

1-1-2013

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Recommended Citation

Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 *Wake Forest L. Rev.* 211 (2013).

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THE GOVERNMENT SPEECH DOCTRINE AND SPEECH IN SCHOOLS

*Kristi L. Bowman**

INTRODUCTION

In 1969, the Supreme Court memorably declared in *Tinker v. Des Moines Independent Community School District*¹ that students do not “shed their constitutional rights inside the schoolhouse gates.”² The right in question was free speech; the students claiming the benefit of that right were wearing black armbands to protest the Vietnam War.³ *Tinker* has been lauded as the “highwater mark” of students’ speech rights,⁴ and, in the most obvious way, it is—none of the Court’s post-*Tinker* student speech decisions have protected students’ rights as broadly as *Tinker*. However, *Tinker* also released a sort of Noahic Flood: Prior to *Tinker*, the Court had not recognized that students had any free speech rights in schools other than a right to not participate in compelled political speech, such as a daily, mandatory recitation of the Pledge of Allegiance.⁵ When the Court decided *Tinker*, only a handful of lower courts were even exploring the existence of

* Professor of Law, Michigan State University College of Law. Earlier iterations of this Article and its component Parts were presented at Wake Forest University School of Law’s excellent conference “Privatizing the Public Good: Emerging Trends in K-16 Education,” Michigan State University College of Law, Southern Methodist University Dedman School of Law, the Law and Society Association annual meeting, and the Education Law Association annual meeting. The Article benefited greatly from the thoughtful comments of participants in those settings as well as from Joseph Blocher, Caroline Mala Corbin, Catherine Yongsoo Kim, Renee Newman Knake, Michael A. Lawrence, Helen Norton, Frank S. Ravitch, Kevin Saunders, William Thro, Emily Gold Waldman, and Arthur Wrobel; from the editorial assistance of the *Wake Forest Law Review* staff; and from the helpful research assistance of Todd Fraley, Sheila Terry, and Patrick O’Brien.

1. 393 U.S. 503 (1969).
2. *Id.* at 506.
3. *Id.* at 504.
4. *Broussard v. Sch. Bd.*, 801 F. Supp. 1526, 1534 (E.D. Va. 1992).
5. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); Kristi L. Bowman, *The Civil Rights Roots of Tinker’s Disruption Tests*, 58 AM. U. L. REV. 1129, 1130 (2009).

students' speech rights, and the few so engaged were proceeding gingerly.⁶

The significance of *Tinker* is not only that it created affirmative speech rights for students, however. The *Tinker* Court also articulated a relationship between students' liberty and adults' democratic self-governance that has echoed through the Court's public school First Amendment decisions ever since. Simply put, schools create citizens to sustain our democracy by training students to know and exercise their First Amendment rights.⁷

Today, the legal and social landscapes are both substantially different than they were a half-century ago: schools are no longer environments where a principal can say, "it's my way or the highway," and the courts will agree.⁸ Courts across the country now regularly hear school speech cases. Several Supreme Court decisions have explored the boundaries of students', teachers', and the government's speech rights in schools, and only one Supreme Court Justice still thinks students do not have free speech rights in public schools.

These Supreme Court decisions have clarified the answers to some questions, but many other questions remain—such as how the "recently minted"⁹ government speech doctrine will affect the already unusual contours of free speech in schools.¹⁰ According to the Court in its 2009 decision in *Pleasant Grove City v. Summum*,¹¹ and previous decisions, when the government has not set forth its viewpoint—in other words, when it is merely the neutral arbiter of a forum—then the government speech doctrine does not affect private speakers' rights.¹² In these situations (at least outside the

6. Bowman, *supra* note 5, at 1148, 1152–53.

7. *Tinker*, 393 U.S. at 507.

8. This is a comment from Gene Reynolds, who was the high school principal in the legendary case *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1998), describing the way schools operated before *Tinker*. Reynolds made this comment at the September 2012 symposium at the University of Missouri-Kansas City, "Forty Years of Landmark School Speech Cases Through the Eyes of Those Who Were There." The author attended and presented at that symposium.

9. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481–83 (2009) (Stevens, J., concurring).

