COMPELLED STUDENT SPEECH & CONTENTIOUS ACADEMIC ASSIGNMENTS: SHOULD THE FIRST AMENDMENT RIGHT NOT TO SPEAK IN SCHOOL EXTEND BEYOND THE PLEDGE OF ALLEGIANCE TO IDEOLOGICALLY AND POLITICALLY CHARGED CLASSROOM EXERCISES?

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ABSTRACT

This Article examines whether the unenumerated First Amendment right not to speak should shield public school students from academic exercises compelling engagement with speech that conflicts with their ideological or political views. The Article additionally explores parameters that might confine such a nascent constitutional right. A trio of recent federal cases, as well as battles between parents and schools over critical race theory, provide timely springboards for analyzing these issues. The United States Supreme Court in *West Virginia State Board of Education v. Barnette* famously held that public school students cannot be compelled to recite the Pledge of Allegiance during ceremonial rituals designed to foster patriotism and affirm nationalism. Yet, the Court never has considered whether this student-centric, First Amendment-based right not to speak stretches beyond that context. Should it also encompass academic assignments, including one addressed here that forced students to write part of the Five Pillars of Islam involving profession of faith? The Article explores pros and cons of granting students a qualified First Amendment right not to speak that expands past *Barnette's* factual boundaries to sweep up ideologically freighted academic assignments. The Article also delves interdisciplinarily into research and philosophy regarding indoctrination and autonomy. The Article concludes by proposing a standard for courts to use when determining whether academic exercises violate students' constitutional right not to speak. Clearly established rights and rules are essential in this niche of First Amendment

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law and the proposed standard facilitates this. Without clarity, school officials will escape liability under the doctrine of qualified immunity.

I. INTRODUCTION

To comprehend the constitutional quagmire the U.S. Court of Appeals for the Fifth Circuit confronted in 2021 in the student-speech case of *Oliver v. Arnold*,[1] it helps to consider four legal principles. Yet, simply knowing the quartet of precepts described shortly below fails to generate an obvious answer to the fundamental question in disputes such as *Oliver* and the one that animates this Article: When may public schools lawfully compel students during academic exercises to engage in speech that conflicts with their ideological or political beliefs?[2]

Indeed, the two-to-one fracturing of the Fifth Circuit's three-judge panel that ruled in *Oliver* in June 2021,[3] when coupled with the ten-to-seven splintering among the court's full array of jurists that December in declining to rehear en banc the June decision,[4] demonstrates that no readily agreed-upon answer exists. The latter divided determination let a case proceed to trial that centers on the constitutionality of an assignment in a high school sociology course.[5] It required students to transcribe from memory the Pledge of Allegiance to illustrate, according to the teacher, "that people sometimes recite things every day out of habit and without thinking about what they are actually saying."[6] Student Mari Leigh Oliver refused to participate and, through her mother, sued teacher Benjie Arnold.[7]

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[1] Oliver v. Arnold, 19 F.4th 843 (5th Cir. 2021).

[2] *See infra* notes 3–7 and accompanying text and Part III, Section A (addressing *Oliver* in greater depth). The phrase "ideological or political beliefs" is used above and throughout this Article to sweep up beliefs regarding "politics, nationalism, religion, or other matters of opinion." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). As examined later, *Barnette* is a critical case in the realm of compelled expression affecting public school students. *See infra* notes 30–40 and 176–188 and accompanying text (addressing *Barnette*).

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

[4] *See Oliver*, 19 F.4th at 843 ("In the en banc poll, seven judges voted in favor of rehearing (Judges Jones, Smith, Elrod, Duncan, Engelhardt, Oldham, and Wilson), and ten voted against rehearing (Chief Judge Owen, and Judges Stewart, Dennis, Southwick, Haynes, Graves, Higginson, Costa, Willett, and Ho).").

[5] Oliver v. Klein Indep. Sch. Dist., 448 F. Supp.3d 673, 686 (S.D. Tex. 2020) (quoting teacher Benjie Arnold).

[6] *Id.* (quoting teacher Benjie Arnold). *See* 4 U.S.C. § 4 (2022) (setting forth the words of the Pledge of Allegiance to the Flag, and noting that it "should be rendered by standing at attention facing the flag with the right hand over the heart").

[7] *Oliver*, 448 F. Supp. 3d at 685–88. *See id.* at 697 (noting "Oliver's claim that Arnold violated her right to abstain from the pledge by attempting to coerce her and the rest of the class to write the pledge").

Oliver is not a one-off case challenging a public-school classroom assignment. In 2019, the U.S. Court of Appeals for the Fourth Circuit addressed a lawsuit opposing a world-history course exercise that had students write part of the Five Pillars of Islam calling for faith in Allah.[8] In 2017, the Fifth Circuit considered the constitutionality of a high school Spanish class assignment celebrating Mexican Independence Day that "required students to memorize and recite in Spanish the Mexican Pledge of Allegiance and sing the Mexican National Anthem."[9]

Furthermore, multiple lawsuits may arise against schools that compel students to voice or write the tenets of critical race theory (CRT),[10] given current controversies about CRT.[11] In fact, a compelled-speech cause of action under Virginia's Constitution was filed by several students and their parents in late 2021 against the Albemarle County School Board, its superintendent, and an assistant superintendent.[12] The case pivots on what the plaintiffs call a policy and a curriculum that "indoctrinate children in an ideology (sometimes called 'critical race theory,' 'critical theory,' or 'critical pedagogy') that views everyone and everything through the lens of race."[13] The complaint alleges that "[t]hrough their Policy and practices, Defendants have sought to compel Plaintiffs to speak racial and political messages with which they disagree and to compel speech based on content and viewpoint."[14] It contends that "Defendants have compelled and seek to compel Plaintiffs, subject to the pains of discipline and lower academic ratings, to affirm and communicate messages that conflict with their deeply held beliefs."[15]

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8 Wood v. Arnold, 915 F.3d 308 (4th Cir. 2019).

9 Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 343 (5th Cir. 2017).

10 *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8–11 (3d ed. 2017) (addressing the basic tenets of critical race theory).

11 In December 2021, a lawsuit was filed against the Albemarle County School Board in state court in Virginia that includes a compelled-speech claim based upon the Virginia Constitution, rather than the First Amendment to the U.S. Constitution. Complaint for Declaratory, Injunctive and Additional Relief at 48–50, C.I. v. Albemarle Cnty. Sch. Bd., No. CL21001737-00 (filed Va. Cir. Ct. Dec. 22, 2021) [hereinafter C.I. Complaint], https://adflegal.org/sites/default/files/2021-12/CI-v-Albemarle-County-School-Board-2021-12-22-Complaint.pdf. *See* Valerie Richardson, *Critical Race Theory in Albemarle County Schools Prompts Parents to Sue District*, WASH. TIMES (Dec. 22, 2021), https://www.washingtontimes.com/news/2021/dec/22/critical-race-theory-albemarle-county-schools-prom/ ("A group of Virginia parents filed a lawsuit Wednesday challenging the 'anti-racism policy' of the Albemarle County Public Schools, arguing that the program indoctrinates children in a radical ideology that teaches them to 'affirmatively discriminate based on race.'").

12 *Supra* note 11. *See* C.I. Complaint, *supra* note 11, at 6 ("Plaintiffs are students enrolled in the Albemarle Public School system and their parents.").

13 C.I. Complaint, *supra* note 11, at 4.

14 *Id.* at 42.

15 *Id.* at 49.

In making sense–at least from a free-speech perspective, rather than one involving religious objections–of such culturally contentious legal skirmishes, four macro-level principles provide helpful starting points.[16] First and foremost, freedom of speech is protected from government censorship by the First Amendment to the United States Constitution.[17] The U.S. Supreme Court has held that this enumerated freedom also embodies an implied right not to be compelled by the government to express certain messages.[18] In fact, the Court recently reasoned that "measures compelling speech are at least as threatening" as ones restricting it.[19] That is because requiring people "to voice ideas with which they disagree" undermines both democratic self-governance and "the search for truth."[20] In brief, the first proposition holds that the First Amendment safeguards, at least sometimes,

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[16] This Article addresses First Amendment-based, free-speech challenges to such assignments, not claims that the assignments violate the Free Exercise Clause of the First Amendment. The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The Free Exercise Clause was incorporated more than eighty years ago through the Fourteenth Amendment Due Process Clause as a fundamental liberty governing the actions of state and local government entities and officials. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Lower courts have addressed challenges, grounded in Free Exercise Clause rights, to classroom assignments. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 106 (1st Cir. 2008) ("Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."); Jones v. Boulder Valley Sch. Dist. Re-2, 2021 U.S. Dist. LEXIS 223090, *48 (D. Colo. Oct. 24, 2021) (concluding that "the Family here has no free exercise right to be free from any references to or discussions about transgender persons or transgender issues. Neither are they, under federal constitutional law principles, entitled to any advance notice or warning of such discussions").

[17] The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties governing the actions of state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[18] *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (opining that the First Amendment includes "the right to refrain from speaking at all," and adding that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'") (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[19] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2464 (2018).

[20] *Id.*

both the right to speak and the right not to speak.[21] Those rights, in turn, are of equal constitutional importance.[22]

Second, minors possess First Amendment rights.[23] The Supreme Court holds that public school students do not doff their constitutional right of free expression "at the schoolhouse gate."[24] That said, the Court has determined that students' rights are not always the same as adults' rights.[25] Indeed, the scope of students' speech rights at school is cabined due to "the special characteristics of the school environment."[26] As Justice Stephen Breyer wrote in 2021 when penning the majority opinion in *Mahanoy Area School District v. B.L.*, "[t]hese special characteristics call for special leeway when schools regulate speech that occurs under its supervision."[27] For instance– and seemingly of particular relevance for cases such as *Oliver* and others addressed in this Article–the Court has concluded that school officials may regulate student speech occurring in "school-sponsored expressive activities" if their reasons "are reasonably related to legitimate pedagogical concerns."[28] In sum, the second proposition is that public school students possess free speech rights, but their rights are not as extensive as those of adults and may be constrained.

Third, while the Court has decided five cases involving either restrictions or punishments imposed on students' ability to speak freely, it never has addressed a case in which students have asserted an unenumerated First Amendment right not to speak against compelled participation in a classroom

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[21] The phrase "at least sometimes" is used here partly because the Court has ruled that not all varieties of speech are shielded by the First Amendment. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2361 (2020) ("The Court has held that entire categories of speech—for example, obscenity, fraud, and speech integral to criminal conduct—are generally unprotected by the First Amendment entirely because of their content.") (Breyer, J., concurring in part, dissenting in part). Additionally, the same phrase is used partly because the Court has held that speech may be compelled in certain circumstances. *See* Zauderer v. Off. Disciplinary Couns., 471 U.S. 626, 651 (1985) (concluding that compelling advertisers to disclose factual information does not violate the First Amendment if the "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and are not "unduly burdensome").

[22] Riley v. Nat'l Fed'n of Blind N.C., 487 U.S. 781, 797 (1988) (noting "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression").

[23] *See* Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975) (observing that "minors are entitled to a significant measure of First Amendment protection").

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

[25] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (observing "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

[26] *Tinker*, 393 U.S. at 506.

[27] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).

[28] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

curricular assignment.[29] The Court, however, held in *West Virginia State Board of Education v. Barnette*[30] that students cannot be forced to recite the Pledge of Allegiance while saluting the American flag as part of a school ritual.[31] Justice Robert Jackson reasoned for the *Barnette* majority that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[32]

Barnette is a seminal compelled-speech/right-not-to-speak case.[33] What is important for now, however, is that *Barnette* did not involve an academic assignment, exercise, or project. Instead, the Court characterized the pledge-and-salute requirement as a "prescribed ceremony"[34] and "ritual"[35] that compelled "students to declare a belief"[36] and to accept both "political ideas" and a "credo of nationalism."[37] In short, the third proposition is that while the Court has not tackled a right-not-to-speak case involving a curricular assignment, it has held that public school students cannot be required to recite government-endorsed political ideologies in "patriotic ceremonies"[38] in a manner "requir[ing] affirmation of a belief and an attitude of mind."[39] In *Oliver*, the relevance of the *Barnette* principle was hotly contested by the Fifth Circuit's judges.[40]

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[29] The five Supreme Court rulings involve: 1) students who wore black armbands to school as a form of political expression (*Tinker*, 393 U.S. at 504–05); 2) a student who gave "a lewd speech at a school assembly" (*Bethel*, 478 U.S. at 677); 3) students who sought to publish articles in their school newspaper that was "produced as part of the school's journalism curriculum" (*Kuhlmeier*, 484 U.S. at 262); 4) a student who displayed a banner reading "Bong Hits 4 Jesus" while attending a school-supervised event (Morse v. Frederick, 551 U.S. 393, 396–98 (2007)); and 5) a student who was punished for a social media post created while off campus and during non-school hours that proclaimed "Fuck school fuck softball fuck cheer fuck everything" (*Mahanoy*, 141 S. Ct. at 2043). These five rulings are discussed in greater depth in Part II.

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

[31] *See id.* at 642 (holding that "compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

[32] *Id.*

[33] *See* William D. Araiza, *The Law of License Plates and Other Inevitabilities of Free Speech Context Sensitivity*, 87 BROOKLYN L. REV. 247, 267 (2021) ("*Barnette* is generally understood to be the foundation of the Court's compelled speech jurisprudence."); *see also infra* notes 176–188 and accompanying text (addressing *Barnette* in greater depth).

[34] *Barnette*, 319 U.S. at 633.

[35] *Id.* at 634.

[36] *Id.* at 631.

[37] *Id.* at 632, 634.

[38] *Id.* at 641.

[39] *Id.* at 633.

[40] *See infra* Part III, Section A (addressing *Oliver*).

The fourth and final starting-point proposition is that under the doctrine of qualified immunity, government officials can evade monetary liability if the constitutional right they allegedly violated was not clearly established when their purported misconduct occurred.[41] In 2021, the Supreme Court reaffirmed that "[a] right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"[42] Government officials who make reasonable mistakes about the constitutionality of their conduct thus are shielded by the qualified immunity doctrine.[43] The Court also recently "reiterate[d] the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'"[44] but, instead, "must be 'particularized' to the facts of the case."[45] Qualified immunity often is invoked successfully by school officials in student speech cases, especially when speech occurs off campus during non-school hours.[46] In brief, the fourth proposition suggests that until the Supreme Court clearly establishes when compelling students to engage in speech during curricular exercises violates the First Amendment, school officials will dodge monetary responsibility. To wit, in the case noted earlier regarding the compelled recitation of the Mexican Pledge of Allegiance,[47] the Fifth Circuit granted both the teacher and principal qualified immunity

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[41] Pearson v. Callahan, 555 U.S. 223, 231–32. *See* Reichle v. Howards, 566 U.S. 658, 664 (2012) ("Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.").

[42] Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015)).

[43] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

[44] White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft*, 563 U.S. at 742).

[45] *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). *See* City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) ("We have repeatedly told courts not to define clearly established law at too high a level of generality.").

[46] *See generally* Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies from 2009*, 8 FIRST AMEND. L. REV. 86 (2009) (addressing the use of qualified immunity by public school officials in off-campus student speech cases). The Supreme Court's 2021 ruling in an off-campus student speech case likely will not end the successful invocation of qualified immunity by school officials in many off-campus speech scenarios. That is because the Court failed to articulate a clear rule for understanding when punishing a student for off-campus speech violates the student's First Amendment right of free speech. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021) (concluding that "we do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent"). As one federal district court recently wrote, the Supreme Court in *Mahanoy* "has still fallen short" of establishing a rule that limits discipline imposed by school officials over off-campus speech. McClelland v. Katy Indep. Sch. Dist., 2021 U.S. Dist. LEXIS 210190, at *26 (S.D. Tex. Nov. 1, 2021).

[47] Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338 (5th Cir. 2017).

because they were "not ignoring clearly established law."[48] Greater clarity therefore is essential so that both students and teachers know the metes and bounds of the First Amendment freedom of speech in similar cases.

With these four propositions in mind, this Article explores whether–and, if so, when–public schools should be able to compel students, without violating their First Amendment right not to speak, to engage in expression during academic assignments that conflicts with their ideological or political views. Put differently, should the First Amendment sometimes shield students from expressing objectionable ideological or political views? Part II reviews the Supreme Court's five student-speech rulings, focusing both on the rules created in those cases and on the levels of deference the Court bestowed on school officials when restricting student speech.[49] Additionally, while none of the five cases involves compelled expression, Part II examines key aspects of the Court's logic in them that seems most pertinent for analyzing right-not-to-speak claims.[50]

Part III then addresses the unenumerated First Amendment right not to speak.[51] Special attention is paid to *Barnette*.[52] Next, Part IV explores in greater depth the facts and appellate court rulings in the recent cases mentioned earlier of *Oliver v. Arnold*, *Wood v. Arnold*, and *Brinsdon v. McAllen Independent School District*.[53] Furthermore, Part IV discusses clashes today between parents and school boards over critical race theory, as these disputes appear ripe for litigation affecting a student's right not to be forced during academic exercises to voice that theory's tenets.[54]

Part V then takes an evaluative turn.[55] It assesses benefits and drawbacks of extending to students a qualified First Amendment right not to speak beyond the factual contours of *Barnette* to also encompass the compelled expression of objectionable ideological or political views during academic exercises. In the process, Part V proposes possible tests for determining when a student's right not to speak might be violated by an academic task. Particularly important in Part V are discussions of: 1) facets of the Court's logic and language in both *Barnette* and *Hazelwood School District v. Kuhlmeier* that might either be borrowed wholesale or modified to define the boundaries of this student-centric First Amendment right; 2) the level of

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[48] *Id.* at 351.
[49] *Infra* notes 59–168 and accompanying text.
[50] *Infra* notes 59–168 and accompanying text.
[51] *Infra* notes 169–229 and accompanying text.
[52] *Infra* notes 176–188 and accompanying text.
[53] *Infra* notes 230–402 and accompanying text.
[54] *Infra* notes 403–430 and accompanying text.
[55] *Infra* notes 431–608 and accompanying text.

deference courts afford to educators' judgments about pedagogical matters; 3) the dangers of courts delving into educators' motives in administering classroom assignments, including difficulties in distinguishing between an illicit intent to have students *affirm/profess* a belief and a benign intent to have students *learn/understand* it; 4) the difference between electoral remedies of aggrieved parents in polling places and litigational relief found in courtrooms; and 5) the burden that would be foisted on teachers to create, administer and grade alternative assignments for students who object, based on compelled-speech grounds, to completing school-sanctioned curricular exercises.[56]

Finally, Part VI draws from the analysis in Part V and concludes by proposing a standard to add much-needed clarity to this compelled-speech niche of First Amendment law.[57] Lucidity is essential because the current dearth of clearly established rights allows teachers and administrators in cases such as *Brinsdon* to successfully assert the doctrine of qualified immunity, thereby dodging monetary liability.[58]

II. THE QUINTET OF SUPREME COURT STUDENT-SPEECH DECISIONS: OF RULES, DEFERENCE, AND POLICY CONSIDERATIONS

This Part reviews the Supreme Court's rulings in its five student-speech cases, moving chronologically from the oldest decision in 1969 to the most recent one more than a half-century later in 2021. This Part does not offer in-depth, comprehensive analyses of these cases. Instead, it concentrates on the rules the Court fashioned, as well as on the facets of the Court's reasoning in arriving at those rules that seem most relevant for addressing compelled-speech scenarios involving academic assignments. Furthermore, attention is paid to the degree of deference the Court suggests must be afforded to educators when making pedagogical judgments.

A. *Tinker v. Des Moines Independent Community School District*[59]

Tinker involved the right of three Iowa minors to wear black armbands to their public schools in 1965 to protest the war in Vietnam.[60] The Supreme Court ruled that the First Amendment barred school officials from "deny[ing]

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[56] *Infra* notes 491–608 and accompanying text.
[57] *Infra* notes 609–623 and accompanying text.
[58] Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338 (5th Cir. 2017).
[59] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[60] *Id.* at 504.

their form of expression."[61] In reaching that free-speech friendly result, the Court held that school officials could ban such speech only if they "had reason to anticipate that [it] . . . would substantially interfere with the work of the school or impinge upon the rights of other students."[62] That was something the Des Moines authorities could not prove.[63] Justice Abe Fortas reasoned for the majority that the record failed to "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."[64] The lead author of this Article encapsulates this principle elsewhere as "*Tinker's* material-and-substantial interference or disruption standard."[65]

Several aspects of the Court's logic in articulating this rule might help students today in asserting a First Amendment right against being compelled to express speech that conflicts with their ideological or political views. First, the Court wrote that "state-operated schools may not be enclaves of totalitarianism"[66] and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[67] These observations intimate that students are not subservient to complete state authority in terms of the messages they receive in state-controlled schools. To not be a so-called closed-circuit recipient of the state's messages, a student must be able to reject some of them–to tune them out–by not being forced to participate in academic exercises that compel their expression.

Second, the *Tinker* Court stressed that "[s]chool officials do not possess *absolute* authority over their students."[68] This lack of unconditional power over students suggests, *sub silentio*, that there must be some limits on schools' ability to compel students to engage in speech activities. By adding that schools are not incubators for producing "'a homogeneous people,'"[69] the Court implies that some allowance for individualism among members of the student body must be abided. Such respect for individualism, in turn, might be objectively manifested by permitting students not to participate in assignments compelling ideological or political speech to which they object.

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61 *Id.* at 514.
62 *Id.* at 509.
63 *Id.*
64 *Id.* at 514.
65 CLAY CALVERT ET AL., MASS MEDIA LAW 92 (21st ed. 2020).
66 *Tinker*, 393 U.S. at 511.
67 *Id.*
68 *Id.* (emphasis added).
69 *Id.* (quoting Meyer v. Neb., 262 U.S. 390, 402 (1923)).

Although these facets of *Tinker's* logic arguably buttress a student's right-not-to-speak claim, a variation of the *Tinker* test might be invoked *against* such a contention. As noted above, *Tinker* safeguards student expression unless facts suggest it will materially and substantially disrupt the educational environment.[70] A court in a compelled-speech case might consider the flipside of that test. Specifically, a judge might ask: *Would a successful compelled-speech challenge or, more likely, a series of successful compelled-speech challenges to academic assignments materially and substantially disrupt the educational operations of the school and detract from the learning of non-objecting students?*

If a teacher must create, administer and grade one alternative assignment for a lone student to substitute for a single objectionable assignment in one class, that might not amount to a material and substantial disruption of the teacher's regularly assigned job duties in effectively delivering the original assignment (i.e., the assignment to which the lone student objects) to the remainder of the class's non-complaining students. But what happens when the numbers–specifically, the number of alternative assignments that must be created and the number of objecting students that must be served–ramp up?

