

VI. CONCLUSION

The special characteristics of high school and college classrooms should not be reason to curtail the speech rights of lawfully attending students. On the contrary, in a well-functioning educational system operating in a robust, advanced democracy, classrooms for young adults should inculcate the values of free thought, inquiry, and speech. But to instill these values in students, we must first extend to

[109] *Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015).

[110] *Id.* at 169 ("[f]or example, a law banning the use of the sound trucks for political speech…would be a content-based regulation, even if it imposed no limits on the political *viewpoints* that could be expressed") (emphasis added).

[111] Assume, *arguendo*, that the speech regulation here is not content-based. In that situation, the school may impose time, place, or manner restrictions on the expression that serve a significant government interest, and leave open ample alternative channels of communication. The school will argue that it is reasonable to disallow discussion of international politics in a chemistry class, and that Sam was allowed to speak on the topic elsewhere in the school. *See Perry*, 460 U.S. at 45. *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The case becomes much closer, of course, but Sam's best argument, likely, is that by eliminating the right to speak in one or many classrooms, the school has foreclosed intercommunication between him students in those classes, and that there is no other ample alternative to such intercommunication.

[112] Contrast this approach with the Court's current thinking about content-based restrictions in schools. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2050 (2021) (Alito, J., concurring) ("[a]s a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject"). *See also Hazelwood*, 484 U.S. at 279 (Brennan, J., dissenting) ("[t]he young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus").

them the legal rights these same values undergird. It is the business of schools to provide a forum where students digest different ideas, and learn the essential role free speech plays in a functioning democracy. Restricting this important right of students any more than is absolutely necessary is repugnant to both the First Amendment and the educational process.