10. Joseph Blocher makes the same prediction in the emerging trend of school naming rights. Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 4 (2007); see also MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 211 (1980) ("Public schools present a kaleidoscopic panoply of First Amendment situations . . ."); Alan Brownstein, *The Nonforum as First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 723–24, 734–40 (2009).

11. 555 U.S. 460.

12. *Id.* at 468–69.

schoolhouse gates), speech may be restricted only based on presumptively viewpoint-neutral criteria applicable to all.¹³ However, when the government sets forth its own message—in a city park, in a hospital that accepts public funds, via government grants to support the creation of art, possibly in a public school—it may constitutionally quash private speakers’ attempts to alter its message.¹⁴ The implications of the government speech doctrine, in Erwin Chemerinsky’s words, are “potentially enormous.”¹⁵

So what might these implications be for speech in public schools? The government speaks a lot in schools, as do students and teachers. School speech cases are hardly rare, and the Supreme Court has determined that inside schools, the free speech rules are different from the default rules in ways that already favor the government.¹⁶ However, few courts or commentators have explored how the government speech doctrine would apply to cases about speech in schools, and also whether it should.¹⁷ This is a substantial gap because the government speech doctrine is as important as it is problematic, and it is gaining momentum.¹⁸

The first Part of this Article analyzes how the Court has grounded its school speech rules in the uniqueness of the school environment, in particular focusing on the school’s role as creating the next generation of citizens. The second Part moves to the government speech doctrine specifically, discussing the development

13. *Id.*

14. *Id.* at 467–68.

15. Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 426 (2009); see also Helen Norton, *Imaginary Threats to Government’s Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1283 (2011) (“The government’s expressive claims in these cases are potentially breathtaking in scope . . .”).

16. Brownstein, *supra* note 10, at 724–25, 808 (discussing the incredible range of speech-in-schools cases and noting that “making decisions about speech is the core function of a school’s educational mission . . . [r]egulating speech is fundamental to what an educator does”); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011); Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 208 (2007).

17. Joseph Blocher’s article and Alan Brownstein’s article provide excellent analysis of some of the issues that arise when considering applying the government speech doctrine to school speech situations, although the former article is limited to the situation contained in its title, and the latter advocates persuasively for a nonforum speech category. See generally Blocher, *supra* note 10; Brownstein, *supra* note 10. Additionally, Helen Norton’s article analyzes a recent Fifth Circuit decision in which a high school cheerleader was dismissed from the cheerleading squad for refusing to cheer for a basketball player who had allegedly sexually assaulted her. Norton, *supra* note 15, at 1275–78.

18. Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 817 (2010) (“Government speech and the government speech forum will not go away.”).

of the doctrine and explaining the doctrine's general relevance to school speech cases. The third and fourth Parts consider the potential impact of the doctrine on many specific types of school speech cases that I classify into two broad categories: (1) speech traditionally assumed to belong to states and school districts, and (2) speech to which students (and in some cases also the school) have a substantial claim. Throughout the discussion of specific types of speech conflicts, I answer difficult questions such as how to identify when speech belongs to the government and what to do when it appears that both the government and someone else are simultaneously speaking. I also examine the impact the government speech doctrine would have on each of these types of speech conflicts if imported wholesale: in some of the situations addressed in this Article, schools already have so much authority that the doctrine would have little impact on principles or outcomes; in other situations, such a change would have a substantial impact on existing principles or outcomes, including overturning one Supreme Court plurality decision and, if the doctrine were extended to cover all student speech cases, mooted the Supreme Court's student speech quartet.

Ultimately, of all the types of school speech cases I consider, I argue that the government speech doctrine should only apply to teachers' instructional speech. Although I reach the conclusion for all other categories that the government speech doctrine should not apply, the reasons supporting this outcome vary substantially depending on the type of conflict considered. In arriving at these conclusions, I consider whether the central purpose of the doctrine (the government retaining control over its own message) is a solid fit for the category of conflicts considered and how the doctrine would impact the two public goods that public education creates—the development of the next generation of citizens and a check on that development through the political and/or judicial process. Extending the doctrine further than I advocate may be an attractive option for states, schools, and courts at the very least because resolving cases under the government speech doctrine is easier and faster than using much existing caselaw,¹⁹ but such an extension