Consider a teacher who must create and grade a half-dozen or more alternative assignments for a half-dozen or more aggrieved students to replace objectionable assignments relating to a controversial piece of the curriculum such as critical race theory.[71] The time and effort required to create, administer, and grade multiple alternative assignments and to serve numerous objecting students might be tantamount to a material and substantial disruption of the learning environment. That is because serving the demurring students distracts and diverts the teacher's attention, energy and focus away from delivering the original assignments to the non-objecting students. More significantly, it puts the teacher in the position of having to teach two dissimilar versions of the same course–one version for objecting students and another variant for accepting students. Teachers placed in such unenviable positions thus must do double duty. *Tinker's* material-and-substantial interference or disruption standard therefore might play a role in compelled-speech cases if courts focus on the disruption caused to the effective delivery of the regular curriculum by teachers being forced to create, administer, and grade a slew of substitute assignments. In brief, the alternative/substitute assignments may materially and substantially detract

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[70] *Supra* notes 62–65 and accompanying text. The term "facts suggest" is used here because the Court in *Tinker* observed that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

[71] *See supra* notes 11–15 and accompanying text (describing a case challenging on compelled-speech grounds the teaching of critical race theory as part of the curriculum).

from the optimally successful delivery of the normal curriculum, thereby harming the educational experience of the non-complaining students in the process.

B. *Bethel School District v. Fraser*[72]

Seventeen years after *Tinker*, the Supreme Court held that public school officials in Washington State did not violate the First Amendment rights of Matthew Fraser when they suspended him for delivering an "offensively lewd and indecent speech" to "an unsuspecting audience of teenage students" during a school assembly.[73] In authoring the Court's opinion, Chief Justice Warren Burger reasoned that the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[74] In short, the majority concluded that schools possess authority, as part of their educational mission, to teach students shared values regarding suitable manners and modes of mature expression.[75] In reaching its decision in the school's favor, the majority noted that Matthew Fraser was not punished because of his political viewpoint.[76] Instead, he was disciplined for pervasively using sexually offensive and lewd innuendos that celebrated "male sexuality" before a captive audience, including girls as young as fourteen years old.[77]

At bottom, *Fraser* illustrates that public schools hold authority not only to teach substantive content, such as lessons about algebra and history, but also to inculcate "shared values"[78] and "essential lessons of civil, mature conduct"[79] during "public discourse."[80] Sexually offensive expression thus can be punished to teach values about appropriate discourse, regardless of whether such speech materially and substantially disrupts the educational

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

[73] *Id.* at 685. Matthew Fraser was given a three-day suspension, but he was allowed to return to school after serving two days. *Id.* at 678–79. He also had his name "removed from the list of candidates for graduation speaker at the school's commencement exercises." *Id.* at 678. Despite the latter sanction, Fraser was elected by his classmates to speak at commencement. *Id.* at 692 (Stevens, J., dissenting).

[74] *Id.* at 681.

[75] *Id.* at 682-86.

[76] *Id.* at 685.

[77] *Id.* at 683. *See id.* at 684 (noting that the Court's rulings in other cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children–especially in a captive audience–from exposure to sexually explicit, indecent, or lewd speech.").

[78] *Id.* at 683.

[79] *Id.*

[80] *Id.*

atmosphere, as is necessary to bar it under *Tinker*.[81] Many lower courts therefore have interpreted *Fraser* as providing public schools with what First Amendment scholars David Hudson and John Ferguson call "free reign to censor vulgar, lewd, or plainly offensive student speech."[82] They add that some courts have stretched *Fraser's* holding beyond sexually offensive expression to more broadly sweep up offensive ideas and political viewpoints.[83]

What relevance does *Fraser* hold for compelled-speech cases in which students object to doing assignments that compel them to utter beliefs contradicting their ideological or political viewpoints? Dictum in Chief Justice Burger's majority opinion militates *against* providing students such a First Amendment right.[84] Specifically, Burger opined that the "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views."[85] This suggests that compelling students to complete assignments that involve writing or otherwise expressing divergent political viewpoints teaches them the value of tolerance that is fundamental for a democratic society. The democratic value inculcated by requiring such assignments thus is that the nation strives to be a tolerant society and that its citizens must have tolerant minds–people who are willing to rationally understand and consider even the offensive political beliefs of others.[86] If it is true, as Justice Stephen Breyer wrote in 2021 in *Mahanoy Area School District v. B.L.*, that "America's public schools are the nurseries of democracy,"[87] then teaching students the value of tolerance through understanding oppositional ideological and political views–even if it means having to write those views or discuss them–forcefully pushes back against a student's right-not-to-speak claim to opt out from them.

Put differently, Chief Justice Burger wrote in *Fraser* that "schools must teach by example the shared values of a civilized social order."[88] By

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[81] *See* William C. Nevin, *Neither Tinker, Nor Hazelwood, Nor Fraser, Nor Morse: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 797 (2015) ("Ultimately, *Fraser* stands for the proposition that school administrators can move to censor student speech they find to be lewd or offensive and that, furthermore, this censorship need not be premised on the presence or threat of a disruption.").

[82] David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002).

[83] *Id.* at 203.

[84] *Fraser*, 478 U.S. at 681.

[85] *Id.*

[86] *See generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY 104 (1986) (linking the concept and goal of tolerance to what Bollinger describes as the "quest for the tolerant mind").

[87] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

[88] *Fraser*, 478 U.S. at 683.

compelling students to engage with ideological and political positions they initially abhor, students are taught not only tolerance of divergent perspectives, but also the notion that being an engaged, civilized citizen means confronting–not ducking or dodging, not fearing or foregoing–the objectionable. After all, as Justice Louis Brandeis memorably wrote, "[m]en feared witches and burnt women."[89] And if, as Justice Brandeis added, "the function of speech [is] to free men from the bondage of irrational fears,"[90] then part of a public education's function is freeing minors from fears of addressing head-on ideas they disdain, be it for reasons rational or otherwise. In sum, *Fraser's* principle that schools may teach values that are "essential to a democratic society"[91] stands counterposed to a student's assertion of a right not to be compelled to speak, so long as the assignment does not, per *West Virginia State Board of Education v. Barnette*,[92] compel affirming an ideology of patriotism or nationalism.[93]

Furthermore, the Court in *Fraser* emphasized that students' on-campus speech rights are not automatically the same as those of adults in public places.[94] Words that may be protected during "adult public discourse"[95] may not be safeguarded when expressed during on-campus student discourse. This logic suggests that the First Amendment right not to speak afforded to adults need not be extended in equal measure to students on campus. This comports with the Court's observation in *Tinker* that the on-campus First Amendment rights of students must be "applied in light of the special characteristics of the school environment."[96] A student's right against on-campus compelled expression consequently may reach no further than the factual confines of *Barnette*, even if the Court has extended that same right elsewhere to adults and businesses in other contexts.[97]

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[89] Whitney v. Cal., 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[90] *Id.*

[91] *Fraser*, 478 U.S. at 681.

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

[93] *See supra* notes 30–39 and *see infra* notes 176–188 and accompanying text (addressing *Barnette*).

[94] *See Fraser*, 478 U.S. at 682 (noting that while "[t]he First Amendment guarantees wide freedom in matters of adult public discourse" in a public place, "it does not follow . . . that . . . the same latitude must be permitted to children in a public school," and emphasizing that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

[95] *Id.*

[96] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Attorney Frank LoMonte notes that this language from *Tinker* is leaned on by courts "to justify affording heightened deference to the decisions of school disciplinarians." Frank D. LoMonte, *"The Key Word Is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 361 (2013).

[97] *See infra* Part III (addressing several key cases in which the Court has extended to adults and businesses the First Amendment right against compelled expression).

Finally, one must consider the extensive deference the Court in *Fraser* bestowed on school authorities.[98] Chief Justice Burger wrote that it was for the school board to decide which manners of speech are appropriate in classes and assemblies.[99] It was not up to the Court to second guess the judgment of school officials or teachers who serve as "role models"[100] through their behavior and speech practices. This suggests that deference is due to teachers when they assign students to express objectional ideological or political views. In total, significant language and logic in *Fraser* augurs against giving students a First Amendment right not to be compelled to participate in curricular exercises that require them to express ideological or political views they find objectionable.

C. *Hazelwood School District v. Kuhlmeier*[101]

Two years after the Court ruled against Matthew Fraser, it dealt student speech rights another defeat in *Kuhlmeier*. *Kuhlmeier* featured a very different factual scenario from *Fraser*. At issue in *Kuhlmeier* was a high school principal's censorship of two articles in a newspaper produced in a journalism class.[102] One article regarded students at the school who dealt with pregnancy, while the other addressed the impact of divorce on students.[103] In upholding the principal's decision to squelch the articles, the Court proclaimed 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 related to legitimate pedagogical concerns."[104]

This rule from *Kuhlmeier* is highly deferential to educators when it comes to regulating "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[105] To wit, Justice Byron White wrote for the majority that only

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[98] *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 536 (2000) (noting that in *Fraser* the Court "emphasized the need for judicial deference to educational institutions").

[99] *Fraser*, 478 U.S. at 683.

[100] *Id.*

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

[102] *Id.* at 262–64.

[103] *Id.*

[104] *Id.* at 273.

[105] *Id.* at 271. *See* David L. Hudson, Jr., *Thirty Years of Hazelwood and Its Spread to Colleges and University Campuses*, 61 HOW. L.J. 491, 491 (2018) (noting that the rule from *Kuhlmeier* "proved to be very deferential to school administrators and led to increased censorship across the country").

when there is "no valid educational purpose"[106] for censorship in such contexts should the judiciary intervene to protect a student's First Amendment right of free expression. He concluded that the principal had acted reasonably under this standard by censoring the articles.[107] Justice White also provided a half-dozen examples of legitimate pedagogical concerns that justify censoring student expression within the context of "activities [that] may fairly be characterized as part of the school curriculum."[108] These examples included "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[109] Ultimately, as one commentator notes, "courts applying the 'legitimate pedagogical concerns' prong of the [*Kuhlmeier*] test are extremely deferential to school districts, favoring the permission of censorship."[110] At bottom, *Kuhlmeier* embodies the notion that judges should step out of the way of educators when it comes to pedagogical decisions.[111] The decision also quoted favorably the Court's statement in *Fraser* regarding the authority of educators to teach students shared values.[112]

Of the Court's five student-speech cases, *Kuhlmeier*, at first glance, supplies the most ready-made test to transport from the realm of *censoring* expression to the domain of *compelling* it. If, per *Kuhlmeier*, school administrators may lawfully *bar* student expression that occurs within the curriculum if their reasons "are reasonably related to legitimate pedagogical concerns,"[113] then they also should be able to *compel* speech for legitimate pedagogical concerns. Symmetrically, the same "legitimate pedagogical concerns" test would apply for analyzing the propriety of both restricting and compelling speech. In fact, as Professor Joseph Martins points out, two federal appellate courts – the Sixth and Tenth Circuits – have held that

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[106] *Kuhlmeier*, 484 U.S. at 273.

[107] *Id.* at 274. For instance, when it came to censoring the article regarding girls at the school who dealt with pregnancy, the majority concluded that the principal's asserted concerns with anonymity, privacy, and "frank talk" about sex and birth control were reasonable. *Id.*

[108] *Id.* at 271.

[109] *Id.*

[110] Nora Sullivan, Note, *Insincere Apologies: The Tenth Circuit's Treatment of Compelled Speech in Public High Schools*, 8 FIRST AMEND. L. REV. 533, 541 (2010).

[111] *Kuhlmeier*, 484 U.S. at 273 (calling the rule it fashioned in *Kuhlmeier* "consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges").

[112] *Id.* at 272. *See supra* notes 72–80 and accompanying text (addressing *Fraser's* discussion of teaching values).

[113] *Id.* at 273.

Kuhlmeier supplies the correct rule in university settings for examining students' compelled-speech lawsuits.[114]

Specifically, the Sixth Circuit in *Ward v. Polite*[115] reasoned in 2012 that "[c]urriculum choices are a form of school speech, giving schools considerable flexibility in designing courses and policies and in enforcing them so long as they amount to *reasonable means of furthering legitimate educational ends*."[116] The case centered on Julea Ward, a student enrolled in the graduate-level counseling program at Eastern Michigan University.[117] Due to her religious beliefs, Ward objected to being required to affirm the sexual orientation of gay and lesbian clients during counseling sessions with them.[118] She was dismissed from the program for not engaging in such expression, prompting her lawsuit alleging violations of her First Amendment rights of both free speech and free exercise of religion.[119] In holding that *Kuhlmeier's* rule governed Ward's free speech claim, the Sixth Circuit sweepingly observed that "[w]hen a university lays out a program's curriculum or a class's requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them."[120] However, the appellate court ultimately left it for a jury to decide whether Ward was dismissed for refusing to complete a legitimate pedagogical exercise or whether she was expelled under a "phantom policy" intended to discriminate against her religious beliefs.[121]

Eight years prior to the Sixth Circuit's ruling in *Ward*, the Tenth Circuit held that *Kuhlmeier* furnished the correct rule in the university-level, compelled-speech case of *Axson-Flynn v. Johnson*.[122] The dispute pivoted on Christina Axson-Flynn's refusal, based on her Mormon faith, to say "fuck" and other offensive words.[123] These words were included in scripts used during classroom exercises for an acting program at the University of Utah.[124] She alleged "that forcing her to say the offensive words constitute[d] an effort to compel her to speak, in violation of the First Amendment's free

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[114] *See* Joseph J. Martins, *The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom?*, 20 U. PA. J. CONST. L. 85, 98–99 (2017) (citing the cases of Ward v. Polite, 667 F.3d 727 (6th Cir. 2012), and Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004)).

[115] *Ward*, 667 F.3d at 727.

[116] *Id.* at 730 (emphasis added).

[117] *Id.* at 729.

[118] *Id.* at 730–32.

[119] *Id.* at 732.

[120] *Id.* at 734.

[121] *Id.* at 738

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

[123] *Id.* at 1280–83.

[124] *Id.*

speech clause."[125] The defendant-educators countered that the script-reading exercises were intended to help prepare students for professional acting careers.[126] The Tenth Circuit held that the *Kuhlmeier* test applies "in a university setting for speech that occurs in a classroom as part of a class curriculum."[127] It stressed the vast judicial deference afforded to educators in curricular matters.[128] In particular, the appellate court reasoned that only when a proffered pedagogical interest is "a sham pretext for an impermissible ulterior motive" should a court overrule an educator's judgment about a teaching method.[129] In this instance, the Tenth Circuit held that certain remarks made by Axson-Flynn's instructors about her Mormonism rendered it unclear if the "justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination."[130]

While *Kuhlmeier* thus has been applied in university-level, compelled-speech cases, this Article proposes a modified version of that standard that is less deferential to educators, requiring them to prove that compelled-speech exercises are directly (not simply reasonably) related to serving an important (not merely a legitimate) pedagogical concern.[131] This less deferential standard better balances the interests, given the impressionability of minors who have yet to graduate from high school and their vulnerability to adult influence in the classroom.[132]

D. *Morse v. Frederick*[133]

The Supreme Court held in *Morse* that public schools may restrict student speech that reasonably can be interpreted "as promoting illegal drug use."[134] The 2007 decision centered on a fourteen-foot banner reading "BONG HiTS 4 JESUS" that senior Joseph Frederick hoisted on a sidewalk across the street from his Juneau, Alaska high school during the Olympic torch relay.[135] The school-hours event was monitored by teachers and considered by the Court

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[125] *Id.* at 1283. Axson-Flynn also alleged a violation of her First Amendment right to freely exercise her religious beliefs.

[126] *Id.* at 1291.

[127] *Id.* at 1289.

[128] *Id.* at 1290.

[129] *Id.* at 1293.

[130] *Id.*

[131] *See infra* notes 540, 572–578 and 615–622 accompanying text (addressing this proposed modified version of the *Kuhlmeier* test).

[132] *See infra* Part V, Section A, Subsection 3 (regarding minors' impressionability).

[133] Morse v. Frederick, 551 U.S. 393 (2007).

[134] *Id.* at 403.

[135] *Id.* at 397.

to be a school-sanctioned activity.[136] The Court concluded that Principal Deborah Morse did not violate Frederick's speech rights when she confiscated his banner.[137] In delivering the Court's opinion, Chief Justice John Roberts deemed it reasonable for Morse to believe that the admittedly "cryptic"[138] message on Frederick's banner "constitute[d] promotion of illegal drug use."[139] In short, the Court held that school officials need not condone speech that contributes to the dangers posed by using illegal drugs.[140]

Morse's rule initially appears irrelevant for examining compelled-speech cases such as *Oliver v. Arnold* and others described in the Introduction. That is because the rule from *Morse* focuses narrowly on messages promoting or encouraging illegal drug use.[141] Indeed, Justice Samuel Alito penned a concurrence in *Morse* that was joined by Justice Anthony Kennedy.[142] They emphasized their understanding that *Morse* stands only for the proposition that "a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."[143] Justice Alito added that he and Justice Kennedy interpreted the Court's opinion as "not endors[ing] any further extension" of school authority over student expression.[144]

Yet, more broadly, the vast degree of deference bestowed to Principal Morse's interpretation of the puzzling, banner-emblazoned message[145] and, in contrast, the relatively short shrift given to the meaning ascribed to it by student Joseph Frederick is significant.[146] *Morse* suggests that when ambiguity exists and a battle over meaning arises, an educator's interpretation will triumph over a student's intended meaning, provided that the educator's understanding is reasonable.[147] To borrow from the baseball maxim that a tie goes to the runner on close plays, a tie over meaning in

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[136] *Id.* at 400–01.
[137] *Id.* at 397.
[138] *Id.* at 401.
[139] *Id.* at 409.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 422 (Alito, J., concurring).
[143] *Id.*
[144] *Id.* at 425.
[145] Chief Justice Roberts suggested the puzzling nature of the banner's meaning when he observed that "[i]t is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all." *Id.* at 401. This echoes Justice John Marshall Harlan's observation about the meaning of Paul Robert Cohen's "Fuck the Draft" message–namely, that "it is . . . often true that one man's vulgarity is another's lyric." Cohen v. California, 403 U.S. 15, 25 (1971).
[146] Frederick contended that he "just wanted to get the camera crews' attention." *Morse*, 551 U.S. at 434 (Stevens, J., dissenting). He claimed the words were "'meaningless and funny.'" *Id.* at 402 (quoting Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006), *rev'd*, Morse v. Frederick, 551 U.S. 393 (2007)).
[147] *See id.* at 401 (calling Principal Morse's interpretation "plainly a reasonable one").

school settings goes to the educator.[148] Such judicial deference over meaning might similarly extend to compelled-speech cases when disagreement exists between a teacher and a student over the intended purpose of a classroom assignment. For instance, if a teacher asserts that the intended purpose of an exercise is instructional while a student contends the purpose is to proselytize an ideological or political belief, then *Morse's* logic suggests that the Court should accept the teacher's proffered instructional purpose, so long as it is reasonably plausible.[149]

The rule in *Morse*, in other words, pivots on how "speech is reasonably viewed."[150] Deborah Morse, in turn, prevailed over Joseph Frederick because her view of the banner's meaning was reasonable.[151] Courts in compelled-speech cases therefore might similarly defer to a teacher's judgment about the purpose of an academic assignment if it reasonably can be understood as instructional. *Morse's* use of a reasonableness standard also jibes with the reasonableness test established in *Kuhlmeier*.[152] *Kuhlmeier's* rule safeguards educators' judgments so long as they "are reasonably related to legitimate pedagogical concerns."[153]

In sum, *Morse's* rule concentrates on banning speech that promotes illegal drug use. Yet, the deference granted in *Morse* to educators via a reasonableness test for whether an ambiguous message carries a pro-drug use meaning bodes well for educators in compelled-speech cases where an academic assignment with an arguably ambiguous purpose–instructional or indoctrinational–is shielded from a student's right-not-to-speak claim.

E. *Mahanoy Area School District v. B.L.*[154]

In its most recent student-speech ruling, the Court in *Mahanoy* held that school officials violated the First Amendment speech rights of a high school student when they punished her for an off-campus social media message that

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[148] David Murphy, *"V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL L. REV. 319, 352 n.233 (2013) (noting that the tie-goes-to-the-runner expression "refers to an unwritten rule in baseball where if a play is so close that an umpire cannot determine whether the base runner was safe before a fielder made a tag, the umpire rules in favor of the base runner").

[149] The Court in *Morse* used the concept of plausibility as part of its reasonable-interpretation methodology. *Morse*, 551 U.S. at 402 ("The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear.").

[150] *Id.* at 403.

[151] *Id.* at 410.

[152] *Supra* Part II, Section C (addressing *Kuhlmeier*).

[153] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1998).

[154] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

read "Fuck school fuck softball fuck cheer fuck everything" and featured a picture of her giving the middle-finger gesture.[155] In doing so, however, the Court failed to delineate a bright-line, categorical rule for when schools may discipline students for off-campus, non-school-hours expression.[156] Instead, the Court simply suggested that a school's leeway under the First Amendment to regulate most off-campus student expression–but not all of it–is diminished.[157] That is the case, Justice Stephen Breyer reasoned for the majority, due to three factors: 1) when a student is off campus, a school "will rarely stand *in loco parentis*;"[158] 2) the problem of student speech being under the jurisdiction of schools twenty-four hours a day;[159] and 3) a school's own interest in teaching students that a democratic society depends on a "free exchange" of ideas–including unpopular ones–in the "marketplace of ideas."[160]

Because *Mahanoy* addressed students' off-campus speech rights, it seemingly carries scant relevance for analyzing cases about compelling students to engage in classroom expression that is part of the curriculum. Yet, two assertions by Justice Breyer collectively suggest that a student's First Amendment right to opt out of a compelled-speech exercise due to ideological or political objections must be extremely limited. First, Breyer averred that public schools function as "nurseries of democracy."[161] Second, and in turn, he stressed that a representative democracy depends on a

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155 *Id.* at 2042–43. *See* Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1407–10 (2008) (observing that "the middle finger gesture serves as a nonverbal expression of anger, rage, frustration, disdain, protest, defiance, comfort, or even excitement at finding a perfect pair of shoes," and adding that "the middle-finger gesture–like the f-word–has become part of the American vernacular").

156 *See Mahanoy*, 141 S. Ct. at 2045 (providing that "we do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent"); *see also* Joel M. Gora, *The Roberts Court and Free Speech: Free Speech Still Matters*, 87 BROOKLYN L. REV. 195, 223 (2021) (noting that this result was somewhat unsurprising because Justice Stephen Breyer, who penned the majority opinion, "generally eschews categorical approaches in favor of multifactor balancing").

157 *See Mahanoy*, 141 S. Ct. at 2046. The Court suggested that a school's regulatory interests are *not* diminished and, instead, "remain significant in some off-campus circumstances," including when the off-campus expression involves:

> serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Id. at 2045.

158 *Id.* at 2046.

159 *Id.*

160 *Id.*

161 *Id.*

marketplace of ideas that safeguards the open exchange of even unpopular ideas in order to produce both "informed public opinion"[162] and laws reflecting "the People's will."[163] In brief, schools are venues for teaching students about how a diverse marketplace of ideas operates and how it provides the ideational bedrock on which a democratic society is built.

Breyer's assertions in *Mahanoy* comport with his view, as this Article's lead author observed elsewhere, that "the value of protecting a robust marketplace of ideas is linked to the promotion of democratic self-governance."[164] For example, Breyer explained more than a decade ago that "the constitutional importance of maintaining a free marketplace of ideas" rests in facilitating access to a wide range of ideas so that the public may "freely choose a government pledged to implement policies that reflect the people's informed will."[165]

Under this logic, compelling students to understand and to express, either by written or spoken word, political perspectives to which they object is pedagogically sound. It teaches them that, as citizens in a democratic society, they must engage with and confront competing perspectives in an informed manner so that, ultimately, governmental policies reflect the collective will of the citizenry. Schools are, to use Breyer's word, the "nurseries" where minors learn about such democratic essentialities.[166] A student who opts out of an assignment due to disagreement with its ideological or political content is also opting out of the marketplace of ideas which, per Breyer's logic, is anathema to how a democratic society operates.

Breyer wrote in *Mahanoy* that public schools have "an interest in protecting a student's unpopular expression."[167] By the same token, they also have an interest in exposing students to ideas that students may find unpopular–namely, an interest in teaching them that properly functioning democracies are premised on freely exchanged ideas. Indeed, the Supreme Court in *Tinker* explicitly linked public school classrooms with the marketplace of ideas when, quoting an earlier decision involving public universities, it wrote that "'[t]he classroom is peculiarly the 'marketplace of

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[162] *Id.*

[163] *Id.*

[164] Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J. L. & POL'Y 1, 14 (2021).

[165] Sorrell v. IMS Health Inc., 564 U.S. 552, 583 (Breyer, J., dissenting). *See also* Barr v. Am. Ass'n Pol. Consultants, 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part, dissenting in part) (describing the marketplace of ideas as "an instrument" for facilitating policy changes in a "representative democracy").

[166] *Mahanoy*, 141 S. Ct. at 2046.

[167] *Id.*

ideas.' The Nation's future depends upon leaders *trained through wide exposure to that robust exchange of ideas* which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[168]

In sum, public school classrooms are mini marketplaces of ideas where students should be exposed to a wide array of views, not simply those squaring with their own convictions. Through this exposure, they learn not only the substance and content of the ideas they are compelled to express in academic exercises, but also that exposure to and exchange of diverse ideas is part and parcel of living in a democratic society. This logic powerfully militates against students' right-not-to-speak claims.

With this background on the Supreme Court's five student-speech cases in mind, the next Part examines the unenumerated First Amendment right not to be compelled by the government to express particular messages.

III. THE FIRST AMENDMENT RIGHT AGAINST COMPELLED EXPRESSION: A DIFFUSE BUT INCREASINGLY FORCEFUL DOCTRINE

The First Amendment's guarantee of free expression encompasses an implied right not to be compelled by the government to speak.[169] As Chief Justice Roberts encapsulated it, the "freedom of speech prohibits the government from telling people what they must say."[170] The Court affords strong protection to the right not to speak in some instances but curbs its scope in others.[171] Regardless of the right's precise sweep, Dean Vikram David Amar and Professor David Brownstein point out that today it "is being invoked more frequently, more widely, and more aggressively than ever before."[172]

In terms of aggressive deployment, minors who invoke the right not to speak to challenge academic assignments imbued with ideological or political overtones might be perceived by school officials as "weaponizing

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[168] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (emphasis added).

[169] *Supra* notes 18–22 and accompanying text.

[170] Rumsfeld v. F. for Acad. & Instit. Rts., Inc., 547 U.S. 47, 61 (2006).

[171] *See* Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1486 (2018) ("The Court has interpreted the First Amendment as offering robust protection for a right not to speak, as well as for the right to speak. There are some exceptions to this strong protection for compelled speech, however.").

[172] Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 3 (2020).

the First Amendment."[173] Instead of turning the First Amendment into what Justice Elena Kagan recently called "a sword and using it against workaday economic and regulatory policy,"[174] students who assert the right not to speak in cases such as *Oliver*, *Wood,* and *Brinsdon* noted in the Introduction wield the First Amendment as a sword against workaday pedagogical policies.[175]

West Virginia State Board of Education v. Barnette,[176] as described earlier,[177] held that compelling public school students to salute the flag of the United States of America and to pledge allegiance to it violated their First Amendment right not to speak.[178] The forced speech in *Barnette*, however, occurred not as part of an academic exercise intended to instill a pedagogical lesson, but rather during "patriotic ceremonies"[179] that compelled students, against their religious objections, to affirm "a belief and an attitude of mind"[180] regarding a "patriotic creed."[181] Justice Robert Jackson reasoned for the majority that this violated a "fixed star in our constitutional constellation"[182]–namely, that the government cannot compel individuals "to confess by word or act their faith"[183] in governmental orthodoxies regarding "politics, nationalism, religion, or other matters of opinion."[184] In contrast to impermissibly compelling students to affirm a government position on "matters of opinion"[185] and "to declare a belief,"[186] however, Justice Jackson observed that "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government.'"[187]

This distinction seems particularly relevant for examining contested academic assignments involving ideological or political matters. It suggests a fundamental First Amendment dichotomy between impermissibly compelling students to espouse and affirm government-endorsed beliefs on matters of political opinion, on the one hand, and lawfully compelling them

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[173] Janus v. Am. Fed'n State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
[174] *Id.*
[175] *See supra* notes 1–9, 40 and 47–48 and accompanying text (addressing *Oliver*, *Wood,* and *Brinsdon*).
[176] W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[177] *See supra* notes 30–39 and accompanying text (addressing *Barnette*).
[178] *Barnette*, 319 U.S. at 642.
[179] *Id.* at 641.
[180] *Id.* at 633.
[181] *Id.* at 634.
[182] *Id.* at 642.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 631.
[187] *Id.* (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).

to learn and recite historical and political facts about both the nation and its government, on the other. Compelling student expression within the context of the latter category is unproblematic, per Justice Jackson's logic quoted immediately above.[188]

One problem, however, is that in today's politically polarized times, people will quarrel over whether something is an opinion or a fact, much as the line between the two often blurs in defamation law.[189] For example, while slavery is a fact of U.S. history, there are passionate disagreements, as evidenced by the recent complaint filed against the school board in Albemarle County, Virginia, over the meaning of racism, who is a racist, and whether the United States is a racist nation.[190] Put differently, if *Barnette* is about banning "governmental efforts to engage in citizen thought control,"[191] is teaching students to interpret facts through the lens of critical race theory similarly an attempt at illicit thought control? Is it an effort to "indoctrinate children in an ideology,"[192] as the plaintiffs contend in the Albemarle County case or, more benignly, is it a mechanism for teaching minors that there are different ways of interpreting objective, verifiable facts?

A second problem is drawing a clear distinction between a school unlawfully compelling the affirmance of an ideological or political belief with which a student disagrees and a school compelling a student's recitation of that same belief for the pedagogical purpose of having the student understand–but not affirm–it.[193] It is the difference, in short, between the compelled *affirming* of a belief and the compelled *understanding* of it. As Part V later suggests when addressing the benefits and downsides of allowing students to assert right-not-to-speak claims, drawing this distinction involves judicial speculation and supposition about–and even second-guessing of–a teacher's professed purpose for assigning a classroom exercise.[194] Was the

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[188] *Id.*

[189] *See* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 4:1, at 4-4 (5th ed. 2017) ("No task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion.").

[190] *See* C.I. Complaint, *supra* note 11, at 4 (asserting the defendants are teaching "a radical new understanding of 'racism' that harms and denigrates everyone. This new understanding classifies all individuals into a racial group and identifies them as either perpetually privileged oppressors or perpetually victimized members of the oppressed, denying agency to both. It assumes that racism terminally infects our social institutions").

[191] Martin H. Redish, *Compelled Commercial Speech and the First Amendment*, 94 NOTRE DAME L. REV. 1749, 1773 (2019).

[192] *See* C.I. Complaint, *supra* note 11, at 4.

[193] *Barnette* stands for the proposition, as the Supreme Court later encapsulated it, that the government "may not compel affirmance of a belief with which the speaker disagrees." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 573 (1995).

[194] *See infra* Part V, Section B, Subsection 4 (regarding educators' motives).

purpose, in other words, to have students *affirm* an ideological or political belief or simply to have students *understand* it? This crucial *affirming-versus-understanding* distinction might alternatively be viewed as the difference between an impermissible affirmational purpose (*Barnette*) and a legitimate pedagogical concern (*Kuhlmeier*).

Although *Barnette* often is cited to support right-not-to-speak claims, it is an extremely unrepresentative example of a compelled-speech case.[195] To wit, Justice Elena Kagan recently described it as "possibly (thankfully) the most exceptional in our First Amendment annals."[196] That is because *Barnette* pivoted on "the state forcing children to swear an oath contrary to their religious beliefs."[197] The case sadly did little to articulate a coherent doctrinal framework for future compelled-speech disputes not hinging on that specific factual scenario.[198]

The Supreme Court's compelled-speech cases since *Barnette*, in turn, have produced a body of law that Professor Ashutosh Bhagwat aptly characterizes as "underdeveloped both doctrinally and theoretically."[199] Professor Eugene Volokh concurs, recently writing that some of the Court's compelled-speech rulings "seem hard to wrestle into a fully coherent pattern."[200] Furthermore, none of the Court's post-*Barnette* cases involved public school students and academic assignments. Instead, among other things, they have centered on whether newspapers can be compelled to print the replies of political candidates they have attacked or assailed,[201] and whether Jehovah's Witnesses can be forced to display vehicular license plates featuring a government motto "repugnant to their moral, religious, and political beliefs."[202] The Court also has addressed compelled-expression issues in commercial speech scenarios, holding that the government

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[195] *See* Genevieve Lakier, *Not Such a Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 741 (2019) (observing that "[a]cross the country, state and federal courts routinely invoke *Barnette* as support for the proposition that the freedom of speech guaranteed by the First Amendment guarantees a right not to speak").

[196] Janus v. Am. Fed'n State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2494 (2018) (Kagan, J., dissenting).

[197] *Id.*

[198] *See* Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. REV. 689, 695 (2019) (asserting that Justice Jackson's opinion in *Barnette* "decides the case, but it does very little by way of practical doctrinal development. Beyond the particular context, it offers very little by way of judicially clear and manageable standards for lower courts in the area of what came to be labeled as 'compelled speech'").

[199] Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL OF RTS. J. 287, 288 (2019).

[200] Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 395 (2018).

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

[202] Wooley v. Maynard, 430 U.S. 705, 707 (1977).

sometimes may force advertisers to disclose purely factual, uncontroversial information to prevent consumer deception.[203]

A pair of 2018 Supreme Court rulings may embolden parents and their attorneys to forcefully raise right-not-to-speak arguments on students' behalf. In *National Institute of Family & Life Advocates v. Becerra*,[204] the Court held that California likely violated the First Amendment speech rights of licensed, pro-life crisis pregnancy centers by compelling them to notify patients that California provides free and low-cost abortion services and to provide patients with contact information regarding those services.[205] Writing for the five-Justice conservative majority, Justice Clarence Thomas reasoned that compelling the centers to voice a message facilitating obtainment of a procedure that the centers "are devoted to opposing" impermissibly impacts the centers' own pro-life message.[206] Thomas bluntly wrote that "California cannot co-opt the licensed facilities to deliver its message for it."[207] The majority was particularly disturbed because the law coerced speech about a controversial topic, abortion.[208] In ruling against California's compelled-speech mandate, the Court privileged the centers' autonomy interest–their power to select for themselves the abortion-related messages they publicly convey–over patients' interest in receiving speech that might influence their decision to have an abortion.[209] Public school students might use this autonomy logic to push back against classroom assignments involving

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[203] Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985). In these situations, the Court holds that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and are not "unduly burdensome." *Id.*

[204] Nat'l Inst. Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

[205] *Id.* at 2376.

[206] *Id.* at 2371. *See* Clay Calvert, *Is Everything a Full-Blown First Amendment Case After Becerra and Janus? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases From Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 75–80 (addressing the fracturing of the Justices along perceived political lines in both *Becerra* and *Janus v. Am. Fed'n State, Cnty. & Mun. Emps.*, 138 S. Ct. 2361 (2018), the latter of which is described in the Article's next above-the-line paragraph).

[207] *Becerra*, 138 S. Ct. at 2376.

[208] *See id.* at 2372 ("The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic.").

[209] *Cf.* Loren Jacobson, *The First Amendment and the Female Listener*, 51 N.M. L. REV. 70, 94 (2021) (asserting that the *Becerra* majority demonstrated "a complete failure to value and understand the female listener and accord her dignity and autonomy to have all of the information she needs to make decisions about her health and body"); William E. Lee, *The Conscience of Corporations and the Right Not to Speak*, 43 HARV. J.L. & PUB. POL'Y 155, 161–62 (2020) (observing that in *Becerra* the Court determined that "government efforts to promote a well-informed public do not justify interfering with speaker autonomy").

controversial topics, asserting that the exercises impinge on their autonomy of expression.[210]

Justice Anthony Kennedy's brief concurrence in *Becerra* may prove particularly powerful in mounting right-not-to-speak claims against schools that compel minors to express ideological or political views that are at odds with their own.[211] Specifically, Kennedy emphasized that the California law "compel[ed] individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these."[212] He asserted, as if embracing a bright-line rule governing all right-not-to-speak lawsuits, that "[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions."[213] If this principle were to apply in public schools, it would provide students with a formidable argument against having to express, as part of academic assignments, statements that conflict with their most strongly held beliefs. Kennedy's principle, by its wording, is not limited to situations where, like *Barnette*, the government attempts to have individuals affirm their belief and allegiance to those statements or a government-imposed orthodoxy.

The day after the Court struck down California's compelled-speech mandate in *Becerra*, the same coalition of five conservative-leaning Justices declared unconstitutional in *Janus v. American Federation of State, County & Municipal Employees*[214] an Illinois statute that forced non-union, public-sector employees to pay fees to the unions designated to represent them to cover costs germane to collective bargaining on their behalf.[215] In so holding, the majority stressed that "[c]ompelling individuals to mouth support for views they find objectionable" is unconstitutional.[216] Justice Samuel Alito reasoned for the majority that forcing people "to voice ideas with which they disagree" undermines essential rationales for safeguarding free expression, including promoting democratic self-governance and facilitating "the search for truth."[217] Citing the Court's ruling in *Barnette* for support, Alito added that it demeans people to compel them to endorse and affirm support for ideas they find objectionable.[218] Specifically, the loss of human dignity flows from having to betray one's own beliefs in favor of government-endorsed

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[210] This point regarding autonomy is addressed later in Part V, Section A, Subsection 2.
[211] *Becerra*, 138 S. Ct. at 2378 (Kennedy, J., concurring).
[212] *Id.* at 2379.
[213] *Id.*
[214] Janus v. Am. Fed'n State, Cnty. & Mun. Emps., 138 S. Ct. 2448 (2018).
[215] *Id.* at 2459–61.
[216] *Id.* at 2463.
[217] *Id.* at 2464.
[218] *Id.*

objectionable ones.[219] In sum, compelling non-union members to subsidize objectionable union-supported viewpoints "on matters of substantial public concern" during collective bargaining violated non-union members' First Amendment right not to speak.[220]

Ultimately, if *Barnette* is narrowly cabined as a case about barring "governments from compelling citizens *to affirm* things they do not believe"[221] or "requiring private citizens to *endorse* those ideas,"[222] then its relevance is diminished in cases where public school students are compelled to express ideological and political viewpoints for the pedagogical purpose of *understanding* – but not *affirming* or *endorsing* – them. Of course, whether one perceives the purpose of a classroom exercise involving compelled expression as about affirming or endorsing, rather than about understanding, a fact or viewpoint may rest today in the eyes of politically biased and jaded beholders. The situation puts a modern-day spin on the Court's sagacious observation seventy-five years ago about the perils of attempting to cleanly distinguish speech intended to inform from speech intended to entertain: "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[223]

On the other hand, if the right not to speak is framed more sweepingly, either in Justice Kennedy's terms as a right about not "forc[ing] persons to express a message contrary to their deepest convictions"[224] or in Justice Alito's view as a right safeguarding people from being forced "to voice ideas with which they disagree,"[225] then it may prove much more effective in judicial battles over contentious classroom assignments. In other words, if frets about forcing people "to *endorse* ideas they find objectionable"[226] and "to mouth *support* for views they find objectionable"[227] are replaced by more generalized worries about compelling people simply to *write* or *speak* objectionable ideas–"the right to refrain from speaking at all," as Chief Justice Warren Burger expressed it in *Wooley v. Maynard*[228]–then the First Amendment right not to speak may be significantly more valuable to

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[219] *Id.*

[220] *Id.* at 2460.

[221] Steven D. Smith, "*Fixed Star" or Twin Star?: The Ambiguity of Barnette*, 13 FIU L. REV. 801, 825 (2019) (emphasis added).

[222] Lakier, *supra* note 195, at 744 (emphasis added).

[223] Winters v. N.Y., 333 U.S. 507, 510 (1948).

[224] Nat'l Inst. Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

[225] *Janus*, 138 S. Ct. at 2464.

[226] *Id.* (emphasis added).

[227] *Id.* at 2463 (emphasis added).

[228] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

complaining students. In brief, how much elasticity courts recognize in this unenumerated constitutional right–how far they are willing to expand it in the context of public schools–will be critical in student right-not-to-speak cases. What is clear now, however, is that the Supreme Court is aggressively enforcing the First Amendment right not to speak in cases such as *Becerra* and *Janus*.[229]

The next Part examines how these predicaments regarding the scope of the right not to speak recently played out in three ideologically fraught federal court cases. Indeed, these battles illustrate the problems with defining the metes and bounds of this constitutional right.

IV. SURVEYING THE LOWER COURT LANDSCAPE AND CONSIDERING A POTENTIAL BATTLE OVER CRITICAL RACE THEORY: POLITICALLY POLARIZED TIMES MELD WITH FIRST AMENDMENT CLAIMS

This Part has four sections. The first three examine federal lawsuits, each involving a student's assertion that a classroom assignment violated her First Amendment right not to speak. The three cases are addressed chronologically, starting with the one featuring the most recent ruling. The fourth section then considers a potential compelled-speech lawsuit challenging the teaching of critical race theory.

A. *Oliver v. Arnold*[230]

The classroom exercise at the heart of *Oliver* occurred in a high school sociology course.[231] It involved students completing two tasks: 1) listening to Bruce Springsteen's song "Born in the USA" and then writing down how it made them feel, and 2) transcribing from memory in a fixed amount of time the words to the Pledge of Allegiance.[232] Teacher Benjie Arnold claimed he gave the exercise to demonstrate "that people sometimes recite things every day out of habit and without thinking about what they are actually saying."[233] Asserting that he had given the assignment for years, Arnold maintained that

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[229] Gora, *supra* note 156, at 206 (observing that "the Court has become more vigilant in recent years in terms of guarding against government compelled speech"); Jacob van Leer, *The Roberts Court, Compelled Speech, and a Constitutional Defense of Automatic Voter Registration*, 115 NW. U. L. REV. ONLINE 169, 191 (2020) (asserting that "decisions by the Roberts Court show a concerning trend toward . . . broadening the scope of compelled speech doctrine while narrowing safe harbors that warrant lesser scrutiny").

[230] Oliver v. Arnold, 19 F.4th 843 (5th Cir. 2021).

[231] Oliver v. Klein Indep. Sch. Dist., 448 F. Supp. 3d 673, 686 (S.D. Tex. 2020).

[232] *Id.*

[233] *Id.*

students frequently could not write the words to the pledge despite having recited them daily in school.[234] He alleged that the Springsteen facet of the exercise was intended to show that "many students feel like the song is patriotic, but when directed to pay attention to the words of the song, they feel that the song's lyrics do not reflect a patriotic intent."[235] Arnold expressly disclaimed that the activity was intended to compel students to adopt an orthodoxy.[236]

Complicating Arnold's denial of an intent to compel an orthodoxy, however, were his words in class the day after the exercise.[237] United States District Court Judge Lee Rosenthal variously characterized them as constituting "a lengthy, meandering speech"[238] and "stream of consciousness."[239] They were secretly recorded by student-plaintiff Mari Leigh Oliver, who refused to complete the exercise.[240] Oliver claimed Arnold violated her First Amendment right not to speak "by attempting to coerce her and the rest of the class to write the pledge"[241] and that he administered the exercise with "an impermissible patriotic intent."[242] Oliver, who is Black, objects to the Pledge of Allegiance partly because, in contrast to its words, she believes "there is not 'freedom and justice for all' in America because she and other [B]lack people continue to experience widespread racial persecution."[243] Oliver asserted that she received a grade of zero from Arnold for not completing the assignment, although Arnold denied it.[244]

So, what did Arnold tell his students that created what Judge Rosenthal deemed a triable issue of material fact for jury resolution regarding whether Arnold gave the exercise for the unconstitutional purpose of promoting patriotism?[245] Among other things, Arnold stated:

> I know the sticker's gone – I used to have it, and it said "America, love it, or leave it." And 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.

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[234] *Id.*
[235] *Id.* at 686–87.
[236] *Id.* at 686.
[237] *See id.* at 697–98 (setting forth key parts of what Arnold told the class).
[238] *Id.* at 687.
[239] *Id.* at 698.
[240] *Id.* at 686.
[241] *Id.* at 697.
[242] *Id.* at 698.
[243] Oliver v. Arnold, 3 F.4th 152, 156 (5th Cir. 2021).
[244] Oliver v. Klein Indep. Sch. Dist., 448 F. Supp. 3d at 687.
[245] *Id.* at 698.

> But if you ever come back you have to pay me twice what it cost me to send you there.[246]

He added that "a country will crumble . . . when people coming into [it] do not assimilate to" it.[247] Arnold also remarked that "you're not gonna impose Sharia law. Because it's not. [T]his. [C]ountry."[248] Further compounding problems for Arnold was that prior to giving the pledge assignment, he had been told by a school administrator that Oliver was allowed not to participate in the Pledge of Allegiance.[249] In essence, he knew in advance of the assignment that Oliver had objections regarding recitation of the pledge.

In denying summary judgment for both Arnold and Oliver on the compelled-speech claims, Judge Rosenthal remarked that "[i]f a jury found that Arnold's pledge assignment was an attempt to instill patriotism, then Arnold would have violated the clearly established law" fashioned by the U.S. Supreme Court in *Barnette*.[250] In other words, Arnold would be denied qualified immunity from civil liability for violating Oliver's First Amendment right not to speak.[251] *Barnette's* relevance in controlling Oliver's compelled-speech claim against Arnold, however, was twice hotly contested by the judges on the U.S. Court of Appeals for the Fifth Circuit. The first friction among the jurists occurred in June 2021, when they rejected Arnold's interlocutory appeal that he was shielded from liability by the doctrine of qualified immunity.[252] The second disagreement over *Barnette* arose that December, when they denied his petition for a rehearing en banc by a ten-to-seven vote.[253] The reasons for this cleavage over *Barnette's* importance are described below.