19. Existing student speech doctrine is already so muddled that Supreme Court Justices even joked about the doctrinal confusion during the 2007 oral argument in *Morse v. Frederick*, the “BONG HiTS 4 JESUS” banner case:

CHIEF JUSTICE ROBERTS: You think the law was clearly established when this happened that the principal, the instant the banner was unfurled, snowballs are flying around, the torch is coming, should have said oh, I remember under *Tinker* I can only take the sign down if it's disruptive. But then under *Fraser* I can do something if it interferes with the basic mission, and under *Kuhlmeier* I've got this other thing. So she should have known at that point that she could not take the

would lead to the “enclaves of totalitarianism” the court cautioned against in *Tinker*, in which students become “closed-circuit recipients of only that which the State chooses to communicate.”²⁰ Future citizens’ deliberations would suffer the effects of such a change, and that cost is too great.

I. THE PUBLIC GOODS CREATED BY FREE SPEECH IN SCHOOLS

Analyzing whether the government speech doctrine should be imported into various types of school speech cases involves asking how it would change the work that the First Amendment does in public schools. As this Part discusses, the Supreme Court has recognized schools’ role in creating citizens; in various ways and to different degrees, free speech rights affect that function.

A. *Creating Citizens*

Public education is both a private good and a public good—it directly benefits those who pay for it (adult taxpayers who are parents of public school students) and arguably benefits even more those who do not (students themselves, adult taxpayers who are benefited by the education of other people’s children, and adults who

banner down, and it was so clear that she should have to pay out of her own pocket because of it.

MR. MERTZ [attorney for Frederick]: Mr. Chief Justice, there are two different time points we have to talk about. There’s the heat of the moment out there on the street, but then later back in the office when she actually decided to levy the punishment after she had talked to him, after she heard why he did it and why he didn’t do it, after she had had a chance to consult with the school district’s counsel. At that point in the calmness of her office, then she should indeed have known it. And she did testify that she had taken a master’s degree course in school law in which she studied *Kuhlmeier* and *Fraser* and *Tinker*. So—

CHIEF JUSTICE ROBERTS: And so it should be perfectly clear to her exactly what she could and couldn’t do.

MR. MERTZ: Yes.

JUSTICE SCALIA: As it is to us, right? (Laughter.)

JUSTICE SOUTER: I mean, we have a debate here for going on 50 minutes about what *Tinker* means, about the proper characterization of the behavior, the nonspeech behavior. The school’s terms in dealing with the kids that morning. The meaning of that statement. We’ve been debating this in this courtroom for going on an hour, and it seems to me however you come out, there is reasonable debate. Should the teacher have known, even in the calm deliberative atmosphere of the school later, what the correct answer is?

Transcript of Oral Argument at 48–50, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-278.pdf.

20. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

do not pay property taxes).²¹ Some of public education's positive externalities are economic: when students receive at least a basic education, they become adults who are employable and thus can contribute to the economy. Some of the positive externalities are civic: students become adults who participate in our democratic government and ultimately sustain it.²²

For nearly a century, the Supreme Court has referred to education's positive civic externalities in cases that arise out of public schools.²³ The Court's two most famous twentieth-century education decisions are based in large part on schools' creation of citizens.²⁴ In the first of these two landmark cases, *Brown v. Board of Education*,²⁵ the Court memorably declared in 1954 that "separate but equal" public schools were unconstitutional.²⁶ In a phrase that has become one of the most cited from *Brown*, the Court described education as "perhaps the most important function of state and local governments."²⁷ The Court then articulated why this is the case:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in

21. Kristi Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 899–900, 902–03, 917 (2010); Jane S. Shaw, *Education—A Bad Public Good?*, 15 INDEP. REV. 241, 241 (2010).

22. Bowman, *supra* note 21, at 935–36. As Anne C. Dailey extensively and thoughtfully analyzes, "early caregiving and family relationships lay down the foundational processes of democratic citizenship" and schools build on these foundations. Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 435 (2006).

23. See, e.g., Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 94–99 (2010) (discussing the Court's view of the purpose of public schools as articulated in its 1940s flag salute cases involving Jehovah's Witness children); Dailey, *supra* note 22, at 438–60 (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), prohibiting public schools from instructing students in the German language before eighth grade and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), prohibiting the state from compelling attendance in public schools, or in private schools under very limited circumstances).