The Fifth Circuit's June 2021 ruling saw a three-judge panel divide against Arnold by a two-to-one vote.[254] Writing for the two-judge majority, Judge James Dennis observed that the appellate court was obligated at this phase of the litigation to accept as true Mari Leigh Oliver's version of the

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[246] *Id.* at 697.
[247] *Id.*
[248] *Id.*
[249] Arnold had been told on August 18, 2017, by Assistant Principal Kimberly Walters "that Oliver was not required to participate in the pledge." *Id.* at 686. Arnold gave the pledge exercise that sparked Oliver's compelled-speech claim slightly more than one month later on September 20, 2017. *Id.*
[250] *Id.* at 698.
[251] *See supra* notes 41–48 and accompanying text (addressing the doctrine of qualified immunity).
[252] Oliver v. Arnold, 3 F.4th 152 (5th Cir. 2021).
[253] Oliver v. Arnold, 19 F.4th 843 (5th Cir. 2021).
[254] Oliver v. Arnold, 3 F.4th 152 (5th Cir. 2021).

disputed facts.[255] The majority thus assumed that Arnold's alleged pedagogical purpose described earlier[256] was merely pretextual and that his true motive was to compel "a mandatory statement of patriotic belief from his students."[257] Accepting Oliver's version of the facts, in turn, led the majority to conclude that Arnold was properly denied qualified immunity by the district court because he violated the rule clearly established by the Supreme Court in *Barnette* against "require[ing] students to swear allegiance."[258] Judge Dennis stressed that the written, rather than spoken, nature of Arnold's pledge assignment did not diminish the applicability of *Barnette's* rule.[259]

Judge Stuart Kyle Duncan dissented.[260] He contended that, regardless of Arnold's motive for giving the pledge exercise, Arnold should be granted qualified immunity and the compelled-speech case against him should be dismissed because the exercise was far different from the "distinct context" of the coerced ceremonial flag salute and pledge recitation in *Barnette*.[261] As Duncan bluntly wrote regarding Arnold's assignment, "[n]o case says this teaching method–unorthodox though it may be–violates the First Amendment."[262] That is, *Barnette* was not on point–it did not provide a clearly established law against compelling students to transcribe from memory "the [p]ledge's words as part of a timed in-class exercise."[263] These distinct factual differences rendered Arnold's motive immaterial for purposes of qualified immunity.[264] Qualified immunity thus was appropriate, in Judge Duncan's view.[265]

Judge Duncan rejected the relevance of a teacher's motive, contending that the majority's decision to send Oliver's case to trial because she alleged Arnold had an illicit motive might open the floodgates of litigation targeting other writing assignments in an era when offense is easily taken.[266] To wit,

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[255] *See id.* at 155 (opining that "we must look only to the district court's ruling, accepting as true the version of the purportedly disputed facts that is most favorable to the claims asserted by the plaintiff").

[256] *See supra* notes 233–235 and accompanying text (providing Arnold's statements regarding the goal of the exercise).

[257] *Oliver*, 3 F.4th at 156.

[258] *Id.* at 163.

[259] *Id.*

[260] *Id.* (Duncan, J., dissenting).

[261] *Id.* at 164.

[262] *Id.*

[263] *Id.*

[264] *See id.* at 165 (assuming that a jury could conclude "that Arnold gave the assignment hoping to inculcate respect for the [p]ledge," but failing to see how this dispute over Arnold's motive was material to the question of whether qualified immunity should be granted).

[265] *Id.* at 164.

[266] *Id.* at 165–66.

he suggested that compelling students to write parts of the Declaration of Independence might spark a lawsuit because they "teem with occasions for offense: they are arguably sexist ("Men") and religious ("Creator"), and were written by a notorious slaveholder. What if there were evidence the teacher gave the assignment to inculcate respect for Thomas Jefferson? Lawsuit."[267] Similarly, students offended by aspects of Martin Luther King, Jr.'s "I Have a Dream" speech might successfully sue.[268] In sum, Judge Duncan forecasts a wave of student-filed, compelled-speech lawsuits proceeding to trial simply because plaintiffs are offended by words they are compelled to write during assignments and because a dispute exists regarding teachers' motives.[269] The majority rejected Judge Duncan's frets, reasoning that "the assignments the dissent envisions are clearly not implicated by the present case."[270]

It is worth noting that Judge Duncan's worry about lawsuits stemming from the compelled recitation of the Declaration of Independence already has been addressed by at least one state.[271] Under Florida law, during the last full week of classes each September, which is designated as Celebrate Freedom Week, "public school principals and teachers shall conduct an oral recitation by students" of part of the Declaration of Independence.[272] A student, however, must be excused from this compelled-speech exercise upon a written request by a parent to the school.[273] This exemption functions much in the same way as a statutory exemption from another Florida law compelling the daily recitation of the Pledge of Allegiance.[274]

In December 2021, the Fifth Circuit in *Oliver* denied Arnold's petition for rehearing en banc, with a majority of the court's judges voting against granting it.[275] The vote against denying the petition, however, sparked

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[267] *Id.* at 166.

[268] *See id.* (noting that Dr. King's "aspiration of colorblindness," via his words about people not being "judged by the color of their skin," today is "under fire. . . . May an offended student sue the teacher for being asked to copy Dr. King's words? Under the majority's approach, yes") (internal citation omitted).

[269] Judge Duncan explained that:

> The majority's . . . approach, which sends the case to trial, would make countless classroom assignments fodder for federal lawsuits whenever a student claims offense. Indeed, so far as I can tell, this is the first decision by any federal circuit permitting a student to challenge a written assignment as "compelled speech" under the First Amendment.

Id. at 164.

[270] *Id.* at 163.

[271] FLA. STAT. § 1003.421 (2021) (as amended effective July 1, 2022).

[272] FLA. STAT. § 1003.421(2) (2021) (as amended effective July 1, 2022).

[273] FLA. STAT. § 1003.421(4) (2021) (as amended effective July 1, 2022).

[274] *See* FLA. STAT. § 1003.44(1) (2021) ("Upon written request by his or her parent, the student must be excused from reciting the pledge, including standing and placing the right hand over his or her heart.").

[275] *See* Oliver v. Arnold, 19 F.4th 843, 843 (5th Cir. 2021) ("The petition for rehearing en banc is

multiple opinions, including: 1) a solo concurrence by Judge James Ho;[276] 2) a dissent by Judge Jennifer Walker Elrod that was joined by five judges;[277] 3) a dissent by Judge Stuart Kyle Duncan that was also joined by five judges;[278] and 4) a dissent by Judge Andrew Oldham that was joined only by Judge Elrod.[279]

Judge Ho's concurrence is noteworthy for at least three reasons. First, he attempted to draw lines between lawful and illicit classroom activities and exercises.[280] Schools, in his view, may teach and educate and, in the process, may also compel students to engage in speech for purposes of "confirm[ing] their knowledge of various topics."[281] In other words, compelled speech is lawful when done to test knowledge. Conversely, Judge Ho asserted that schools may neither indoctrinate nor require endorsement of, or agreement with, a political viewpoint.[282] These latter activities, he wrote in invoking a variation of the rule established by the Supreme Court in *Kuhlmeier*, serve "no legitimate pedagogical interest."[283] The line demarcating teaching from indoctrinating, however, as well as the one separating compelled-writing assignments designed to confirm knowledge from those intended to affirm a belief, may prove murky and subjective to operationalize.[284] For example, if indoctrination refers to students accepting uncritically the views they are taught and the closing off of their minds from alternative perspectives, how is a judge–far removed from the site of instruction–to decide exactly whether and when this occurs as a result of an assignment or assignments?[285]

A second key aspect of Judge Ho's opinion was his interpretation of the precedent established by the Supreme Court in *Barnette* as it affects

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DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing.").

[276] *Id.* at 843–54 (Ho, J., concurring).

[277] *Id.* at 854–58 (Elrod, J., dissenting).

[278] *Id.* at 858–63 (Duncan, J., dissenting).

[279] *Id.* at 863 (Oldham, J., dissenting).

[280] *Infra* notes 281–283 and accompanying text.

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

[282] *Id.*

[283] *Id. See supra* notes 104–111 and accompanying text (describing the rule created by the Supreme Court in *Kuhlmeier* for determining when school authorities may lawfully squelch student speech that is sponsored by a school or that occurs as part of the curriculum).

[284] For example, Merriam-Webster's online dictionary in 2022 listed "indoctrinate" as a synonym for "teach." *Teach*, *MERRIAM-WEBSTER*, https://www.merriam-webster.com/dictionary/teach#synonyms (last visited June 10, 2022). *But see infra* notes 440–450 (defining indoctrination and distinguishing it from education).

[285] *See* William Hare, *Ideological Indoctrination and Teacher Education*, 2 J. EDUC. CONTROVERSY 1, 1 (2007) ("Indoctrination results when students lose the ability to assess the merits of the ideas they are studying or coming to acquire and find themselves locked into certain beliefs and assumptions in such a way that they cannot seriously consider alternative views because their minds have been closed.").

classroom activities. Rather than narrowly construing *Barnette* as a case about banning compelled patriotism and affirmance of allegiance to the United States, *Barnette*–at least for Judge Ho–represents the much broader principle "that government officials–including public school officials–may not engage in viewpoint discrimination."[286] Indeed, viewpoint discrimination is especially problematic in First Amendment jurisprudence.[287] Judge Ho suggested that *Barnette* bars public schools from compelling students "to embrace a particular political view,"[288] irrespective of what the viewpoint is.[289] He drew support for this proposition from *Barnette's* celebrated "fixed star" assertion that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[290] For Judge Ho, "the bedrock First Amendment principles upheld in *Barnette* extend well beyond the 'prescribed ceremony' and 'stiff-arm salute' that occurs every morning in public schools across our circuit."[291] In brief, Judge Ho construed *Barnette* to give "broad First Amendment protections"[292] to students against being compelled to embrace disagreeable political viewpoints.

A third important facet of Judge Ho's opinion was his willingness to frankly question Benjie Arnold's objective in giving the pledge assignment and, in turn, to preclude granting him qualified immunity. This was because Arnold's actual motivation might have been to engage in viewpoint discrimination against Oliver and punish her with a zero grade, especially because Arnold already knew Oliver objected to the pledge's words.[293] As Judge Ho wrote, "Arnold received ample warning that forcing Oliver to

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286 *Oliver*, 19 F.4th at 844.

287 *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) (calling it "a core postulate of free speech law" that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys"); Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (declaring that viewpoint discrimination is "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny"); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination.") (internal citation omitted).

288 *Oliver*, 19 F.4th at 844 (Ho, J., concurring).

289 *See id.* ("And naturally, this principle applies regardless of what political viewpoint the teacher is attempting to indoctrinate—whether it's a 'liberal' or 'conservative' public school teacher who is attempting to punish a 'conservative' or 'liberal' student.").

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

291 *See Oliver*, 19 F.4th at 852 (Ho, J., concurring).

292 *Id.* at 851.

293 *See id.* at 848 ("Based on the record evidence, including Arnold's own remarks, a jury could reasonably conclude that the Pledge assignment served no legitimate pedagogical purpose, and that Arnold was engaged in nothing more than viewpoint discrimination against one of his students.").

embrace the [p]ledge over her personal, political, and religious objections would violate her constitutional rights."[294] Exhibiting no deference to the teacher's asserted pedagogical purpose, Judge Ho also determined that Arnold's remarks to the class the day after the assignment–remarks excerpted earlier in this Section–"confirmed that his agenda here was not pedagogical, but personal."[295] In sum, Judge Ho believed sufficient evidence existed for a jury to conclude that Arnold violated *Barnette* by punishing her with a zero grade for not embracing a political viewpoint with which she disagreed, and thus affording Arnold qualified immunity was unwarranted.[296]

Judge Jennifer Walker Elrod's dissent made four crucial points, each militating for granting Arnold qualified immunity. They are that: 1) courts generally should not meddle with teachers' lessons and, instead, should largely defer to their decisions about how to teach;[297] 2) teachers' motives are irrelevant in compelled-speech cases;[298] 3) qualified immunity determinations in compelled-speech cases should not focus on allegedly impure motives but, instead, should concentrate only on whether a very specific act was compelled that violates a clearly established First Amendment right;[299] and 4) *Barnette* is factually far afield from the contested classroom exercise in *Oliver* and, in turn, *Barnette's* "fixed star" pronouncement operates "at far too high a level of generality" to provide Arnold with proper notice under qualified immunity principles that his classroom exercise was unconstitutional.[300]

The first of these four points is particularly important because it functions at a macro level. Specifically, it taps into a fundamental question: Who or what should provide the proper remedy for aggrieved students and their parents or guardians in cases such as *Oliver*? For Judge Elrod, redress should not come from federal judges, largely because they possess "no special insight into whether it is a good idea to give an assignment asking sociology

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[294] *Id.* at 851.

[295] *Id.* at 847. *See supra* notes 246–248 and accompanying text (setting forth parts of Arnold's statement to his class the day following the pledge assignment).

[296] *See id.* at 849 (concluding that Arnold "used the assignment as a pretext to punish Oliver for disagreeing with his view of the Pledge").

[297] Judge Elrod opined that "[f]ederal judges should not be in the business of policing the lesson plans of public-school teachers." *Id.* at 854–55 (Elrod, J., dissenting). She asserted that "it is generally well-established that teachers have wide latitude to, well, teach." *Id.* at 858.

[298] *See id.* at 857 ("But in determining whether speech was compelled in violation of the First Amendment, motive is irrelevant. To establish that her speech was compelled in violation of the First Amendment, Oliver does not have to show that Arnold *intended* to make her pledge loyalty to America.") (emphasis in original).

[299] *Id.* at 855–57.

[300] *Id.* at 856.

students to transcribe the Pledge of Allegiance from memory."[301] In her view, it is not for judges to award damages based on their perceptions about whether an exercise is sufficiently pedagogical.[302] Instead, the better solution for parents and guardians who believe their students are being improperly indoctrinated by academic exercises is found either at the ballot box or by sending their children to different schools.[303] As Judge Elrod explained, "[p]arents may see to it that their children avoid such indoctrination – not in a federal courthouse, but in a local school board meeting or at the ballot box. And, ultimately, parents retain the power to choose where their children attend school."[304] More succinctly, the remedy is not to sue, but to elect a new school board or find another school.

Judge Elrod's fourth point also merits further analysis. When contrasted with facets of Judge Ho's concurrence, it demonstrates profound judicial disagreement about precisely what, for purposes of compelled-speech cases and qualified immunity, was clearly established in *Barnette*. Is the rule that was clearly established in *Barnette* an exceedingly narrow one: Students cannot be compelled to recite the Pledge of Allegiance while simultaneously saluting the flag of the United States of America during fealty-based ceremonial rituals?[305] Or, more broadly, is the clearly established rule Justice Robert Jackson's statement that a "fixed star in our constitutional constellation . . . is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"?[306] Judge Ho found that Justice Jackson's "fixed star" proclamation in *Barnette* established two clear rules: 1) public schools cannot force students to embrace political viewpoints, and 2) "government officials – including public school officials – may not engage in viewpoint discrimination."[307]

Other courts, however, may find that those two rather sweeping principles are not specific enough to deny a teacher such as Benjie Arnold qualified immunity. That is because the U.S. Supreme Court in 2017 held that under principles of qualified immunity, "the clearly established law must be 'particularized' to the facts of the case"[308] and "should not be defined 'at

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301 *Id.* at 857.

302 *Id.*

303 *Id.* at 858.

304 *Id.*

305 This closely comports with Judge Elrod's view that "*Barnette* involved students being required to stand and salute the American flag and pledge fealty to it." *Id.* at 856.

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

307 *Oliver*, 19 F.4th at 844 (Ho, J., concurring).

308 White v. Pauly, 580 U.S. 73, 79 (2017).

a high level of generality.'"[309] A pivotal issue in future student compelled-speech cases thus will be whether Justice Jackson's fixed star maxim functions "at too high a level of generality,"[310] especially when a compelled-speech assignment does not involve the particularized facts of *Barnette*, to deny teachers qualified immunity. Judge Elrod rather waggishly suggested that Justice Jackson's declaration, replete with its "fixed star in our constitutional constellation" reference,[311] operated at an "interstellar level of generality" that was inappropriate for rejecting Benjie Arnold's qualified immunity claim.[312]

Judge Stuart Duncan also dissented from the decision denying Benjie Arnold's petition for a rehearing en banc, just as he earlier dissented from the Fifth Circuit's June 2021 ruling against Arnold.[313] In his December 2021 opinion, Judge Duncan factually distinguished *Barnette* from *Oliver*.[314] Quoting *Barnette*, he emphasized that Arnold's written classroom exercise did not involve a "'prescribed ceremony'–'the compulsory flag salute and pledge [that] require[d] affirmation of a belief and an attitude of mind.'"[315] For Judge Duncan, the First Amendment rule clearly established in *Barnette* is restricted to factual scenarios in which students must "salute the Flag while reciting the Pledge."[316]

Judge Duncan criticized Judge Ho's assertion that *Barnette* barred Arnold's assignment because it forced Oliver to adopt a particular political view.[317] As he did in his June 2021 dissent in *Oliver*, Judge Duncan predicted that stretching *Barnette* that far would spawn an upsurge of litigation over writing assignments involving historical statements that express now-controversial political views.[318] Lurking *sub silentio* here, in the view of this Article's authors, is the seeming difficulty courts would confront in such prospective cases between deciding whether a classroom exercise

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[309] *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

[310] City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021).

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

[312] *Oliver*, 19 F.4th at 858 (Elrod, J., dissenting).

[313] *See supra* notes 260–269 and accompanying text (addressing Judge Duncan's dissent in the Fifth Circuit's June 2021 ruling in Oliver v. Arnold, 3 F.4th 152 (5th Cir. 2021)).

[314] *Oliver*, 19 F.4th at 859–60 (Duncan, J., dissenting).

[315] *Id.* at 859 (quoting W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 634 (1943)).

[316] *Id.*

[317] *Id.* at 859–60. Judge Ho asserted that *Barnette* made "clear" that "forcing a public school student to embrace a particular political view serves no legitimate pedagogical function and is forbidden by the First Amendment." *Id.* at 844 (Ho, J., concurring).

[318] *See id.* at 860 (Duncan, J., dissenting) ("Does it mean *Barnette* bars any written assignment that, in a student's opinion, requires 'embracing a particular political view'? If so, then the panel decision heralds a brave new world where First Amendment litigation will become a regular part of curricular planning.").

permissibly compelled students to *write* a political viewpoint for a legitimate pedagogical purpose or whether it illicitly compelled students, via writing, to *embrace* or *affirm* that viewpoint.

Indeed, for Judge Duncan, judges need not and should not become mired in the quicksand of determining a teacher's motive. He contended that ferreting out whether a teacher's motivation for giving an academic assignment was truly pedagogical simply is irrelevant when determining whether the assignment violates *Barnette*.[319] As noted above, Judge Elrod also asserted in her dissent that motive is immaterial.[320] For Judges Duncan and Elrod, the proper focus of inquiry is solely on the compelled act, not the teacher's motive for compelling it.[321]

Judge Duncan acknowledged, however, that the Tenth Circuit had considered motive in the college-level, compelled-speech case of *Axson-Flynn v. Johnson*[322] discussed earlier in this Article.[323] The Tenth Circuit there held that determining whether the motive for giving an academic exercise laden with offensive language "was truly pedagogical" was vital for deciding if student Christina Axson-Flynn's First Amendment right not to be compelled to speak had been infringed.[324] Judge Duncan pointed out that the Fifth Circuit was not bound by the "out-of-circuit decision" in *Axson-Flynn*.[325] Additionally, he deemed it imprudent to place federal judges in the position of evaluating a teacher's motive for administering assignments.[326] Judge Elrod, as noted earlier, similarly questioned the merit of allowing judges to decide what constitutes a legitimate pedagogical motive.[327] For both Judge Duncan and Judge Elrod, the proper remedy for parents perturbed by ideologically charged assignments lies in school board elections, not

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[319] *Id.* at 860–62.

[320] *Supra* note 298 and accompanying text.

[321] *See Oliver*, 19 F.4th at 861 (Duncan, J., dissenting) ("*Wooley* is talking about the compelled act itself, not the state's 'motives' for compelling it."); *see id.* at 857 (Elrod, J., dissenting) ("The focus of our inquiry is not the teacher's motive, but the student's compelled act.").

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

[323] *See Oliver*, 19 F.4th at 861 (Duncan, J., dissenting) (addressing *Axson-Flynn*). *See supra* notes 122–130 and accompanying text (discussing *Axson-Flynn*).

[324] *Axson-Flynn*, 356 F.3d at 1293.

[325] *Oliver*, 19 F.4th at 861 (Duncan, J., dissenting).

[326] *See id.* at 862 (calling it "unwise" for judges "to evaluate a teacher's motives for assigning classwork").

[327] *Supra* notes 301–302 and accompanying text.

federal lawsuits.[328] To support this proposition, Judge Duncan cited Justice Clarence Thomas's observation in *Morse v. Frederick*[329] that:

> If parents do not like the rules imposed by . . . schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.[330]

Judge Andrew Oldham penned a four-paragraph dissent joined by Judge Elrod.[331] Judge Oldham questioned the Fifth Circuit's use of a test in cases such as *Oliver* that hinges on sorting out "on the *purity* (whatever that means) of the *motives* (however we find those) guiding" teachers in their assignments.[332] Judge Oldham's twin parentheticals suggest, respectively, the slipperiness of explicating a lawful–i.e., a pure–pedagogical motive and the corresponding difficulty of determining exactly what a teacher's motive was in giving an assignment. This bolsters the dissenting position of both Judges Elrod and Duncan that a teacher's motive is irrelevant for resolving qualified immunity in compelled-speech cases.[333]

In addition to disagreeing about the significance of motive, the Fifth Circuit judges in *Oliver* fractured over the scope of the rule established by the Supreme Court in *Barnette*. As noted above, Judge Ho construed *Barnette* as establishing "broad First Amendment protections."[334] Those safeguards include banning viewpoint discrimination by government officials, including teachers,[335] and forbidding assignments that compel a public school student "to *embrace* a particular political view,"[336] "to *endorse* a particular political viewpoint"[337] or "to *agree* with a particular political viewpoint."[338] The words "embrace," "endorse" and "agree" are italicized

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[328] *See Oliver*, 19 F.4th at 862 (Duncan, J., dissenting) ("And do we really want federal judges and juries deciding whether class assignments are 'truly pedagogical'? If I wanted to do that, I would have run for school board."); *see id.* at 858 (Elrod, J., dissenting) ("Parents may see to it that their children avoid such indoctrination–not in a federal courthouse, but in a local school board meeting or at the ballot box. And, ultimately, parents retain the power to choose where their children attend school.").

[329] Morse v. Frederick, 551 U.S. 393, 420 (2007). *See supra* Pt. II, Sec. D (addressing *Morse*).

[330] *Morse*, 551 U.S. at 420 (Thomas, J., concurring).

[331] *Oliver*, 19 F.4th at 863 (Oldham, J., dissenting).

[332] *Id.* (emphasis in original).

[333] *See supra* notes 266–269 and 298–299 (addressing the irrelevance of a teacher's motive).

[334] *Oliver*, 19 F.4th at 851 (Ho, J., concurring).

[335] *Id.* at 844.

[336] *Id*. (emphasis added).

[337] *Id.* at 845 (emphasis added).