24. These decisions were not the first cases in which the Court considered schools' civic role, however. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens . . . has long been recognized by our decisions."); see also Bowman, *supra* note 21, at 935–36 n.218.

25. 347 U.S. 483 (1954).

26. *Id.* at 495; see also Pamela W. Carter & Phoebe A. Roaf, *A Historic Overview of Brown v. Board of Education*, 51 LA. L.J. 410, 410 (2004).

27. *Brown*, 347 U.S. at 493.

preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²⁸

The Court's focus in *Brown* was, of course, on racial equality in education. But *Tinker v. Des Moines*, about liberty in schools, similarly addressed the role of schools in creating citizens.²⁹ In *Tinker*, the Court held that students have free speech rights in public schools, although those rights are more limited than in the nonschool environment.³⁰ The *Tinker* Court stated: "state-operated schools may not be enclaves of totalitarianism. . . . [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."³¹ The *Tinker* majority quoted an earlier university faculty speech case, *Keyishan v. Board of Regents*,³² as part of the proposition that "[t]he classroom is peculiarly the 'marketplace of 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.'"³³ Similarly, the *Tinker* decision also excerpted some of the most famous language from the Court's decision in the 1943 pledge of allegiance case *West Virginia v. Barnette*³⁴: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."³⁵ *Tinker* did not grant students unlimited speech rights in schools,

28. *Id.*

29. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

30. *Id.* at 511.

31. *Id.* at 511–12 ("In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [*sic*] their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." (quoting Meyer v. Nebraska 262 U.S. 390, 402 (1923))).

32. 385 U.S. 589 (1967).

33. *Tinker*, 393 U.S. at 512 (quoting *Keyishan*, 385 U.S. at 603) (striking down a statutory provision that public employees, including university faculty, sign statements declaring themselves to not be communists).

34. 319 U.S. 624 (1943).

35. *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637).

however—even under *Tinker*, schools can discipline students for speech that substantially or materially disrupts the educational process, is reasonably forecast to do so, or impinges on the rights or others.³⁶ These limitations balance students' rights with schools' needs to maintain an orderly and thus potentially effective educational environment.

Both *Brown* and *Tinker* were substantial departures from what came before them. They created equality rights and speech rights where "separate but equal" had been constitutional and teachers and administrators had wielded largely unquestioned authority over students. As such, both cases needed to justify their new directions. They both did so, in part, by emphasizing what was unique about public schools' social function.³⁷ Subsequent decisions, especially in free speech cases, have continued to articulate and refine public schools' unique role by building on *Brown* and *Tinker*.

In 1986, the Court in *Bethel School District No. 403 v. Fraser*³⁸ held that a high school could discipline a student for delivering a lewd speech at an all-school assembly. In doing so, it quoted a high school history book for the principle that "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."³⁹ The Court then continued in its own words:

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. 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. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics

36. *Id.* at 513.

37. William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 941, 954–59, 977–80 (1987).

38. 478 U.S. 675 (1968).

39. *Id.* at 681 (quoting CHARLES BEARD & MARY BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.⁴⁰

Two years later, in the 1988 school newspaper case *Hazelwood School District v. Kuhlmeier*,⁴¹ the Court quoted *Fraser* as part of the proposition that “[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”⁴² “Otherwise,” the Court continued while quoting from *Brown*, “the schools would be unduly constrained from fulfilling their role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”⁴³

In all of these cases, the Court assumed a certain causal relationship—what we teach students, in a direct or indirect way, influences their behavior as adults; specifically, if we teach them to know and exercise their First Amendment rights, that will have a positive impact on the quality and quantity of public debate down the road.⁴⁴ Bringing empirical research to bear on this specific proposition is difficult,⁴⁵ although a couple of articles have made substantial contributions in this direction. First, in 1991, Richard Roe engaged cognitive psychology research to argue that students

40. *Id.* at 681, 683.

41. 484 U.S. 260 (1988).

42. *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

43. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Justice Brennan’s dissent also engaged the question of the role of schools as training citizens. *Id.* at 277–78 (Brennan, J., dissenting). Richard Roe argues that “[t]he standards developed under *Fraser* and [*Hazelwood v.*] *Kuhlmeier* reflect a very different understanding of the ‘work of the schools’ and the ‘special characteristics of the school environment’ than does the *Tinker* standard.” Richard Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1288 (1991). While I agree that *Fraser* and *Hazelwood* refine *Tinker*, I do not think they go so far as to present a fundamentally different view of the work that the First Amendment does in schools.

44. In Suzanna Sherry’s words, “The core of the claim that education is necessary to citizenship must instead be that education is necessary to the thoughtful or responsible exercise of citizenship rights.” Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 132 (1995).

45. See, e.g., Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980); Norton, *supra* note 15, at 1275 n.48; Roe, *supra* note 43, at 1301, 1309; Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 447, 454 (2009).

learn best through “an active process in which they construct, rather than receive, their knowledge and skills”—and that what is learned includes not only facts, but also “such skills as critical thinking and rational deliberation, which are essential to the exercise of civic responsibilities and individual rights.”⁴⁶ Roe concluded that the First Amendment serves the general function in public schools assumed by the Court, although public schools have less ultimate influence than the Court implies because students “are not ‘empty vessels’ waiting passively to be filled by the school’s lessons.”⁴⁷ Second, Anne Dailey’s 2006 work engaged developmental psychology literature to argue that early family and caregiving relationships establish “the foundational processes of democratic citizenship,” while “[l]ater associations, most notably educational ones, will contribute to the development of democratic skills and values.”⁴⁸ Dailey, too, suggested that the Court’s assumptions about the role of schools in training citizens are generally correct, although these assumptions do not tell the whole story about how citizenship develops.⁴⁹

Another portion of the literature has engaged the question of what schools should teach about civic involvement by asking which definition of citizenship should dominate.⁵⁰ Should schools teach, as Susanna Sherry argues, a civic republican model of citizenship in which students are taught to value political participation in their government by instilling this as a shared value of a common culture and a responsibility of individuals?⁵¹ Or, as Bruce Ackerman contends, does that approach prioritize conformity, and is a classic liberal approach preferred in which children and families have greater choice about their own values and individual as well as collective futures?⁵² Alternatively, does a liberal model insufficiently emphasize the collective, and should the focus be communitarianism, with the goal of assimilating children into the community, whether defined at the national or local level?⁵³ But,

46. Roe, *supra* note 43, at 1343.

47. *Id.* at 1294, 1343–45, 1292–1301.

48. Dailey, *supra* note 22.

49. *Id.*

50. Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT’L L. 330, 344 n.74 (2006) (citing Rainer Bauböck, *Recombinant Citizenship*, POL. SCI. SERIES No. 67 (1999)) (elaborating on the principle of thin versus thick conceptions of citizenship).

51. John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33, 47–50 (1999); Sherry, *supra* note 44, at 162–63.

52. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 139–67 (1980); Rhee, *supra* note 51, at 50–52.

53. Rhee, *supra* note 51, at 52–57.

does a communitarian approach sufficiently prioritize public concerns such as governance?⁵⁴ While it is beyond the scope of this Article to advocate for one of these approaches, I focus on one aspect that is common to, or at least consistent with, all of these approaches at a very general level: students' ability to understand and exercise their First Amendment free speech rights. Civic republicans and large communitarians would embrace this as part of what it means to be a citizen who adds value to society, engaging in public debate about important issues.⁵⁵ Liberals would support this as educating students about how to advocate for various viewpoints, whether they challenge or support mainstream society and whether or not they are part of the political process per se.⁵⁶ Small communitarians, focused on creating identity based in local communities, would find this consistent with the goal of advocating for one's community within the larger social context, although it would not be a high priority for them.⁵⁷ While advocates prioritize different definitions of citizenship, none are willing to give up on schools' contributions to the project of creating citizens.

B. Ensuring the Creation of Citizens in a Constitutionally Sound Manner

The discussion about creating a public good does not end with an evaluation of the ways in which education creates the next generation of citizens. As one scholar notes, part of the theory of public goods is that ensuring that a public good is adequately provided is itself a public good.⁵⁸ This Subpart examines how that latter public good, essentially the public good of enforcement, operates in the context of the creation of citizens in public schools.