[338] *Id.* (emphasis added).

above because it is unclear whether Judge Ho used them interchangeably as synonyms or whether he intended each to convey a distinct meaning. In contrast, Judge Duncan believed that the law clearly established in *Barnette* is that the First Amendment bars the "coerced ceremonial recitation" of the Pledge of Allegiance while students simultaneously salute the flag of the United States of America.[339] Similarly, Judge Elrod asserted that, at least for purposes of qualified immunity, the First Amendment rule established in *Barnette* is confined to barring "students [from] being required to stand and salute the American flag and pledge fealty to it."[340]

In summary, teacher Benjie Arnold's words to his class the day after the pledge assignment came back to haunt him when seeking summary judgment against Mari Leigh Oliver on grounds of qualified immunity. Colloquially put, if he had just kept his mouth shut and his political stances to himself, then the triable issue of fact identified by both the district court in March 2020 and the Fifth Circuit majority in June 2021 over whether he administered the assignment for an improper motive or purpose violating *Barnette* might never have arisen.[341]

Yet, for Judges Elrod and Duncan, as well as for the other Fifth Circuit jurists who joined them in their respective dissents from the denial of a rehearing en banc, a teacher's motive is immaterial when determining if a compelled-speech assignment violates *Barnette*.[342] For them, what Arnold told his class the day after the pledge assignment did not matter for deciding whether he should have been granted qualified immunity; all that counted for Judges Elrod, Duncan and their fellow dissenters was the specific act that Arnold compelled.[343] A clear split in *Oliver* thus emerges among the Fifth Circuit's judges on whether motive matters under *Barnette* for obtaining qualified immunity in compelled-speech cases. If motive is materially meaningful, then sussing out whether a teacher acted with an unlawful one may prove much more challenging in cases factually dissimilar to *Oliver*. Specifically, it likely will be harder to demonstrate an illicit motive when

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[339] Oliver v. Arnold, 3 F.4th 152, 164 (5th Cir. 2021) (Duncan, J., dissenting).

[340] *Oliver*, 19 F.4th at 856 (Elrod, J., dissenting).

[341] *See Oliver,* 3 F.4th at 162–63 (noting that "because the district court found that Arnold's motives are genuinely disputed, we must presume here that Arnold was requiring his students to make precisely the sort of written oath of allegiance that the dissent acknowledges would be impermissible").

[342] *See supra* notes 298 and 319–321 and accompanying text (addressing how Judge Elrod and Judge Duncan reasoned that a teacher's motive in giving an assignment is irrelevant).

[343] As Judge Elrod put it, "in determining whether speech was compelled in violation of the First Amendment, motive is irrelevant. To establish that her speech was compelled in violation of the First Amendment, Oliver does not have to show that Arnold intended to make her pledge loyalty to America." *Oliver*, 19 F.4th at 857 (Elrod, J., dissenting).

teachers profess to their students an innocuous reason for giving an in-class exercise and say no more.

B. *Wood v. Arnold*[344]

Wood was sparked by an eleventh-grade classroom exercise in a world history course at a Maryland public school.[345] Students studied tenets, beliefs, and practices of Islam during a unit concerning the Muslim world.[346] A written exercise tested their knowledge of the first of the Five Pillars of Islam, which is known as the Shahada and entails a profession of faith.[347] Specifically, students had to complete the blank spaces in this statement: "There is no god but _______________ and Muhammad is the _______________ of Allah."[348] To successfully accomplish this task, students needed to write "Allah" in the first space and "messenger" in the second one.[349]

Student Caleigh Wood objected to this assignment.[350] She contended it violated her First Amendment right of free speech by forcing her to write "Allah" and "messenger" and, in so doing, compelled her "to confess by written word and deed her faith in Allah."[351] Wood's framing neatly parallels *Barnette's* "fixed star" principle that government officials may not "force citizens to confess by word or act their faith" in government orthodoxies on matters including religion.[352]

A unanimous three-judge panel of the U.S. Court of Appeals for the Fourth Circuit, however, rejected Wood's compelled-speech claim in 2019 and, in doing so, affirmed a 2018 district court decision against her.[353] The

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[344] Wood v. Arnold, 915 F.3d 308 (4th Cir. 2019).

[345] *Id.* at 312.

[346] *Id.*

[347] *Id.* at 312–13. The Five Pillars of Islam pertain to the "fundamental duties, practices, and beliefs" of Muslims. Kamari Maxine Clarke, *Internationalizing the Statecraft: Genocide, Religious Revivalism, and the Cultural Politics of International Criminal Law*, 28 LOY. L.A. INT'L & COMP. L. REV. 279, 307 (2006). The first pillar – the one at issue in *Wood* – is known as the Shahada, and it requires "the profession of faith through testimony declaring, 'there is no God but Allah and . . . Muhammad is the messenger of Allah.'" *Id.*

[348] *Wood*, 915 F.3d at 312–13.

[349] *Id.* at 312.

[350] *Id.* at 312–13.

[351] *Id.* at 319.

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

[353] *Wood*, 915 F.3d at 319. *See also* Wood v. Arnold, 321 F. Supp. 3d 565, 579 (D. Md. 2018) (concluding that "Defendants' did not violate Ms. Wood's First Amendment protections when teaching about the Shahada within the contexts of its World History course").

U.S. Supreme Court, without dissent, declined to disturb the Fourth Circuit's ruling.[354]

The Fourth Circuit's analysis of Wood's right-not-to-speak claim spans a mere four paragraphs spread across two pages, succinctly explaining why the student's claim failed.[355] The appellate court observed that while compelled-speech mandates typically face rigorous First Amendment scrutiny, the right not to speak is more limited in classroom settings when students must study and discuss materials with which they disagree.[356] In other words, the usually stringent First Amendment safeguards against government-imposed speech obligations lighten, if not evaporate, when the speech being compelled relates to classroom studies and deliberations.

To support that assertion, the court quoted an observation by the Third Circuit more than a dozen years earlier in *C.N. v. Ridgewood Board of Education*.[357] The Third Circuit there reasoned that "[a] student may . . . be forced to speak or write on a particular topic even though the student might prefer a different topic."[358] The Third Circuit added that "while a public educational institution may not demand that a student profess beliefs or views with which the student does not agree, a school may in some circumstances require a student to state the arguments that could be made in support of such beliefs or views."[359] The dispute in *C.N.,* however, centered not on an academic assignment, but on a survey students were asked to complete regarding their attitudes and behaviors on topics such as sex and drugs.[360]

The Fourth Circuit indicated that the Supreme Court's decision in *Barnette* would have supported Caleigh Wood's compelled-speech claim if the school had forced her "to profess or accept the tenets of Islam."[361] It concluded, however, that the assignment had not done that.[362] Instead, the task compelled Wood "to write only two words . . . as an academic exercise to demonstrate her understanding of the world history curriculum."[363] In short, the Fourth Circuit seemingly found a profound difference between

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[354] Wood v. Arnold, 140 S. Ct. 399 (2019).

[355] *Wood*, 915 F.3d at 318–19 (setting forth the appellate court's analysis of the First Amendment-based compelled-speech claim).

[356] *Id.* at 319.

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

[358] *Id.* at 187.

[359] *Id.*

[360] *See id.* at 161 ("The survey sought information about students' drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest.").

[361] *Wood*, 915 F.3d at 319.

[362] *See id.* ("The students were not asked to recite the shahada, nor were they required to engage in any devotional practice related to Islam.").

[363] *Id.*

compelling students to engage in speech to *profess* or *accept* a religious belief system (unconstitutional) and compelling students to engage in speech to determine if they *understand* that system (constitutional). Ferreting out the purpose of an assignment regarding a belief system–is the assignment intended to foster acceptance or, instead, is it intended to promote or test understanding?–thus is pivotal on the question of constitutionality.

The Fourth Circuit thus suggests that *Barnette's* rule against compelled speech is not broad. It protects only against classroom exercises that compel students to profess or accept tenets of a belief system.[364] It does not shield them from studying and discussing those belief systems.[365] Additionally, *Barnette* does not protect students from being compelled to write the principles of those belief systems for purposes of proving their understanding of them.[366] Finally, it should be noted that the Fourth Circuit did not address the doctrine of qualified immunity.[367]

Although the Fourth Circuit dealt a defeat to Caleigh Wood, controversies over compelled-speech assignments involving Islamic precepts seem unlikely to disappear. A variation of the exercise in *Wood*–this one involving transcription of the Shahada in a world geography course–proved so controversial in Augusta County, Virginia, in December of 2015, that officials there temporarily closed all of the district's schools.[368] The shutdown occurred "after the district received an overwhelming number of threatening messages."[369] Many parents reportedly complained about the indoctrination of "their children under the guise of multiculturalism."[370]

The deeper problem here, to paraphrase Justice John Marshall Harlan's memorable quip about interpretational ambiguity that "one man's vulgarity is another's lyric,"[371] is that one person's education is another person's indoctrination. If distinguishing between permissible education and illicit indoctrination hinges on an educator's motive or purpose in giving an assignment, then courts may face sometimes treacherous slogs in

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[364] *Supra* note 361 and accompanying text.

[365] *Supra* note 356 and accompanying text.

[366] *Supra* note 363 and accompanying text.

[367] The Fourth Circuit's decision, rather than addressing qualified immunity, simply affirmed the district court's grant of summary judgment in favor the school-official defendants, Evelyn Arnold and Shannon Morris. *Wood*, 915 F.3d at 312.

[368] Engy Abdelkader, *Muslims and Islam in U.S. Public Schools: Cases, Controversies and Curricula*, 17 HASTINGS RACE & POVERTY L.J. 491, 492 (2020). The law journal article cited here incorrectly identifies the state where this incident occurred as West Virginia. Riverheads High School is located in Virginia. *See* Riverheads High School, https://www.augusta.k12.va.us/o/riverheads-hs (last visited July 20, 2022).

[369] Abdelkader, *supra* note 368, at 492.

[370] *Id.*

[371] Cohen v. California, 403 U.S. 15, 25 (1971).

differentiating pretextually professed assertions of legitimate pedagogical motives from actual motivating objectives.

C. *Brinsdon v. McAllen Independent School District*[372]

Brinsdon concerned a high school Spanish course assignment that required students "to memorize and recite in Spanish the Mexican Pledge of Allegiance and sing the Mexican National Anthem" during "a week-long celebration of Mexican Independence Day."[373] Geographically speaking, the exercise appeared relevant because the school where it was given is situated in a region of Texas bordering Mexico and boasting the second highest percentage of Hispanics in the United States.[374] According to Reyna Santos–the course's instructor and, along with Principal Yvette Cavazos, one of two individual defendants in *Brinsdon*–"the pledge was educational, and the punishment for noncompliance was a failing grade."[375] More specifically, Santos asserted the assignment was "meant for cultural awareness and language fluency."[376]

Sophomore Brenda Brinsdon, who is of mixed Mexican and American heritage, objected to the Mexican Pledge of Allegiance facet of the exercise.[377] At one point, after claiming she felt peer pressure to do so, Brinson practiced reciting the pledge with the rest of her class.[378] After complaining about the exercise to Principal Cavazos, Brinsdon was given an alternative assignment.[379] Brinsdon ultimately sued, alleging that the teacher and principal violated "her First Amendment right to be free from compelled speech."[380]

The Fifth Circuit in 2017–four years prior to issuing its two fractured rulings in *Oliver v. Arnold* described earlier[381]–affirmed U.S. District Court Judge Micaela Alvarez's 2014 grant of summary judgment in favor of Santos and Cavazos on Brinsdon's compelled-speech claim.[382] The appellate court

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[372] Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338 (5th Cir. 2017).
[373] *Id.* at 343.
[374] *Id.*
[375] *Id.* at 349.
[376] *Id.* at 343.
[377] *Id.* Brinsdon had no objection to the Mexican National Anthem part of the exercise.
[378] *Id.* at 344.
[379] *Id.*
[380] *Id.* at 347.
[381] *See supra* Pt. IV, Sec. A (addressing *Oliver*).
[382] *Brinsdon*, 863 F.3d at 351. *See* Brinsdon v. McAllen Indep. Sch. Dist., 2014 U.S. Dist. LEXIS 199752, *43 (S.D. Tex. Aug. 11, 2014) (granting summary judgment to Santos and Cavazos based on qualified immunity).

unanimously determined that the doctrine of qualified immunity shielded the pair from liability because the Mexican pledge exercise did not violate any clearly established law.[383]

In reaching that educator-friendly ruling, the Fifth Circuit focused on the Supreme Court's ruling in *Barnette*.[384] Although it found *Barnette* the most factually relevant precedent, the Fifth Circuit distinguished it from the exercise in *Brinsdon* because there was "no direct evidence . . . of a purpose to foster Mexican nationalism"[385] or "to compel the speaker's affirmative belief."[386] The Fifth Circuit, in other words, seemingly interpreted *Barnette* as creating a constitutional rule against compelling speech for purposes of fostering nationalism or "forc[ing] orthodoxy."[387]

The Fifth Circuit acknowledged that proving such an illicit purpose or motive behind an assignment might not always be easy.[388] In this case, however, all that Brenda Brinsdon could muster was mere "speculation" that the exercise was intended to foster loyalty to Mexico.[389]

Despite holding that the Mexican pledge exercise did not contravene *Barnette*, the Fifth Circuit was bothered by administering pledges in public schools that involve simulated beliefs, even when they are not intended to foster them.[390] Such exercises, Judge Leslie Southwick reasoned for the three-judge panel, raise "heightened concerns" because they may affect actions relating to matters of public interest.[391] He added that judicial analysis of simulated pledge exercises is not necessarily controlled by *Barnette*.[392]

Rather than articulating a new test or establishing precisely what such an analysis would entail, Judge Southwick suggested five factors courts might weigh in future compelled-speech cases involving simulated pledges.[393] They are:

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[383] *See Brinsdon*, 863 F.3d at 351 ("We conclude that Santos as teacher, and Cavazos as principal, were not ignoring clearly established law when compelling a non-operative recitation of the Mexican pledge. Qualified immunity on compelled speech was properly granted.").

[384] *See id.* at 348 (calling *Barnette* "[t]he most factually analogous precedent to this case").

[385] *Id.* at 349.

[386] *Id.* at 350.

[387] *Id.*

[388] *See id.* at 349 ("It is true that direct evidence of motive or intent can be hard to come by.").

[389] *Id.*

[390] *Id.* at 350.

[391] *Id.*

[392] *See id.* ("Yet, whatever the proper analysis of compelled recitation of simulated pledges may be, no caselaw holds that such analysis is the same as *Barnette*. Indeed, no caselaw has directly addressed this situation.").

[393] *See infra* notes 394–98 and accompanying text.

1) searching for evidence that a pledge assignment "was seeking to force orthodoxy;"[394]

2) acknowledging that educators must be allowed to compel some forms of student expression without violating the First Amendment;[395]

3) deferring to educators on most curricular choices;[396]

4) recognizing that all pledge assignments trigger heightened First Amendment concerns because "even a non-operative pledge may affect the public and political discourse;"[397] and

5) understanding that the First Amendment speech rights of students are not necessarily as expansive as those of adults.[398]

Judge Southwick was not on the Fifth Circuit's three-judge panel in June 2021 that considered the constitutionality of the pledge exercise in *Oliver v. Arnold*.[399] Furthermore, in December 2021 he was one of the ten Fifth Circuit judges who successfully voted against rehearing en banc the June 2021 ruling.[400] Judge Southwick thus never considered in *Oliver* how the factors that he articulated just four years earlier in *Brinsdon* applied to teacher Benjie Arnold's pledge exercise. The other two jurists on the Fifth Circuit panel in *Brinsdon*–Judges W. Eugene Davis and Edward C. Prado–were not involved in either of the court's 2021 rulings in *Oliver*.[401]

With this analysis of the federal court rulings in *Oliver*, *Wood,* and *Brinsdon* complete, the Article next suggests that potential compelled-speech battles over the teaching of the tenets of critical race theory ("CRT") may soon arise. Indeed, as the Introduction pointed out, a compelled-speech challenge targeting the teaching of CRT based on Virginia's constitution, rather than the First Amendment to the U.S. Constitution, was filed in December 2021.[402]

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[394] *Brinsdon*, 863 F.3d at 350.

[395] If this were not possible, then "a student who refuses to respond in class or do homework would not suffer any consequences." *Id.*

[396] *See id.* ("Students . . . generally do not have a right to reject curricular choices as these decisions are left to the sound discretion of instructors.").

[397] *Id.*

[398] *Id.* at 351.

[399] *See* Oliver v. Arnold, 3 F.4th 152, 154 (5th Cir. 2021) (identifying Judges James L. Dennis, Stuart Kyle Duncan, and Jacques L. Weiner, Jr. as the judges who heard this case).

[400] *See* Oliver v. Arnold, 19 F.4th 843, 843 (5th Cir. 2021) (identifying Judge Leslie Southwick as voting against rehearing the case).

[401] Judge Davis assumed senior status on the Fifth Circuit in December 2016. *See* Federal Judicial Center, *Davis, W. Eugene*, FEDERAL JUDICIAL CENTER (last visited June 10, 2022), https://www.fjc.gov/history/judges/davis-w-eugene. Judge Prado left the court in 2018 to become U.S. Ambassador to Argentina. *See* U.S. Embassy in Argentina, *Ambassador Edward C. Prado*, U.S. EMBASSY IN ARGENTINA (last visited June 10, 2022), https://ar.usembassy.gov/embassy/edward-c-prado/.

[402] *Supra* notes 12–15 and accompanying text.

D. *Critical Race Theory: The Next Student Compelled-Speech Battleground?*

Although the teaching of "gender identity ideology" in public schools now draws the wrath of some parents, perhaps no facet of the curriculum is more controversial than critical race theory (CRT).[403] Indeed, the *New York Times* in 2021 reported a "rush by states across the country to ban the teaching of critical race theory in schools."[404] More recently, Professor Khiara M. Bridges observed that "[a] vocal cadre of conservatives has been on the warpath, seeking to expunge CRT from schools."[405] She noted that lawmakers in several states have introduced bills, some of which are now law, that ban teaching CRT in public schools.[406] These measures do not use the term critical race theory, but rather forbid the teaching of what lawmakers seemingly believe are its core tenets, such as the notion that "an individual, by virtue of the individual's race or sex, bears responsibility, blame, or guilt for actions committed by other members of the same race or sex."[407] For instance, Arkansas bars the teaching of "any divisive concepts."[408] In addition to banning instruction regarding specific items,[409] it broadly prohibits teaching "any other form of race or sex stereotyping or any other form of race or sex scapegoating."[410] The teaching of race and sex scapegoating, in turn, is defined as "any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others."[411] In

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[403] *See* S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 REGENT U. L. REV. 219, 223 (2021) ("Across the country, parents are speaking out at school board meetings and demanding that schools refuse to implement gender identity ideology."); Christina Coleburn, *The Danger of Flirtations with First Amendment Violations*, 2021 HARV. C.R.-C.L. L. REV. AMICUS 1, 3 (noting that "controversies over critical race theory engulf school boards").

[404] Charles M. Blow, *Demonizing Critical Race Theory*, N.Y. TIMES (June 13, 2021), https://www.nytimes.com/2021/06/13/opinion/critical-race-theory.html.

[405] Khiara M. Bridges, *Language on the Move: "Cancel Culture," "Critical Race Theory," and the Digital Public Sphere*, 131 YALE L.J. F. 767, 768 (2022).

[406] *Id.* at 786.

[407] TEX. EDUC. CODE § 28.0022(a)(4)(A)(v) (2022).

[408] ARK. CODE ANN. § 25-1-902(a) (2022).

[409] For example, the law bans teaching that "[a]n individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously." ARK. CODE ANN. § 25-1-901(1)(C) (2022). It also forbids, among other items, teaching that "[a]ny individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex." ARK. CODE ANN. § 25-1-901(1)(G) (2022).

[410] ARK. CODE ANN. § 25-1-901(1)(I) (2022).

[411] ARK. CODE ANN. § 25-1-901(3)(B) (2022).

short, such bans comport with the view "that educators have no business inculcating moral views in the classroom."[412]

Whether such principles truly are tenets of CRT is another matter. Critical race theory scholars Richard Delgado and Jean Stefancic observe that CRT "holds that racism is ordinary, normal, and embedded in society and, moreover, that changes in relationships among the races . . . reflect the interest of dominant groups, rather than idealism, altruism, or the rule of law."[413] They add that CRT views race as "a social construction."[414] In short, Delgado and Stefancic define CRT as a "[p]rogressive legal movement that seeks to transform the relationship among race, racism, and power."[415] Professor Kimberle Williams Crenshaw posits that CRT "is dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era."[416] Likely more eye-catching and provocative to CRT critics, however, are the premises "that race and racism are endemic to the American normative order and a pillar of American institutional and community life"[417] and that American law "constitutes, constructs and produces races and race relations in a way that supports white supremacy."[418]

However one defines CRT, the framing of its tenets in a civil complaint seemingly matters to its antagonists.[419] What provoked the lawsuit filed against the Albemarle County School Board in December 2021 was the alleged curricular classroom embracement of:

> a radical new understanding of "racism" that harms and denigrates everyone. This new understanding classifies all individuals into a racial group and identifies them as either perpetually privileged oppressors or perpetually victimized members of the oppressed, denying agency to both. It assumes that racism terminally infects our social institutions,

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[412] George Sher & William J. Bennett, *Moral Education and Indoctrination*, 79 J. OF PHIL. 665, 665 (1982).

[413] DELGADO & STEFANCIC, *supra* note 10, at 16.

[414] *Id.*

[415] *Id.* at 171.

[416] Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward Commentary: Critical Race Theory: A Commemoration: Lead Article*, 43 CONN. L. REV. 1253, 1261 (2011).

[417] Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333 (2006).

[418] *Id.* at 333-34.

[419] *See* Robert N. Entman, *Toward Clarification of a Fracture Paradigm*, 43 J. COMMC'N 51, 52 (1993) ("To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.").

> requiring their dismantling. And it imputes racism not only to those who consciously discriminate based on race, but also to those of a certain race (white) who do not actively participate in the prescribed dismantling.[420]

The declaration of plaintiff Marie Mierzejewski avers that this curriculum was deployed at a middle school and "used ideology and terminology taken from critical race theory."[421] She characterizes the actions of the school district not simply as teaching, but as indoctrination.[422]

Of particular importance for this Article, the plaintiffs contend in a memorandum filed in 2022 supporting their motion for a preliminary injunction that such indoctrination violates the right not to speak safeguarded by Virginia's constitutional guarantee of free expression, which they argue is co-extensive with that protected by the First Amendment to the U.S. Constitution.[423] The plaintiffs somewhat sweepingly assert that the right not to speak is violated whenever the government compels speech that "the speaker objects to."[424] They contend that the Supreme Court's ruling in *Barnette* stands for the principle that "indoctrination is prohibited" in public schools.[425] The plaintiffs push the *Barnette* link further, claiming that students in Albemarle County are compelled to declare a belief because "the highly controversial and overtly racist concepts were not put forth as ideas for debate or one possible worldview. Rather, Defendants present Policy-based curriculum as an objective description of the world in contrast to what Plaintiffs are taught at home."[426] The plaintiffs also distinguish supposedly impermissible indoctrination from the Court's observation in *Kuhlmeier* that

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[420] C.I. Complaint, *supra* note 11, at 4.