To begin with, consider the enforcement mechanism for ensuring educational quality. In our current era of nationwide educational "accountability" focused on standards-based testing, public school districts regularly monitor the performance of their schools and publicly report about that performance.⁵⁹ As part of this accountability system, government ensures that parents have access to information about the degree to which a basic education is provided in their children's schools—and presumably parents can

54. *Id.*

55. *Id.* at 50–52, 55.

56. *Id.* at 51.

57. *Id.* at 55–56.

58. Shaw, *supra* note 21, at 242 ("If the theory of public goods is correct, relatively few people are likely to spend time and resources making sure that someone else's education (or health care or justice) is adequate.").

59. *Accountability*, EDUC. WK. (Aug. 3, 2004), <http://www.edweek.org/ew/issues/accountability>. For the primary present example of this, see No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6578 (2006) (amending the Elementary and Secondary Education Act of 1965).

try to move their children to other schools if dissatisfied with the current school (of course many practical barriers often prevent this). Related to this is the idea that competition from private and charter schools arguably helps ensure the quality of public education, as well.⁶⁰ Additionally, the government arguably enforces quality in an admittedly imperfect way: federal and some state statutes subject low-performing schools to a series of escalating interventions.⁶¹ Thus, part of the enforcement mechanism is operationalized by the state, and part by parents. These enforcement mechanisms are not effective in creating quality education for all students, but even if they were, they focus only on the curriculum as traditionally defined, not on more abstract concepts such as students' free speech rights.⁶²

Because states and school districts do not measure the extent to which various schools and school districts have an environment in which students' speech flourishes or is stifled, there is no data for the government to use in administrative enforcement of students' liberty interests, or for parents to create a comparison between particular public schools.⁶³ So, because of a lack of data, government administrative enforcement is not enabled, and parental public choice enforcement is not viable, either. Furthermore, although private schools certainly may choose to let students engage in controversial speech, much like public schools themselves may grant students more speech rights than the constitutional floor requires, students have no constitutional free speech rights in private schools because those schools are not state actors.⁶⁴ Thus, free speech is not incentivized by public schools competing with one another for students; private schools do not have

60. Shaw, *supra* note 21, at 251.

61. See, e.g., 20 U.S.C. §§ 6301–6578.

62. U.S. DEPT. OF EDUC., NO CHILD LEFT BEHIND EXECUTIVE SUMMARY (2004) (discussing the focus on evaluating students' reading and math).

63. Administrative enforcement is prevalent in other areas, such as racial and ethnic equity. Consider Title VI of the Civil Rights Act of 1964, which gives the U.S. Department of Education authority to investigate and negotiate compliance with school districts that deny students opportunities based on race. 42 U.S.C. § 2000(d) (2006); see also Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 969–73 (2010) (discussing the importance of recordkeeping in the civil rights context).

64. Catherine LoTempio, Comment, *It's Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435, 446–53 (2012) (discussing courts' inconsistent results about whether or not charter schools are state actors, and establishing that traditional private schools are not state actors); see also Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 873–97 (1979) (discussing constitutional limits for public schools in providing aid to private religious schools).

to give students even the low level of speech protection available in public schools; and there is no standardized data that would support such a comparison even if it motivated parents to take action.⁶⁵

Thus, neither government oversight nor public or private competition does much, if anything, to create the public good of ensuring speech rights in schools. To the extent that an enforcement mechanism exists, it occurs through two other avenues, one of which is the political process. In the context of public schools, the political process refers to the election of school board members who create and amend district policies that establish the curriculum and limit individuals' speech rights.⁶⁶ These same school boards also ultimately hear appeals from principals' decisions to suspend and expel students or discipline teachers, or make those decisions themselves.⁶⁷ Because school board members are elected, presumably they can be voted out at the next election if they make decisions that fly in the face of widely shared community values about free speech or other matters.⁶⁸ As a result, the political process is a substantial check on the speech-restrictive authority of school administrators—that is, unless the political process is distorted.

At least as far back as 1938, in the famous footnote four of *United States v. Carolene Products*,⁶⁹ the Court emphasized the special importance of judicial review when the political process is unable to provide a meaningful check on government action.⁷⁰ This concern remains a strong one today, and thus judicial review is the second way liberty in schools is ensured, although one need not prove that the political process is distorted in order to access the courts. In school speech cases, litigation is initiated by private parties, mainly students, parents, and teachers, who challenge the constitutionality of a school's discipline or restriction of their speech. Plaintiffs who are prevailing parties can petition the court for fee shifting under § 1988, and in that way the federal government has removed a major disincentive to initiating constitutional litigation.⁷¹

65. Yudof, *supra* note 64, at 889 (discussing parental decisions in selecting a school district).

66. MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 938–48 (2011) (discussing the election of school board officials).

67. *Id.* at 325–406 (discussing student discipline); *id.* at 938–48 (discussing the election of school board officials).

68. See, e.g., Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 420–21 (2006) (discussing the evolution-intelligent design controversy in Dover, Pennsylvania in 2005, and how the school board that adopted the controversial policy was voted out at the next election).

69. 304 U.S. 144 (1938).

70. *Id.* at 152 n.4.

71. 42 U.S.C. § 1988(b) (2012).

However, federal statutes incentivize other types of constitutional challenges even more, such as section 4 of the Civil Rights Act of 1964 that authorizes the Attorney General of the United States to bring litigation against individual school districts challenging racial discrimination in education.⁷² This is discussed more throughout Parts III and IV. Nonetheless, the availability of litigation remains the backstop when seeking to ensure that the creation of citizens is accomplished in a constitutionally sound manner.

In sum, schools are unique institutions because education is a private and public good that, the Court assumes, creates positive externalities of general economic and civic benefits. Ensuring the constitutionally sound creation of these civic benefits is an independent public good that is created through the political and also the judicial processes, not through public or private competition or through government administrative enforcement. Based on these understandings, the rest of this Article considers the relationship between the changes the government speech doctrine would impose on speech in schools and the need to maintain both the public good of creating citizens, and the public good of ensuring that process of creation is constitutionally sound.

II. THE GOVERNMENT SPEECH DOCTRINE

The government speech doctrine took root in a doctrinal landscape in which the forum analysis doctrine and the general presumption against viewpoint discrimination already existed. However, at least vis-à-vis those two concepts, the government speech doctrine is somewhat like intellectual kudzu, climbing on the existing framework and perhaps eventually covering it up entirely. At this point, the doctrine still contains many open questions, including whether it should apply in school speech cases.

A. *The Doctrine Emerges*

The story of the government speech doctrine begins with the forum analysis doctrine, which focuses on determining when members of the public can use government property to communicate their own messages.⁷³ Specifically, if a forum is “public”—traditionally open for public expression, protest, et cetera—then the government’s regulation of the property must be minimal, whereas if the forum is “nonpublic”—generally not open to the public for expressive purposes—then the government may impose more

72. *Id.* § 2000c-6(a); Act of July 2, 1964, Pub. L. No. 88-352, §§ 407, 409–10, 78 Stat. 248–49.

73. Bezanson, *supra* note 18, at 809–10; Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979–94 (2011).

stringent regulations on the private speech occurring there.⁷⁴ “Limited” or “designated” public fora fall somewhere in the middle both in terms of the openness of the property and the restrictions the government may impose on private speech in those contexts.⁷⁵

The forum analysis doctrine emerged during the mid-twentieth century⁷⁶ and gained heft during the 1960s and 1970s.⁷⁷ As Robert Post has described, forum analysis was a “fundamental principle of First Amendment doctrine” by the mid-1980s.⁷⁸ As the forum analysis doctrine was coming into its own, notable First Amendment scholars including Steven Shiffrin, Laurence Tribe, and Mark Yudof began writing about the theoretical and practical problems presented when the government was not a neutral arbiter of speech in a forum, but rather was the speaker itself.⁷⁹ Some of these problems already had presented themselves to lower courts, but most of the prominent government speech cases were yet to come. It was not until 1991, when the Supreme Court decided *Rust v. Sullivan*,⁸⁰ that the contemporary government speech doctrine started to emerge in what is, in retrospect, a now-recognizable form. In *Rust*, the Court held that Congress could require that federal funds not be used “in programs where abortion is a method of family planning” because “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”⁸¹ The Court continued, “[i]n so doing, the

74. Blocher, *supra* note 10, at 43–44; Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987).

75. Blocher, *supra* note 10, at 45; Post, *supra* note 74, at 1745–46.

76. See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

77. See *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–03 (1974); *Amalgamated Food Empls. v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

78. Post, *supra* note 74, at 1714; see, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 46 (1983); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981); *Widmar v. Vincent*, 454 U.S. 263, 267–69 (1981).