[421] Declaration of Plaintiff Marie Mierzejewski in Support of Plaintiffs' Motion for Preliminary Injunction at 4, C.I. v. Albemarle Cnty. Sch. Bd., No. CL21001737-00 (Va. Cir. Ct. Feb. 22, 2022), https://adflegal.org/sites/default/files/2022-03/CI-v-Albemarle-County-School-Board-2022-02-22-Declaration-Of-Marie-Mierzejewski.pdf.

[422] *See id.* (expressing her strong objection to "indoctrinating our children in views contrary to our beliefs. We have already seen the School District doing this through Defendants' 'Anti-racism' Policy that tells children to focus on race, judge people based on race, and treat people differently depending on their racial, ethnic, and religious backgrounds").

[423] Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 12–14, C.I. v. Albemarle Cnty. Sch. Bd., No. CL21001737-00 (Va. Cir. Ct. Feb. 25, 2022), https://adflegal.org/sites/default/files/2022-03/CI-v-Albemarle-County-School-Board-2022-02-25-Memorandum-In-Support-MPI.pdf.

[424] *Id.* at 13.

[425] *Id.*

[426] *Id.* at 14.

schools may regulate student speech that occurs as part of the curriculum in the interest of serving legitimate pedagogical concerns.[427]

Buttressing their compelled-speech claim, the plaintiffs allege that students "were told to produce a classroom mission and vision statement, to vow to be more 'anti-racist' and to state how they will 'look,' 'think,' 'sound,' and 'act' accordingly…. So, under the Policy, Students cannot simply sit quietly and be sorted and judged based on the color of their skin."[428] This, the plaintiffs contend, violates *Barnette's* rule against the government mandating affirmance of beliefs and attitudes of the mind.[429]

In sum, although *C.I. v. Albemarle County School Board* hinges on alleged violations of Virginia's Constitution, it sheds light on how First Amendment-based right-not-to-speak lawsuits targeting critical race theory might soon unfold elsewhere. If a state does not statutorily bar the teaching of CRT's tenets in public schools–something Florida forbade in 2022–then one might reasonably expect CRT-opposed parents and their students to file First Amendment-grounded lawsuits seeking injunctive relief to ban their teaching.[430]

V. Some Pros and Cons of Expanding Students' First Amendment Right Not to Speak to Shield Them from Expressing Objectionable Ideological and Political Views During Academic Exercises

This Part is evaluative. It offers the authors' opinions regarding potential benefits and drawbacks of extending to public school students a qualified First Amendment right not to speak that stretches beyond the factual confines

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[427] *See id.* at 13 (asserting that "indoctrination in a politicized racist ideology is not a legitimate pedagogical interest"); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (concluding "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 related to legitimate pedagogical concerns").

[428] Memorandum, *supra* note 423, at 14 (internal citation omitted).

[429] *Id.*; *See* W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.").

[430] In April 2022, Florida Governor Ron DeSantis signed into law House Bill 7 banning the teaching of what Sunshine State lawmakers consider to be the central tenets of critical race theory. *See* H.B. 7 (Fla. 2022); *see also* Staff, *Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination*, RON DESANTIS 46TH GOVERNOR OF FLORIDA (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/ (calling the bill "the first of its kind in the nation to take on both corporate wokeness and Critical Race Theory in schools in one act," and quoting DeSantis for the proposition that "[i]n Florida, we will not let the far-left woke agenda take over our schools and workplaces. There is no place for indoctrination or discrimination in Florida").

of *West Virginia State Board of Education v. Barnette* to more broadly encompass curricular exercises that require expressing objectionable ideological or political views.[431] Section A identifies three reasons for expanding students' compelled-speech rights in public schools, while Section B assesses seven problems with doing so. In the process, Section B also examines potential standards for determining when a student's qualified First Amendment right not to speak might be violated by an academic exercise. Some of the pros and cons identified in this Part were either explicitly or implicitly suggested in *Oliver*, *Wood,* and *Brinsdon* addressed earlier in Part IV.

A. *Reasons to Expand the Right Not to Speak*

This section offers three reasons to grant public school students a qualified First Amendment right not to speak that would shield them from voicing objectionable ideological and political views. Specifically, affording students such a constitutional right: 1) might serve as a check on alleged ideological and political indoctrination; 2) would respect minors' interest in autonomy; and 3) would recognize concerns regarding minors' impressionability. This section does not endorse these reasons. It merely offers them as possible justifications for giving students a qualified right not to speak that pushes past *Barnette's* factual boundaries.

1. Keeping Alleged Ideological and Political Indoctrination in Check

"We need to be educating people, not trying to indoctrinate them with ideology."[432] That is what Florida Governor Ron DeSantis proclaimed shortly before his state's board of education voted in June 2021 to ban the teaching of critical race theory.[433] At least one federal judge in a key case addressed in this Article agrees that schools should not be in the indoctrination business. Specifically, Judge James Ho asserted in *Oliver* that "[s]chools should educate–not indoctrinate."[434] Some parents too are concerned about "what they say are efforts to use critical race theory to indoctrinate students, compel speech and treat students differently because of

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[431] The evaluative nature of this Part in providing the authors' views and opinions explains why not every sentence includes a supporting footnote.

[432] Jennifer Schuessler*, Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html.

[433] *Id.*

[434] Oliver v. Arnold, 19 F.4th 843, 845 (5th Cir. 2021) (Ho, J., concurring).

the color of their skin."[435] As one Northern Virginia resident complained about her local schools at a Republican rally in 2021, "They're trying to indoctrinate the kids."[436] The concept of indoctrination and, in turn, profound objection to it, unites all of these sentiments.

Viewed in this light, one possible benefit of affording students a First Amendment right not to be compelled to express ideological or political views that conflict with their own is that it provides a bulwark against indoctrination. In other words, and to invoke the dichotomy deployed by both Governor DeSantis and Judge Ho, only compelled-speech exercises that educate–not indoctrinate–are permissible under the First Amendment.[437] That would track the approach in Europe, where "States have an obligation to conduct public education in an objective and pluralistic manner that does not indoctrinate children into particular worldviews."[438] It would also map a "precept . . . widely shared among educators and citizens, at least in liberal societies"–namely, that "[t]he schools should be educating our children, not indoctrinating them."[439]

What, however, is indoctrination? And is it even possible to draw a clear line demarcating education from indoctrination? Scholars in other fields have long considered such knotty questions.[440] Indoctrination, at the most basic, descriptive level, involves transmitting beliefs.[441] More normatively and pejoratively–and seemingly more in line with the sense of indoctrination about which people such as Governor DeSantis and Judge Ho are concerned–"[i]ndoctrination entails the inculcation of attitudes or beliefs that are contested, where there is intent to instill those beliefs, and where the methods

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[435] Douglas Belkin & Jacob Gershman, *Federal Lawsuits Say Antiracism and Critical Race Theory in Schools Violate Constitution*, WALL ST. J. (July 1, 2021), https://www.wsj.com/articles/federal-lawsuits-say-antiracism-and-critical-race-theory-in-schools-violate-constitution-11625151879.

[436] Paul Schwartzman, *In Tight Governor's Race, Virginia GOP Targeting Critical Race Theory to Draw Votes*, WASH. POST (Oct. 2, 2021), https://www.washingtonpost.com/local/virginia-politics/critical-race-theory-virginia-governor-youngkin/2021/10/01/17ad45f0-1cc8-11ec-8380-5fbadbc43ef8_story.html.

[437] *See supra* notes 432–434 and accompanying text (quoting Governor DeSantis and Judge Ho).

[438] Fernando Mendez Powell, *Prohibition of Indoctrination in Education – A Look at the Case Law of the European Court of Human Rights*, 2015 BYU EDUC. & L. J. 597, 607 (2015).

[439] David Copp, *Moral Education Versus Indoctrination*, 14 THEORY & RSCH. IN EDUC. 149, 149 (2016).

[440] *See* Ruth J. Wareham, *Indoctrination, Delusion and the Possibility of Epistemic Innocence*, 17 THEORY & RSCH. IN EDUC. 40, 41 (2019) (asserting that "[t]he question of how we distinguish between legitimate educational practices and indoctrination has a well-established history in the philosophy of education," and adding that "despite the many and varied protestations of futility, thoroughgoing discussions of indoctrination still abound").

[441] *See id.* at 43 ("One basic and uncontroversial feature of indoctrination is that it involves the transmission of beliefs rather than behaviours."); Copp, *supra* note 439, at 150–51 (addressing "indoctrination as a way of affecting people's beliefs").

circumvent important arguments or evidence."[442] A teacher's intent in conveying beliefs via a particular method of instruction thus is relevant under this definition.[443] The notion of circumventing some arguments and evidence suggests that students are indoctrinated if "evidence was tendentiously selected while contrary evidence was ignored, suppressed or distorted by misleading or charged terminology."[444] This comports with the view that "indoctrination means influencing unfairly, as by a biased presentation of the evidence."[445]

Indoctrination may be objectionable not only because of the manner in which a belief is taught or because students are taught to accept the belief uncritically, but also because of the belief itself that is being taught.[446] Here, as philosophy Professor David Copp explains, "the reason indoctrination is objectionable is that *what is taught* is objectionable because it is 'partisan,' 'ideological,' or 'biased.' Call this, 'the ideology view'" of indoctrination.[447] Perhaps this is what Governor DeSantis laments when he bristles against in-school indoctrination.[448]

Counterposed to indoctrination, education "seeks to provide *knowledge* or *training*" and "to inculcate knowledge, belief in proven truth."[449] D.C. Phillips, a professor of education, writes that "[i]n contrast to indoctrination, education is a process whereby students are led to hold views on the basis of reason and evidence."[450] Under this education-versus-indoctrination dichotomy, students might be afforded a First Amendment right not to express ideological or political views they disagree with unless a school demonstrates an educational purpose in teaching those views and that a balanced, reason-and-evidence based method is used to convey them. In other words, successful invocation of this right would depend on a school failing to prove both that there is a legitimate pedagogical purpose in teaching a particular view and that the method of teaching it is unbiased and neutrally

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[442] Michael S. Merry, *Indoctrination, Islamic Schools, and the Broader Scope of Harm*, 16 THEORY & RSCH. IN EDUC. 162, 164 (2018).

[443] *See* Johan Dahlbeck, *Spinoza on the Teaching of Doctrines: Towards a Positive Account of Indoctrination*, 19 THEORY & RSCH. IN EDUC. 78, 80 (2021) (identifying content, intention, and method as three "internal features of indoctrination").

[444] Max Hocutt, *Indoctrination v. Education*, 18 ACAD. QUESTIONS 35, 35 (2005).

[445] R. Roderick Palmer, *Education and Indoctrination*, 34 PEABODY J. OF EDUC. 224, 225 (1957).

[446] Copp, *supra* note 439, at 152.

[447] *Id.*

[448] Schuessler, *supra* note 432 and accompanying text (quoting Governor DeSantis).

[449] Hocutt, *supra* note 444, at 36 (emphasis in original).

[450] D.C. Phillips, *Directive Teaching, Indoctrination, and the Values Education of Children*, 15 SOC. THEORY & PRAC. 339, 343 (1989).

presents arguments and evidence, both supporting the view and militating against it.

2. Respecting Minors' Autonomy

A second reason to expand students' right not to speak to academic exercises is closely related to the anti-indoctrination argument. It is that indoctrination intrudes on the autonomy interests of minors.[451] As Professor Michael S. Merry points out, "[t]he charge of indoctrination ostensibly is meant to undermine the credibility of imparting dogmatic beliefs, whereby children's autonomy is sidestepped and their capacity for critical thinking is foiled."[452] He adds that "[u]nlike the indoctrinated, the autonomous person would seem to have the capacity to accept or reject beliefs or knowledge claims whose premises are false."[453] Autonomy thus "bespeaks a capacity for self-determination."[454]

This directly relates to *Barnette's* emphasis that individuals possess "a right of self-determination in matters that touch individual opinion and personal attitude."[455] This self-determination right pushed back forcefully in *Barnette* against "a compulsion of students to declare a belief."[456] Expanding *Barnette* to include academic exercises that compel students to declare beliefs thus would safeguard minors' interest in their autonomy. This jibes with the Court's recognition in the right-not-to-speak context that a "fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message."[457]

When students refuse to participate in the behavior of uttering a message that conflicts with their own beliefs, such behavior may be viewed as the result of psychological reactance to "the prescribed behavior . . . infring[ing] upon their autonomy."[458] Specifically, psychological reactance theory holds

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[451] *See* Dahlbeck, *supra* note 443, at 80 (noting that "as a rule, indoctrination is seen as a potential threat to human autonomy and critical thinking").

[452] Michael S. Merry, *Indoctrination, Moral Instruction, and Nonrational Beliefs: A Place for Autonomy*, 55 EDUC. THEORY 399, 399 (2005).

[453] *Id.* at 400.

[454] *Id.* at 402; *See also* Gerald Dworkin, *The Nature of Autonomy*, 2015 NORDIC J. STUD. EDUC. POL'Y 7, 8, 10 (2015) (noting that while autonomy often is "used in an exceedingly broad fashion" and "is a term of art," "a certain idea of *persons as self-determining* is shared by very different philosophical positions") (emphasis added).

[455] W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 631 (1943).

[456] *Id.*

[457] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Boston, 515 U.S. 557, 573 (1995).

[458] Hannah Ball & Alan K. Goodboy, *An Experimental Investigation of the Antecedents and Consequences of Psychological Reactance in the College Classroom*, 63 COMMC'N EDUC. 192, 192 (2014).

"what when individuals perceive that a persuasive message is imposing on their ability to enact free behavior, they experience reactance, which manifests in a motivation to restore their eliminated or threatened freedom."[459] Expanding *Barnette* thus would acknowledge both the reality of psychological reactance that arises when a compelled-speech assignment conflicts with a student's views and the intrusion on their autonomy.

3. Protecting Impressionable Minors

In its First Amendment Establishment Clause jurisprudence, the Supreme Court recognizes the impressionability of minors in public schools, as well as the influence of their teachers.[460] In penning the Court's opinion in *Edwards v. Aguillard*, Justice William Brennan wrote that:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.[461]

Advocates of expanding *Barnette's* right not to speak past the Pledge of Allegiance might argue that the same fret regarding impressionability exists if one replaces "religious views" in Justice Brennan's statement with "ideological or political views." Furthermore, the Court in *Edwards* posited that "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models . . ."[462] In brief, the right-not-to-speak argument here is that impressionable minors are vulnerable to persuasion by their role-model teachers to accept the ideological and political views presented in class.[463] Impressionability, as used here in a social science sense, "results in the

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[459] *Id.* at 192–93.

[460] The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion . . .." U.S. CONST. amend. I. The Establishment Clause has been incorporated to apply to state and local government entities and officials through the Fourteenth Amendment Due Process Clause. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[461] Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

[462] *Id.*

[463] *See* Hare, *supra* note 285, at 1 ("Philosophers . . . concerned with the problem of indoctrination have focused attention . . . on . . . the curriculum in elementary and secondary schools where the age of the students and the fact that they have yet to fully develop their own critical judgment suggests a certain vulnerability and susceptibility to nonrational persuasion.").

transformation of attitudes or behavior by being influenced by and susceptible to various social and environmental factors."[464]

In summary, affording students a First Amendment right against compelled expression that goes beyond *Barnette* might be supported by concerns with shielding minors from indoctrination, safeguarding their autonomy and guarding against their impressionability.

B. *Reasons Against Expanding the Right Not to Speak*

This section articulates seven reasons why granting students a First Amendment right not to participate in academic exercises that compel them to express objectionable ideological or political views is either misguided or problematic. Specifically, expanding the constitutional right not to speak beyond *Barnette* in this fashion is wrong–or, at least, troublesome–because:

1) it teaches minors that they can opt out of the marketplace of ideas upon which a representative democracy depends and, in turn, that they do not need to tolerate, consider, or confront divergent views on matters of public concern;

2) establishing clear parameters and explicating lucid definitions that are essential for cabining and effectively operationalizing such a qualified First Amendment right to opt out of academic exercises is exceedingly difficult;

3) it threatens to jettison deference currently bestowed to educators' expertise regarding pedagogical matters and to replace it with judicial judgments about impermissible exercises;

4) it may devolve into speculative efforts to decipher a teacher's motive in administering an assignment and, in turn, to determine if that motive is permissible under the First Amendment or whether it violates a student's right not to speak;

5) it imposes additional burdens on teachers to create, administer, and grade alternative or substitute assignments for objecting students while simultaneously diverting teachers' attention, efforts, and energy away from effectively delivering the official curriculum to non-complaining students;

6) it is unnecessary, given that protesting students and their parents already have remedies via school board elections, curricular legislation, and private schools; and

7) lawsuits over students' right-not-to-speak claims will siphon off taxpayers' money to cover attorneys' fees and litigation costs–money that

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[464] Seok Hyun Gwon & Suyong Jeong, *Concept Analysis of Impressionability Among Adolescents and Young Adults*, NURSING OPEN 1, 8 (2018).

might be better spent on educating minors rather than on defending against civil complaints.

With these seven objections in mind, this section now explores each in greater detail.

1. Instilling Minors with Deleterious, Democracy-Threatening Values

The First Amendment generally safeguards the unfettered flow of opinions affecting matters of public concern in order to stock a robust, diverse, and truth-seeking marketplace of ideas.[465] Such a marketplace, in turn, facilitates a representative democracy where people "influence the public policy enacted by elected representatives."[466] Justice Stephen Breyer in 2022 crisply encapsulated this relationship among the First Amendment, the marketplace of ideas, and successful representative democracies: "The First Amendment, by protecting the 'marketplace' and the 'transmission' of ideas, thereby helps to protect the basic workings of democracy itself."[467]

The Supreme Court recognizes classrooms as marketplaces of ideas where students, as the nation's future leaders, should be exposed to a vast swath of perspectives.[468] Public school classrooms also are venues where students learn how representative democracies function, including how they thrive on diverse opinions, including displeasing ones.[469] The Court furthermore acknowledges that public schools must be free to teach values underlying democratic discourse, "includ[ing] tolerance of divergent political and religious views, even when the views expressed may be

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[465] *See* Hustler Mag. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); Gertz v. Robert Welch, 418 U.S. 323, 339–40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (asserting that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"); *see generally* Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMMC'N. L. & POL'Y 437 (2019) (addressing the marketplace of ideas metaphor in First Amendment jurisprudence).

[466] Barr v. Am. Ass'n Pol. Consultants, 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring).

[467] City of Austin v. Reagan Nat'l Adver. of Austin, LLC, 142 S. Ct. 1464, 1477 (2022) (Breyer, J., concurring).

[468] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[469] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which . . . helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas . . .")

unpopular."[470] This represents what might be dubbed "democratic education."[471]

Granting students a First Amendment right not to participate in academic exercises that compel them to express views that conflict with their ideological or political beliefs teaches them exactly the wrong lessons about ideational marketplaces and representative democracies. It instructs them that their own views are all that matter–that their personal beliefs are paramount, carrying such constitutional muscle that minors can be shielded from engaging with contradictory speech. Minors are free to be intolerant of others' views, to treat them as inferior. Minors may insularly retreat into the comforting cocoons of their own belief systems and ideological safe spaces. Rather than learn how to constructively grapple with adversarial views, students are constitutionally free to run away from them. The First Amendment right not to speak creates a student-centric filter bubble, which is "damaging to the ideal of open public discourse."[472]

As addressed earlier, if a key constitutional value of open expression is freeing people from irrational fears about different ideas, then a central facet of a public school education should be liberating minors from perturbation over directly exploring and confronting ideas they abhor.[473] Furthermore, encountering divergent perspectives facilitates individual self-realization through speech, as minors' own quest for knowledge and truth may flourish when exposed to new perspectives.[474] Conversely, and by implication, minors' minds may atrophy in analytically sterile classrooms. Extending a First Amendment right not to speak beyond *Barnette* threatens to transform public schools from "nurseries of democracy"[475] into echo chambers where

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[470] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986). The Court in *Fraser* added that "schools must teach by example the shared values of a civilized social order." *Id.* at 683.

[471] *See* Michalinos Zembylas, *Hannah Arendt's Political Thinking on Emotions and Education: Implications for Democratic Education*, 41 DISCOURSE: STUD. CULTURAL POL. OF EDUC. 501, 502 (2020) (defining "democratic education" as "education that promotes common values and skills necessary for political participation").

[472] Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 403 (2020).

[473] *See supra* notes 89–90 and accompanying text (addressing Justice Brandeis's views regarding the relationship between irrational fears and free speech).

[474] *See* THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 6–7 (1st ed. 1970) ("An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds.").

[475] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

closed-minded minors[476] may adopt the communicative values of what Justice Louis Brandeis called "an inert people."[477]

In sum, giving students a First Amendment right to withdraw from academic exercises that compel expressing ideological and political views is highly ironic; it teaches them values that directly contradict fundamental principles of a robust marketplace of ideas upon which First Amendment jurisprudence largely is premised.[478] If, as Chief Justice Earl Warren memorably wrote in *Brown v. Board of Education*,[479] education provides "the very foundation of good citizenship,"[480] then that foundation cracks and craters when minors learn they can dodge speaking during academic exercises when the words offend their ideological and political views. The "fabric of our society" that "education has a fundamental role in maintaining"[481] is torn apart by such intellectual isolationism.

The classroom marketplace of ideas, it must be stressed, also is endangered by the chilling effect teachers might feel if the First Amendment right not to speak were extended past *Barnette* to cover academic exercises.[482] A chilling effect arises "when a governmental action has the indirect effect of deterring a speaker from exercising her First Amendment rights."[483] As is relevant here, teachers might be deterred–due to fear of civil liability, loss of employment or the filing of lawsuits targeting their schools–from administering academic exercises that oblige students to express controversial stances about matters of public concern. Speech about matters

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[476] The authors use the term closed-minded here to reflect states of mind evidencing either intellectual cowardice or intellectual arrogance. *See* Jose Maria Ariso, *Teaching Children to Ignore Alternatives is—Sometimes—Necessary: Indoctrination as a Dispensable Term*, 38 STUD. PHIL. & EDUC. 397, 400 (2019) (suggesting that "close-mindedness may be the effect of intellectual cowardice, [and] intellectual arrogance," among other things).

[477] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[478] *See* Dawn Carla Nunziato, *The Varieties of Counterspeech and Censorship on Social Media*, 54 U.C. DAVIS L. REV. 2491, 2492–93 (2021) ("The 'marketplace of ideas' or 'free trade in ideas' model has long been acknowledged as the preeminent model on which our First Amendment free speech protections are based.").

[479] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[480] *Id.* at 493.

[481] Plyler v. Doe, 457 U.S. 202, 221 (1982).

[482] A chilling effect involves deterrence of some activity and may take place "not only when activity shielded by the [F]irst [A]mendment is implicated, but also when any behavior safeguarded by the Constitution is unduly discouraged." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 BOSTON U. L. REV. 685, 690 (1978). Professor Schauer added that "[a] chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." *Id.* at 693 (emphasis removed).

[483] Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1474 (2013).

of public concern, including controversial views, generally is safeguarded from tort liability under the First Amendment.[484] Such expression, as Justice Sonia Sotomayor wrote in 2014, "lies at the heart of the First Amendment."[485] In brief, extending to students a First Amendment right against compelled expression could foster a dystopian ideational marketplace in public school classrooms, one where only the most banal and incontestable views and assignments are ventured by lawsuit-wary teachers. If "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,"[486] then that goal might be thoroughly thwarted in the classroom due to self-censorship spawned by stretching *Barnette* to the realm of academic exercises. A marketplace of ideas neutered by lawsuits and self-censorship is indubitably no marketplace at all.

2. Problematic Parameters and Definitional Difficulties

Should, however, courts set aside the concerns raised immediately above and decide to afford students a First Amendment right against expressing ideological or political views that clash with their own during academic exercises, then the judicial focus would likely turn to demarcating this right's boundaries. Surely there must be some criteria–some prerequisites beyond mere objections to expressing ideological or political views–that students must satisfy before they can successfully assert such a constitutional right. Without needing to surmount any other preconditions, public school students could easily opt out of multiple academic exercises simply by asserting that the tasks compel uttering personally objectionable views that conflict with their own convictions.[487] If that were the case, then the curriculum would be reduced to the academic equivalent of a school's cafeteria smorgasbord, with students subjectively picking and choosing only non-disagreeable exercises

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[484] *See* Snyder v. Phelps, 562 U.S. 443, 451 (2011) (observing that speech about public issues and matters of public concern lies at the heart of First Amendment protection, and reasoning that whether tort liability should be imposed on members of the Westboro Baptist Church for hoisting signs near a funeral that were emblazoned with messages such as "Pope in Hell," "Priests Rape Boys" and "God Hates Fags" hinged "largely on whether that speech [was] of public or private concern, as determined by all the circumstances of the case").

[485] Lane v. Franks, 573 U.S. 228, 235 (2014).

[486] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[487] Such a vast and expansive right might be possible if courts adopted either Justice Anthony Kennedy's sweeping assertion that "[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions," Nat'l Inst. Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring), or Justice Samuel Alito's broad-based contention that the goals of free speech are thwarted whenever the government compels people "to voice ideas with which they disagree." Janus v. Am. Fed'n State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2464 (2018). *See supra* notes 224–225 and accompanying text (addressing this possibility).

that appeal to their (and/or their parents') ideological and political palates.[488] In brief, any in-school First Amendment right not to speak that reaches past *Barnette* should be qualified, not absolute.

Articulating the parameters of this qualified right and formulating clear definitions of and distinctions between concepts that might guide it, however, is anything but easy. That is partly because, as noted earlier, the Court's compelled-speech jurisprudence is doctrinally underdeveloped and somewhat incoherent.[489] Additionally, whatever compelled-speech rights adults and businesses may possess do not necessarily need to extend in equal measure to public school students.[490]

Regardless of those problems, an obvious starting point for identifying the parameters is *Barnette*, given its status as the only Supreme Court ruling recognizing public school students' constitutional right not to speak.[491] Yet, as addressed earlier, *Barnette* did not involve an academic task or curricular exercise.[492] Instead, it centered on ritualistic ceremonies designed to foster student patriotism and to have students affirm a government-endorsed belief privileging national unity by saluting the flag of the United States of America while pledging allegiance to it.[493]

Various parts of *Barnette's* language, however, might be borrowed from the Pledge of Allegiance setting and made applicable to academic-exercise scenarios. For instance, a First Amendment right not to be compelled to express objectional ideological or political views in classrooms might be limited to only academic exercises that additionally:

- mandate an "affirmation of a belief and an attitude of mind,"[494]
- "impose any ideological discipline,"[495]
- induce students to "confess . . . their faith,"[496]

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[488] Parents do not possess a fundamental right to dictate the curriculum taught to their children, partly because such a right would raise a similar problem. *See* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 534 (1st Cir. 1995) ("If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter.").

[489] *Supra* notes 199–200 and accompanying text.

[490] *See supra* notes 25–27 and accompanying text (noting that the special characteristics of the school environment limit the scope of students' First Amendment rights); *see also* Stepien v. Murphy, 574 F. Supp. 3d 229, 242 (D. N.J. Dec. 7, 2021) ("The Court has emphasized . . . that students' First Amendment rights, particularly on campus, are narrower than those of adults.").

[491] *See supra* notes 30–40 and 176–188 and accompanying text (addressing *Barnette*).

[492] *See supra* notes 33–37 and accompanying text.

[493] *See supra* notes 33–37 and 176–78 and accompanying text.

[494] W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 633 (1943).

[495] *Id.* at 637.

[496] *Id.* at 642.

• "compel youth to unite in embracing"[497] a doctrine,
• force "students to declare a belief,"[498]
• require students to "publicly to profess any statement of belief,"[499] or
• attempt "to coerce uniformity of sentiment"[500] or "compel coherence"[501] to it.

Synthesizing key facets of these seven points into a coherent four-step sequence, *Barnette's* language points to barring academic exercises that: 1) impose upon, coerce, or otherwise compel students; 2) to affirm, confess, embrace, declare, or profess; 3) beliefs, attitudes, ideologies, faiths, or sentiments; 4) that government officials – namely, public school authorities– consider "orthodox."[502] The Court in *Barnette* contrasted such illicit actions with permissibly compelling speech so that students "may be informed as to what [something] is or even what [something] means."[503] The Court also noted that "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government.'"[504] As addressed earlier,[505] this creates an apparent dichotomy between compelling expression to inform students of historical and governmental facts (permissible) and "a compulsion of students to declare a belief"[506] (impermissible).

Judge James Ho in *Oliver v. Arnold* added two more verboten actions – exercises intended not to "teach," but rather to "indoctrinate"[507] and to have students "endorse"[508] specific views – to *Barnette's* laundry list of confining terms. For Judge Ho, teaching (permissible) and indoctrination (impermissible) are counterposed. The concept of coercion noted above in *Barnette*[509] also was important for Judge Ho, who broadly asserted that the First Amendment "protects every student in classrooms across the country who has been coerced into expressing a particular position, whether on

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[497] *Id.* at 641.
[498] *Id.* at 631.
[499] *Id.* at 634.
[500] *Id.* at 640.
[501] *Id.* at 641.
[502] *Id.* at 642.
[503] *Id.* at 631.
[504] *Id.* (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).
[505] *Supra* notes 185–188 and accompanying text.
[506] *Barnette*, 319 U.S. at 631.
[507] Oliver v. Arnold, 19 F.4th 843, 845 (5th Cir. 2021) (Ho, J., concurring). *See supra* notes 286–292 and 334–338 and accompanying text (addressing Judge Ho's interpretation of what *Barnette* forbids).
[508] *Oliver*, 19 F.4th at 845.
[509] *Supra* note 507 and accompanying text.

matters of race, gender, religion, or politics."[510] This language is broad because it forbids simply "expressing" a position, not embracing, affirming, or adopting it.

The unanimous three-judge panel of the Fourth Circuit in *Wood v. Arnold*–the case described earlier involving the Five Pillars of Islam exercise[511]–indicated that the right not to speak would be violated only when an exercise forced a student "to profess or accept the tenets of Islam"[512] or "to profess any belief."[513] This emphasis on professing echoes *Barnette's* language questioning the constitutionality of forcing a person "publicly to profess any statement of belief."[514] Conversely, the Fourth Circuit in *Wood* suggested that student speech may be compelled "to demonstrate . . . understanding" of a subject.[515] In brief, there seemingly is a critical distinction between compelling the *profession or acceptance* of beliefs (impermissible) and compelling speech to demonstrate an *understanding* of beliefs (permissible).

Finally, and as discussed earlier,[516] the Fifth Circuit in *Brinsdon v. McAllen Independent School District* suggested that the compelled recitation in Spanish of the Mexican Pledge of Allegiance would have violated the First Amendment, per *Barnette's* logic, if there was "direct evidence"[517] that the teacher either sought "to inculcate beliefs by requiring the recital of the Mexican pledge"[518] or acted with "the purpose . . . to compel the speaker's affirmative belief"[519] or "to force orthodoxy."[520] A teacher's "motive or intent"[521] in administering an exercise thus is critical under this analysis, with a teacher's asserted "educational"[522] motive prevailing in the absence of direct evidence of an illicit motive to inculcate or otherwise have students affirm beliefs and orthodoxies. Implicit here too is a dichotomy between compelling speech regarding objective facts (permissible) and compelling

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510 *Oliver*, 19 F.4th at 847.

511 *See supra* Pt. IV, Sec. B (addressing *Wood*).

512 Wood v. Arnold, 915 F.3d 308, 319 (4th Cir. 2019).

513 *Id.* at 312.

514 W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 634 (1943). *See supra* note 499 and accompanying text (quoting this language from *Barnette*).

515 *Wood*, 915 F.3d at 319.

516 *See supra* Pt. IV, Sec. C (addressing *Brinsdon*).

517 Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 349 (4th Cir. 2017).

518 *Id.* The Fifth Circuit wrote that "[i]f there were such evidence in this case, we would reach the same result the Supreme Court did in *Barnette* . . ."

519 *Id.* at 350.

520 *Id.*

521 *Id.* at 349.

522 *Id.*

speech regarding beliefs and values (only permissible if done to educate about those beliefs; impermissible if done to inculcate them).

In sum, *Barnette* and the three recent federal appellate court cases examined in Part IV suggest–albeit in sometimes different terminology and to varying degrees–that students may bring successful right-not-to-speak claims targeting academic exercises that compel or coerce them to–variously phrased–affirm, confess, embrace, declare, profess, or endorse beliefs, attitudes, ideologies, faiths, and sentiments that reflect the government's view of what is accepted (i.e., of what is orthodox).[523] One definitional problem, of course, is whether the words affirm, confess, embrace, declare, profess, and endorse all mean the same thing or whether they carry different shades of legal significance, with some terms suggesting or representing more constitutionally egregious actions than others.[524] Similarly, are beliefs, attitudes, ideologies, faiths, and sentiments simply synonyms for the same thing that schools may not compel or are they distinct concepts?[525] The Supreme Court would need to clarify this muddle of meaning were it to tackle future cases similar to *Arnold*, *Wood,* and *Brinsdon*.

Additionally, the Court would need to articulate evidentiary factors that lower courts should use when judging if an assignment impermissibly compelled a student to embrace or affirm a government-sanctioned ideology or belief.[526] In other words, how should lower courts discern if an assignment innocently taught a student to *learn* and *understand* an ideology or, more perniciously, whether it made a student *affirm* or *embrace* a belief in that ideology?[527] What indicators, beyond a teacher's likely self-serving declaration of a benign learning-and-understanding purpose, might courts examine?

The Supreme Court might choose to further circumscribe this right not to speak to only situations in which the subject matter being compelled is about what it dubbed in *Barnette* as a "credo of nationalism"[528] or "any patriotic creed."[529] The *Barnette* Court's "fixed star in our constitutional constellation"[530] dictum, however, was not confined only to such topics, but stretched more broadly, sweeping up "politics, nationalism, religion, or other

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[523] *See supra* notes 494–522 and accompanying text (sweeping up language from which this definition is synthesized).

[524] These problems are referenced later in Pt. V, Sec. B, subsec. 4.

[525] These problems are referenced later in Pt. V, Sec. B, subsec. 4.

[526] These problems are referenced later in Pt. V, Sec. B, subsec. 4.

[527] These problems are referenced later in Pt. V, Sec. B, subsec. 4.

[528] W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 634 (1943).

[529] *Id.*

[530] *Id.* at 642.

matters of opinion."[531] Indeed, the Court stressed early on that it was evaluating government actions affecting "matters of opinion and political attitude."[532] Thus, an emergent First Amendment right not to speak on academic exercises is not inevitably limited to expression regarding nationalism and patriotism but might stretch to all matters of opinion.

Rather than leaning on *Barnette's* language for crafting the contours of a student's right against compelled expression, the Court instead might turn to its more recent decision in *Hazelwood School District v. Kuhlmeier*.[533] The Court there held that educators may regulate student speech that occurs "as part of the school curriculum"[534] or that "bear[s] the imprimatur of the school"[535] if their reasons "are reasonably related to legitimate pedagogical concerns."[536] Borrowing from the latter part of that language, the Court might define a student's First Amendment right not to speak during an academic exercise this way:

> *The First Amendment right not to speak safeguards students from expressing content during academic exercises only when school officials cannot reasonably provide a legitimate pedagogical concern for compelling it.*

Put differently, school officials may compel student speech during academic exercises unless they fail to prove the compelled speech was reasonably related to serving a legitimate pedagogical concern.

This articulation of the scope of a student's First Amendment right not to speak, however, expansively defers to school authorities, as does the *Kuhlmeier* test itself.[537] As Dean Erwin Chemerinsky explains, the notion of being reasonably related to a legitimate concern "is the classic phrasing of the rational basis review."[538] To wit, applying this test in student right-not-to-speak cases would mean that school officials do not need to prove that they possess an important educational reason to compel a student to express

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[531] *Id.*

[532] *Id.* at 636.

[533] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). *See supra* Pt. II, Sec. C (addressing *Kuhlmeier*).

[534] *Kuhlmeier*, 484 U.S. at 271.

[535] *Id.*

[536] *Id.* at 273.

[537] *See supra* notes 105–111 and accompanying text (addressing *Kuhlmeier's* deferential nature); *see also* Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1271, 1288 (1991) (noting *Kuhlmeier's* "extensive deference to school authorities").

[538] Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 294 (2013).

an ideological or political view, but merely a "legitimate" reason. Requiring educators to prove at least an important educational interest in compelling such views jibes with the intermediate scrutiny standard of judicial review, thereby adding more muscle to students' First Amendment right not to speak in public schools.[539] In short, modifying the *Kuhlmeier* test in this manner–requiring educators to demonstrate a higher level of pedagogical interest than just a legitimate one–would strike a better balance between educators' instructional interests and students' constitutional right against compelled expression.[540]

Additionally, under an unmodified *Kuhlmeier* approach, school officials only would need to establish that the impetus for compelling speech was "reasonably" related to a legitimate pedagogical end, not that it was directly related to it. Tightening up the degree of the relationship required for a compelled-speech exercise to pass constitutional muster–mandating that educators prove a direct relationship between an exercise and a pedagogical concern, rather than merely demonstrating a reasonable nexus–would add teeth to students' First Amendment interests. Viewing this suggested modification of *Kuhlmeier* along with the potential alteration described in the paragraph immediately above, the Court might define a student's First Amendment right not to speak during academic exercises as follows:

> *The First Amendment right not to speak safeguards students from expressing content during academic exercises only when school officials cannot demonstrate that the exercises are directly related to serving an important pedagogical concern.*[541]

This modified *Kuhlmeier* test shifts the focus away from a *Barnette*-like methodology – one focusing on the act a student does during an exercise (i.e., Is the student affirming, confessing, embracing, declaring, professing, or endorsing beliefs, attitudes, ideologies, faiths, and sentiments endorsed by

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[539] *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 819 (2007) (noting that a "common characteristic of all of the various intermediate scrutiny tests announced by the Supreme Court is a requirement that a reviewing court examine…the strength of the (*important/substantial/significant*) governmental interest asserted in support of the regulation") (emphasis added).

[540] Under the Court's strict scrutiny test, the government must establish an interest even higher than an important one to justify a content-based statute–namely, a compelling interest. *See* Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015) (noting the "compelling interest" requirement under strict scrutiny).

[541] This proposed test for deciding whether an academic exercise violates a public school student's First Amendment right not to speak is addressed again in Pt. V, Sec. B, subsec. 4 and in the Article's Conclusion in Pt. VI.

the government?) – to whether an important pedagogical concern is directly served by compelling the student's expression.

Yet another problem with applying an unmodified school-friendly, *Kuhlmeier*-based test in right-not-to-speak cases would arise when school officials prove that a legitimate pedagogical concern exists for compelling speech but a student makes an equally forceful argument that the officials actually may have compelled speech for a non-pedagogical motive. In other words, how should a case be resolved when a malevolent, non-pedagogical motive for giving a compelled-speech exercise exists but school officials also demonstrate the presence of a legitimate pedagogical concern? Under traditional rational basis review methodology, school officials would prevail.[542]

In summary, problems arise with borrowing language from both *Barnette* and *Kuhlmeier* to establish the boundaries of a qualified First Amendment right for students not to be compelled to speak during academic exercises. This Article ultimately concludes that a modified version of the *Kuhlmeier* test proposed above offers a suitable standard for deciding when such tasks violate a student's right against compelled expression, should courts embrace such a qualified First Amendment right.[543]

3. Replacing Deference to Educator Expertise with Judicial Judgment

Another problem with granting students a First Amendment right not to speak during academic exercises is that it conflicts with the wide deference the Supreme Court generally affords educators, replacing it with a regime of judicial oversight.[544] As addressed earlier, the Court in *Fraser* deferred to school officials' judgments regarding the suitability of modes of on-campus expression.[545] Chief Justice Warren Burger reasoned there that determining "what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[546] Similarly, *Kuhlmeier's* test regarding educators' pedagogical decisions to squelch

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[542] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 696 (6th ed. 2019) ("In other words, a law will be upheld so long as the government's lawyer can identify some conceivable legitimate purpose, regardless of whether that purpose was the government's actual motivation.").

[543] *See infra* notes 618–622 and accompanying text (addressing the proposal for a modified version of the *Kuhlmeier* test).

[544] *See, e.g.,* Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147, 1162 (2018) ("By increasingly deferring to school officials' pedagogical judgments, the Court has created a de facto, albeit inchoate, category of lower-level speech that had not previously been defined in judicial or scholarly literature.").

[545] *See supra* notes 98–100 and accompanying text (addressing deference in *Fraser*).

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

student speech during "activities [that] may fairly be characterized as part of the school curriculum"[547] is exceedingly deferential.[548] As one First Amendment attorney writes, the "resulting impenetrability of *Hazelwood* deference leaves students defenseless against even the most egregious abuse of school authority."[549] Furthermore, the Court in *Morse* deferred to the disciplinary decisions of educators–not students–regarding the disputed meaning of a student's message.[550] Per *Morse*, as long as a school official's interpretation of meaning is reasonable, it prevails.[551] One scholar contends that *Morse* reflects "a general movement toward according more deference to school officials."[552] Finally, such deference was evident in the Fifth Circuit's 2017 decision in *Brinsdon v. McAllen Independent School District* addressed earlier.[553] Judge Southwick wrote there that "[s]tudents . . . generally do not have a right to reject curricular choices as these decisions are left to the sound discretion of instructors."[554]

Allowing students to contest academic exercises on right-not-to-speak grounds, however, erodes this deference. It allows judges to decide whether curricular drills serve permissible pedagogical purposes when compelling expression. As noted earlier, Judge Elrod in *Oliver* was troubled by this notion, questioning the expertise judges possess in such matters.[555] She contended that the First Amendment "certainly gives [judges] no license to authorize a damages award against teachers for assignments they deem insufficiently 'pedagogical.' That is because it is generally well-established that teachers have wide latitude to, well, teach."[556] Similarly, Judge Duncan queried in *Oliver* whether "we really want federal judges and juries deciding whether class assignments are 'truly pedagogical'? If I wanted to do that, I

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

[548] *See supra* notes 105–111 and accompanying text (addressing deference in *Kuhlmeier*).

[549] Frank D. LoMonte, *Censorship Makes the School Look Bad: Why Courts and Educators Must Embrace the "Passionate Conversation,"* 65 WASH. U. J. L. & POL'Y 91, 111 (2021).

[550] *See supra* notes 145–153 and accompanying text (addressing deference in *Morse*).

[551] Scott A. Moss, *The Overhyped Path From Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions–for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1431 (2011) ("Where *Tinker* required the school to prove actual disruption, *Morse* required it to prove only the 'reasonable[ness]' of viewing the speech as 'promoting' some evil–regardless of whether the evil (drug use) occurred or was likely and regardless of whether students actually viewed the speech as promoting the evil.").

[552] Caroline B. Newcombe, *Morse v. Frederick One Year Later: New Limitations on Student Speech and the "Columbine Factor"*, 42 SUFFOLK U. L. REV. 427, 435 (2009).

[553] Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338 (5th Cir. 2017); *see supra* Pt. IV, Sec. C (addressing *Brinsdon*).

[554] *Brinsdon*, 863 F.3d at 350.

[555] *See supra* notes 301-02 (noting Judge Elrod's concerns with judges deciding the merits of academic exercises).

[556] Oliver v. Arnold, 19 F.4th 843, 857–58 (5th Cir. 2021) (Elrod, J., dissenting).

would have run for school board."[557] In brief, a key problem is whether judges are qualified to make curricular decisions.

Granting students a First Amendment right not to speak that extends past *Barnette* to encompass academic exercises compelling the expression of ideological and political views allows judges, who may lack training and qualifications in elementary and secondary education, to second-guess the pedagogical merit of classroom exercises.[558] As Justice Ruth Bader Ginsburg observed in a law school case, "[c]ognizant that judges lack the on-the-ground expertise and experience of school administrators . . . we have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'"[559] One lower court interpreted Justice Ginsburg's sentiment as standing for the principle that "educators, not federal judges, are the ones that choose among pedagogical approaches."[560] Viewed collectively, the logic of Judges Elrod and Duncan, along with that of Justice Ginsburg, militates either against extending to students past *Barnette's* factual boundaries a First Amendment right not to speak or, at the very least, expanding such a right cautiously, perhaps with a built-in mechanism that ensures educators' pedagogical decisions are rarely treaded upon when compelling expression.

4. Playing Guessing Games About Educators' True Motives and Purposes

As described earlier, disagreement exists regarding whether a teacher's motive or intent underlying an academic exercise should determine if a student's right against compelled expression was violated and whether a teacher enjoys qualified immunity.[561] To wit, Judge Elrod wrote in dissent in *Oliver* that "motive is irrelevant" when "determining whether speech was compelled in violation of the First Amendment."[562] Judge Duncan, in a

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[557] *Id.* at 862 (Duncan, J., dissenting).

[558] *Cf.* Pompeo v. Bd. of Regents Univ. of New Mexico, 852 F.3d 973, 985 n.2 (10th Cir. 2017) ("Courts are in poor position to second guess every teacher's conclusion that speech used in an assignment was inflammatory rather than merely controversial, or that a student was disruptive rather than simply passionate.").

[559] Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661, 686 (2010).

[560] Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1378 (S.D. Ga. 2011), *aff'd*, 664 F.3d 865 (11th Cir. 2011).

[561] *See supra* notes 264–269, 319, and 321–326 (addressing Judge Duncan's concerns with considering a teacher's motive), 298–299 and 320–321 (addressing Judge Elrod's stance against the relevance of motive), and 332 (addressing Judge Oldham's concerns with analyzing motives).

[562] Oliver v. Arnold, 19 F.4th 843, 857 (5th Cir. 2021) (Elrod, J., dissenting).

separate dissent, concurred with her.[563] In brief, they contend that courts should not adopt an "improper-motive path" when deciding if compelled-speech assignments are constitutional.[564]

Rather than concentrating on a teacher's subjective intent, they believe the focus must be on "the student's compelled act"[565] and, specifically, on whether it is objectively reasonable to conclude that the student was required to profess or accept beliefs, tenets, or views with which they disagreed.[566] That approach, however, is fraught with the definitional difficulties and problems of distinction described earlier.[567]

In contrast to an act-centric methodology, the Fifth Circuit in *Brinsdon* focused on the professed purpose of teacher Reyna Santos in giving the Mexican Pledge of Allegiance assignment.[568] Yet, the appellate court in *Brinsdon* readily acknowledged that "direct evidence of motive or intent can be hard to come by."[569] In other words, ferreting out an instructor's unconstitutional motive in compelling speech may be difficult for students to prove, thus imperiling their First Amendment interests. As Judge Oldham bluntly opined when dissenting from the denial of the petition for a rehearing en banc in *Oliver*, where the majority of a three-judge panel earlier also had focused on motive,[570] an "'impure motive' test reaffirms none of our Nation's founding principles; it undermines them."[571]

Adopting some variation of *Kuhlmeier's* test–a standard that might hinge liability in compelled-speech cases on whether an assignment reasonably or

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[563] *See id.* at 860 (Duncan, J., dissenting) (writing that "the panel is wrong that the teacher's 'motivations' matter").

[564] *Id.* at 857 (Elrod, J., dissenting).

[565] *Id.*

[566] *Id.*

[567] *See supra* notes 524–527 and accompanying text.

[568] The Fifth Circuit in *Brinsdon* explained:

> The difference with this pledge assignment, the defendants insist, is that Santos was not seeking to inculcate beliefs by requiring the recital of the Mexican pledge. If there were such evidence in this case, we would reach the same result the Supreme Court did in *Barnette* and *Wooley*. There is, though, no direct evidence here of a *purpose* to foster Mexican nationalism. Instead, the only evidence is that students were, as part of a cultural and educational exercise, to recite a pledge of loyalty to a foreign flag and country. Santos testified and the class syllabus stated that the pledge was educational . . . . Here . . . only speculation might support that either defendant was trying to motivate the students to become loyal to Mexico.

Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 349 (5th Cir. 2017) (emphasis added).

[569] *Id.*

[570] *See* Oliver v. Arnold, 3 F.4th 152, 162–63 (5th Cir. 2021) (observing that "because the district court found that *Arnold's motives* are genuinely disputed, we must presume here that Arnold was requiring his students to make precisely the sort of written oath of allegiance that the dissent acknowledges would be impermissible") (emphasis added).

[571] Oliver v. Arnold, 19 F.4th 843, 863 (5th Cir. 2021) (Oldham, J., dissenting).

directly served a legitimate or an important pedagogical concern–seemingly imports an intent/motive element into the constitutional inquiry.[572] That seemingly is the case to the extent judges treat a teacher's "concern" or "purpose" in giving an assignment as equivalent to a teacher's "intent" or "motive" in administering it.[573]

Possible workarounds, however, exist from both an approach that focuses on a teacher's subjective intent in giving an assignment (the *Brinsdon* methodology) and one that pivots solely on examining the act being compelled (the tack embraced by Judges Elrod and Duncan in *Oliver*).[574] The alternatives, which incorporate language from the *Kuhlmeier* test, are for courts to decide whether it is objectively reasonable to conclude that an exercise either reasonably or directly served either a legitimate or an important pedagogical concern, *regardless* of whether that concern–that pedagogical interest–was actually what motivated a teacher to give it. The more stringent variation of this test would safeguard a school against a student's compelled-speech claim only when a school could convince a court that it is objectively reasonable to discern that an exercise directly (rather than simply "reasonably") served an important (rather than just a "legitimate") pedagogical concern.[575] Schools, in other words, would need to demonstrate that: 1) a pedagogical concern was served by a compelled-speech exercise; 2) the pedagogical concern served was important; and 3) the important pedagogical concern was directly–not reasonably or tangentially–served by the exercise.[576] This approach allows courts to avoid going down the rabbit hole of playing guessing games about whether a teacher had an "impure motive"[577] when administering an exercise.

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[572] *See supra* notes 533–541 and accompanying text (addressing possible variations of the *Kuhlmeier* test that might be applied in compelled-speech cases).

[573] The Supreme Court in *Kuhlmeier* used the words "concern" and "purpose" interchangeably in defining the test articulated in that case. It wrote 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 related to legitimate pedagogical *concerns*." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (emphasis added). It then clarified that judicial intervention to protect a student's First Amendment right of free speech is necessary "only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational *purpose* . . ." *Id.* (emphasis added).

[574] *See supra* notes 299 and 321 and accompanying text (addressing the approach of Judges Elrod and Duncan).

[575] This facet of the proposed test for deciding whether an academic exercise violates a public school student's First Amendment right not to speak is addressed again in the Article's Conclusion in Part VI.

[576] This facet of the proposed test for deciding whether an academic exercise violates a public school student's First Amendment right not to speak is addressed again in the Article's Conclusion in Part VI.

[577] Oliver v. Arnold, 19 F.4th 843, 855 (5th Cir. 2021) (Walker, J., dissenting).

Additionally and crucially, a court adopting this methodology would, in *Barnette*-like fashion, necessarily preclude forbidden interests in promoting patriotism and nationalism from the realm of important pedagogical concerns.[578] In other words, such a test would meld facets of *Kuhlmeier* with *Barnette*.

5. Imposing Additional Burdens on Teachers and Detracting from the Quality of Instruction for Non-Objecting Students

When Brenda Brinsdon objected to reciting in Spanish the Mexican Pledge of Allegiance, she was given an alternative exercise to complete.[579] Her teacher then needed to (and did, in fact) grade that alternative assignment.[580] Presumably, it took additional time and effort on the part of Brindson's teacher to create, administer, and grade the substitute assignment for her.

Now, consider the ramifications for both teachers and non-objecting students if multiple students such as Brinsdon, who are in the same class or same school, can successfully assert First Amendment-based right-not-to-speak claims and opt out of normally assigned academic exercises. Both teachers and non-objecting students face negative consequences for conferring such a constitutional right on objecting students.

Specifically, teachers would have two options. One is to work additional hours on alternative assignments for students such as Brinsdon – to put in extra time and effort beyond that expended on creating, administering, and grading regular assignments for non-objecting students. This option might be considered the *extra workload option*. Teachers shoulder the additional time-and-effort costs under this option to comply with the First Amendment rights of objecting students while simultaneously serving as usual, and without detracting from, the educational interests of non-objecting students.

The second option–for teachers who do *not* desire to work more hours, at least not without receiving commensurate financial compensation for their labors–is for them to spend less time on creating, administering, and grading regular assignments for non-objecting students and to replace that saved time by spending it on alternative assignments. This might be called the *zero-sum workload option*. Under it, if a teacher spends one hour on an alternative assignment, then the teacher also spends one less hour on the regular

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[578] *See supra* notes 34–39 and 179–181 and accompanying text (addressing the Supreme Court's concern with these purposes underlying the compelled flag salute and pledge of allegiance in *Barnette*).

[579] Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 344 (5th Cir. 2017).

[580] *Id.* (noting that Brenda Brinsdon received a "C" grade).

assignment. Time is simply swapped out, with the total number of hours a teacher works remaining constant.

Teachers do not lose anything under the zero-sum workload option. Non-objecting students, however, are disadvantaged because teachers carve away time that normally would be spent on their assignments and redirect it to comply with the First Amendment rights of objecting students. As suggested earlier, one thus might reasonably consider–in borrowing from *Tinker's* test–whether a series of successful compelled-speech challenges to academic assignments would materially and substantially disrupt the educational operations of the school by detracting from the learning of non-objecting students.[581]

Giving objecting students zeros or failing grades, rather than substitute assignments, for not completing regularly assigned exercises is off the board. That is because it likely amounts to unconstitutional retaliation against the objecting students for exercising their First Amendment right not to speak, thereby handing objecting students potentially viable First Amendment retaliation claims under 18 U.S.C. § 1983.[582] Indeed, the Fifth Circuit in December 2021 dismissed teacher Benjie Arnold's appeal of a district court's decision that left it for a jury to decide whether Arnold had unconstitutionally retaliated against Mari Leigh Oliver for refusing to transcribe the Pledge of Allegiance.[583] Critically, there was a dispute in that case regarding "whether Arnold gave Oliver a zero for failing to complete the pledge-writing assignment."[584]

What about simply giving objecting students a penalty-free pass from completing an alternative assignment? In other words, what about allowing objecting students to opt out of *both* offensive compelled-speech assignments and substitute exercises? This tack imposes no additional workload on teachers because they do not need to create, administer, and grade alternative tasks. Yet, this approach seemingly eviscerates objecting students' education; they pass through the public education system without needing to complete anything in certain facets of the curriculum.

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[581] *Supra* notes 70–71 and accompanying text.

[582] *See* 18 U.S.C. § 1983 (2022) (creating a cause of action for civil liability against anyone "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

[583] *See* Oliver v. Arnold, 3 F.4th 152, 162 (5th Cir. 2021) (reasoning that "assum[ing] for purposes of this appeal that Arnold gave the Pledge assignment for impermissible purposes, rendering Oliver's refusal protected activity; that Arnold singled Oliver out and treated her differently than other students; and that these adverse actions were motivated by hostility to Oliver's refusal to complete the Pledge assignment").

[584] Oliver v. Klein Indep. Sch. Dist., 448 F. Supp. 3d 673, 698–99 (S.D. Tex. 2020).

In sum, there are possible drawbacks for teachers, non-objecting students, and, as the scenario immediately above suggests, even objecting students in creating a First Amendment right not to speak that stretches past *Barnette*.

6. Ignoring Extant Remedies of Elections, Legislation and Changing School Districts

One argument against recognizing right-not-to-speak challenges is that the proper remedy to objectionable exercises resides not in First Amendment-based litigation, but rather in elections for local school boards (i.e., boards of education) and state education boards,[585] as well as via legislation.[586] As the U.S. Court of Appeals for the First Circuit wrote in a rebuffing a Free Exercise Clause challenge to the use of particular books, "If the school system has been insufficiently sensitive to . . . religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state. . . . They are not entitled to a federal judicial remedy under the U.S. Constitution."[587] Indeed, Judge Elrod emphasized in her *Oliver* dissent that "[p]arents may see to it that their children avoid such indoctrination–not in a federal courthouse, but in a local school board meeting or at the ballot box."[588] Justice Thomas, as noted earlier, made a similar point in 2007.[589]

The Ninth Circuit examined similar considerations in 2006 in *Fields v. Palmdale School District*.[590] The parents in *Fields* objected to questions about sex on a questionnaire given to schoolchildren, claiming the queries violated their fundamental right to raise their children in accord with their personal and religious values.[591] In rejecting this argument, the Ninth Circuit reasoned that "[w]hat information schools provide is a matter for the school

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[585] *See* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 955 (2017) ("[A]ll state constitutions decree that the state provide education. To implement this mandate, the states install a chief state school officer, and forty-seven states also empower a state board of education. The chief school officer and state board members are appointed by the governor or elected by the citizens.").

[586] *Cf.* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 173 (1996) ("The governance structure has rendered public education highly political and accountable to the local electorate. While ultimate responsibility for education resides at the state level, the daily operation of schools is delegated to local communities with funding primarily through local property taxes.").

[587] Parker v. Hurley, 514 F.3d 87, 107 (1st Cir. 2008).

[588] Oliver v. Arnold, 19 F.4th 843, 858 (2021) (Elrod, J., dissenting).

[589] *See supra* notes 329–330 (regarding Justice Thomas's sentiments in *Morse v. Frederick*, 551 U.S. 393 (2007)).

[590] Fields v. Palmdale Sch. Dist., 447 F.3d 1187 (9th Cir. 2006).

[591] *Id.* at 1188.

boards, not the courts, to decide."[592] It added that "our decision does not affect the rights of parents to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation."[593] In other words, objecting parents might make their views known at school board meetings or elect a different board.[594]

Other alternatives to First Amendment-based lawsuits are for parents to change school districts, enroll their children in private schools, or homeschool them.[595] As Justice Thomas wrote in *Morse v. Frederick*, parents who object to the rules at their children's current public schools "can send their children to private schools or homeschool them; or they can simply move."[596] Judge Elrod concurred with this sentiment in *Oliver*.[597]

A recent example of a legislative response comes from Florida which, as noted earlier, adopted a law in 2022 that bans teaching the supposed tenets of critical race theory.[598] Other states have considered and/or adopted similar measures.[599] Tennessee, for example, bans teaching that "[a]n individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex."[600] Whether or not

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[592] *Id.* at 1190.

[593] *Id.*

[594] *Cf.* Kathleen Conn, *Parents' Rights to Direct Their Children's Education and Sex Surveys*, 38 J. EDUC. L. 139, 150 (2009) ("Parents who object to school board actions or school district policies may use the political process to effectuate change.").

[595] States cannot require that parents send their children to public schools. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."). The federal government reported in 2016 that there were 1,690,000 students being homeschooled, with a student being considered homeschooled "if their parents reported them being schooled at home instead of at a public or private school, if their enrollment in public or private schools did not exceed 25 hours a week, and if they were not being homeschooled only due to a temporary illness." KE WANG ET AL., SCHOOL CHOICE IN THE UNITED STATES 32 (2019), https://nces.ed.gov/pubs2019/2019106.pdf.

[596] Morse v. Frederick, 551 U.S. 393, 420 (2007) (Thomas, J., concurring).

[597] *See* Oliver v. Arnold, 19 F.4th 843, 858 (5th Cir. 2021) (Elrod, J., dissenting) ("And, ultimately, parents retain the power to choose where their children attend school.").

[598] *Supra* note 430 and 432–433 and accompanying text.

[599] *See* Christopher F. Rufo, *Battle Over Critical Race Theory*, WALL ST. J. (June 28, 2021), https://www.wsj.com/articles/battle-over-critical-race-theory-11624810791. ("In recent months, lawmakers in 24 states have introduced, and six have enacted, legislation banning public schools from promoting critical race theory's core concepts, including race essentialism, collective guilt and racial superiority.").

[600] *See* TENN. CODE ANN. § 49-6-1019 (2021) (banning the teaching of fourteen principles, including, in addition to the one quoted in the above-the-line sentence to which this footnote corresponds, that "[a]n individual should be discriminated against or receive adverse treatment because of the individual's race or sex" and "[a]n individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex"); *see also* Scott Calvert, *In Tennessee*

these are actual tenets of CRT is another matter and beyond the scope of this Article.[601]

In short, before courts extend to students a First Amendment right not to speak shielding them from being compelled to voice objectionable ideological or political views, courts should consider whether expanding the First Amendment in this manner is even necessary. Alternative avenues of redress certainly exist. This is not to say that they provide perfect solutions, as problems exist with some of these options. For example, when it comes to electing new school boards, "[l]ow voter turnout and lack of voter engagement in school board elections suggest that modern bureaucratic school governance systems lack both meaningful participation and deliberation by the general public, especially minority groups."[602] Furthermore, it seems intuitive that not all parents can afford to send their children to private schools or to move to another school district that might be in situated in a more expensive area and geographically distant from a parent or guardian's place of employment.

7. Rising Litigation Costs for School Districts

A seventh reason against expanding the First Amendment right not to speak in public school settings is fiscal: it might produce a swell of expensive lawsuits filed by agitated parents and their children, thereby depleting finite monetary resources for educating students. This was a concern of Judge Duncan in his *Oliver* dissent in the Fifth Circuit's three-judge panel decision.[603] Specifically, he worried that the majority's approach of hinging right-not-to-speak liability on whether a teacher had an improper motive for giving an exercise "would make countless classroom assignments fodder for federal lawsuits whenever a student claims offense."[604] As noted earlier, he forecast a wave of litigation caused by compelling students to recite portions

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Law on Teaching About Race, Supporters and Opponents See Vindication, WALL ST. J. (Apr. 11, 2022), https://www.wsj.com/articles/tennessee-restricted-teaching-about-race-one-year-later-law-sits-mostly-unused-11649669400. ("Tennessee's law prohibits teaching 14 concepts that the legislature deemed divisive, including that either Tennessee or the U.S. 'is fundamentally or irredeemably racist or sexist.' Also barred is instruction that promotes the idea that anyone should feel discomfort, guilt or anguish solely because of their race or sex.").

[601] Bridges, *supra* note 405, at 786 (addressing "misdescriptions of CRT," and contending that "no critical race theorist ever" uttered the belief that "America is an inherently racist/evil country").

[602] Tara Raam, *Charter School Jurisprudence and the Democratic Ideal*, 50 COLUM. J.L. & SOC. PROBS. 1, 22 (2016).

[603] Oliver v. Arnold, 3 F.4th 152, 164 (5th Cir. 2021) (Duncan, J., dissenting).

[604] *Id.*

of documents such as the Declaration of Independence and Dr. Martin Luther King, Jr.'s "I Have a Dream" speech.[605]

Whether such a floodgates-of-litigation argument would resonate with the Supreme Court is uncertain, but the Court recently has considered that line of logic multiple times.[606] The floodgates argument "asserts that a proposed rule, if adopted, will inundate the court with lawsuits"[607] or, as one professor rather wryly wrote, would make a court conclude that it "cannot give relief . . . because then everybody and his brother will sue."[608] Although perhaps doubtful that a floodgates argument standing alone would prevent the Supreme Court from expanding *Barnette* to apply to academic exercises involving compelled ideological or political speech, it might simply add more heft to the overall argument when considered collectively with the other reasons identified in this section.

In summary, this Part identified multiple reasons both for and against expanding the First Amendment right not to speak in public schools. In the process, it considered limitations that might be placed on such a qualified right, as well as potential standards for determining when it has been violated.

VI. CONCLUSION

Surely public schools may compel students to engage in some forms of expression without raising First Amendment concerns. Absent that authority, students would not need to: 1) answer questions when called upon, 2) complete routine homework assignments, or 3) demonstrate knowledge on exams.[609] In short, teachers' ability to educate would be eviscerated.

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[605] *See supra* notes 266–269 and accompanying text (addressing Judge Duncan's concerns about litigation).

[606] Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1076 (2013) (writing that "[s]ince 2000, the justices have considered floodgates arguments in nearly thirty cases, with fourteen coming from the last few years alone," and noting "the Court's consistent–and even increasing–discussion of floodgates arguments").

[607] Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 73 (2001).

[608] Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727, 754 (1999).

[609] *See* Oliver v. Arnold, 19 F.4th 843, 845 (5th Cir. 2021) (Ho, J., concurring) ("Teachers may obviously test students to confirm their knowledge of various topics."); Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 350 (5th Cir. 2017) (calling it "clearly established that a school may compel some speech. Otherwise, a student who refuses to respond in class or do homework would not suffer any consequences").

Yet, precisely how far schools may go in compelling student speech in academic exercises is unclear.[610] The fracturing of the Fifth Circuit's judges twice in 2021 in *Oliver v. Arnold* exposed that uncertainty.[611] Furthermore, the Supreme Court's aging decision in *West Virginia State Board of Education v. Barnette*, which addressed the compelled salute of the American flag while pledging allegiance to it to affirm patriotism, is factually far afield from typical academic exercises such as writing essays and taking exams.[612] The *Barnette* Court indicated merely that students could be: 1) compelled to study the nation's history and structure of government, even if it might inspire patriotism, and 2) "made acquainted with the flag salute so that they may be informed as to what it is or even what it means."[613]

This Article explored multiple benefits and drawbacks of giving students a qualified First Amendment right not to speak that goes beyond *Barnette* to apply to academic tasks that require them to express ideological or political views that conflict with their own.[614] If the Supreme Court were to recognize such a right, then placing parameters on it is essential.[615] One approach, addressed earlier and borrowing from *Barnette*, is for the Court to declare that students may successfully bring right-not-to-speak lawsuits when academic exercises compel or coerce them to–variously put–affirm, confess, embrace, declare, profess, or endorse beliefs, attitudes, ideologies, faiths, and sentiments that reflect the government's view of what is accepted (i.e., of what is orthodox).[616] The Article described problems with this methodology, which focuses on the acts students are compelled to perform.[617]

Another approach–also described earlier and which the authors favor–draws from the Court's *Kuhlmeier* standard but modifies it to better balance educators' and students' interests.[618] Under this alternative standard, the

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[610] *See* C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 177 (3rd Cir. 2005) (asserting that "it seems clear that a school may compel some speech for" legitimate pedagogical purposes, such as "compel[ling] a student to write a paper on a particular topic even if the student would prefer to write on a different topic," but adding that "[h]ow far a school may go in compelling speech for what it views as legitimate pedagogical purposes is a difficult and unsettled question").

[611] *See supra* notes 3–4 and accompanying text (addressing the division of the Fifth Circuit judges in both the three-judge panel ruling and the petition for a rehearing en banc decision).

[612] *See supra* notes 30–39, 176–188 and 218–219 (addressing *Barnette*).

[613] W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 631 (1943).

[614] *Supra* Pt. V.

[615] *Supra* notes 487–488.

[616] *Supra* note 523 and accompanying text.

[617] *Supra* notes 524–527 and accompanying text.

[618] *Supra* note 541 and accompanying text. This modified and more stringent version of the *Kuhlmeier* standard proposed here provides a better balance because of the impressionability and vulnerability of minors to teachers' influences regarding beliefs addressed in Part V, Section A, Subsection 3. An unmodified version of the *Kuhlmeier* test is too deferential to educators' judgments in light of these impressionability and vulnerability concerns.

Court would hold that the First Amendment safeguards students from expressing content during academic exercises only when school officials cannot demonstrate that the exercises are directly related to serving an important pedagogical concern.[619] This standard demands that schools prove that: 1) a pedagogical concern was served by a compelled-speech exercise; 2) the pedagogical concern served was important, not merely legitimate; and 3) the important pedagogical concern was directly–not reasonably or tangentially–served by the exercise.[620] To avoid the pitfalls of trying to discern a teacher's subjective motive in giving an exercise, the Article suggested that courts focus on whether it is objectively reasonable to conclude that an exercise directly served an important pedagogical concern, *regardless* of whether that concern actually motivated a teacher to give it.[621] The Article added that under this approach, the Court would, in accord with *Barnette's* reasoning, preclude interests in promoting patriotism and nationalism from the domain of important pedagogical concerns.[622] This alternative standard thus blends a modified, more rigorous version of *Kuhlmeier's* test with concerns that animated *Barnette*.

Even if the Court rejects this methodology, it must soon establish clear rights and rules for this emerging niche of First Amendment law to ward off the problems wrought by qualified immunity described earlier.[623] The trio of recent federal court cases analyzed in this Article – *Oliver v. Arnold*, *Wood v. Arnold,* and *Brinsdon v. McAllen Independent School District* – along with today's contentious fights over the teaching of critical race theory, add to this urgency.

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[619] *Supra* note 541 and accompanying text.

[620] *Supra* note 576 and accompanying text.

[621] *Supra* note 576 and accompanying text.

[622] *See supra* notes 34–39 and 179–181 and accompanying text (addressing the Supreme Court's concern with these purposes underlying the compelled flag salute and pledge of allegiance in *Barnette*).

[623] *See supra* notes 41–48 and accompanying text (addressing qualified immunity issues).