79. Steven Shiffrin was the first scholar to draw together various cases as presenting some sort of government speech “doctrine,” but his definition in 1980 was more broad than the Supreme Court’s cases would bear out over the thirty years that followed it. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 *passim* (1980); see also Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Laurence Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237 (1978); Yudof, *supra* note 64.

80. 500 U.S. 173 (1991).

81. *Id.* at 178, 193.

Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”⁸²

In the ten years following *Rust*, the Court issued a handful of cases that we now identify as the core building blocks of the government speech doctrine.⁸³ In contrast to the forum analysis doctrine, which creates individual rights and thus regulates the government’s behavior when it is the neutral arbiter of a forum, the government speech doctrine gives the government an absolute defense to an individual’s free speech claim when the government can claim that the individual’s speech attempts to alter the government’s message.⁸⁴ In 2001, at the end of the decade after *Rust*, Randall Bezanson and William Buss described the government speech doctrine as follows:

The [government speech] cases may reflect a new and theoretically fundamental development in First Amendment jurisprudence on which a working majority of the Court has yet to form, a transformative idea of the First Amendment and the relationship between modern, complex government and the

82. *Id.* at 193.

83. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 905 (2010) (explaining that *Rust* does not use the term “government speech,” but over the decade that followed, *Rust* came to represent an idea against which the Court contrasted other situations in which speech regulations were impermissible). In 2009, the Court described the central principles of the doctrine, and in doing so provided also a history of the development of the doctrine:

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n.7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression”). A government entity has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). “[I]t is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and to select the views that it wants to express. See *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (SCALIA, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”). *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). See also Blocher, *supra* note 10, at 21–25, for Joseph Blocher’s summary of the development of the doctrine during this time period.

84. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 698–99 (2011).

polity it serves. This is a view of government as initiator, persuader, educator, shaper of culture and beliefs, and molder of consensus.

But to us the cases reflect something less than this, something more ambiguous or, at least, more inchoate. They look more like an experiment borne of felt necessity on the one hand, and theoretical confusion on the other hand, tried out gingerly on a case-by-case basis. At the very least, the cases reflect a doctrinal development that is far from complete. Virtually all of the opinions have left room for later interpretation on alternative grounds.⁸⁵

In the decade since Bezanson and Buss wrote those words, the main contours of the doctrine have remained the same. Two trends have dominated the Court's engagement with these issues over the past decade. First, the many remaining open questions about the doctrine suggest that the Court has continued to "operat[e] on an intuitive, even inchoate, sense of what government speech is."⁸⁶ Second, the government speech doctrine appears to be assuming the previously dominant place of the forum analysis doctrine, and these two doctrines (government speech and forum analysis) continue to be viewed as a binary.⁸⁷

85. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1509 (2001).

86. *Id.* at 1436. Writing nearly a decade later, Steven Gey described the doctrine as incredibly sloppy at best, and in fact so incoherent that it makes the most sense if it is ideologically driven, rather than doctrinally driven. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1264, 1269 (2010). He summarizes the doctrine as follows:

Government subsidies for private speakers sometimes constitute government speech (*Rust*), except when the Court chooses to treat those accepting the government subsidies as private speakers (*Velazquez*), or when the government-funded speaker is participating in a legal medium of expression that limits government speech that affects the way courts do their business (*Velazquez*), except when the Court decides that imposing limits on government-funded speakers in the legal medium of expression is just fine (*Garcetti*). The Court's distinctions . . . are either nonexistent . . . or utterly baffling

Id. at 1286. The placement of this doctrine in a constitutional law textbook belies some of the substantial questions about the doctrine. One leading textbook, by Erwin Chemerinsky, places *Summum* under "B. Free Speech Methodology, 1. The Distinction Between Content-Based and Content-Neutral Laws, c. Problems in Applying the Distinction Between Content-Based and Content-Neutral Laws (*Pleasant Grove v. Summum*)."^{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (3d ed. 2009).}

87. Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 379 (2009) (discussing how Supreme Court cases assume a binary approach, while others recognize a "hybrid" or "mixed" speech category "unrecognized thus far by the Supreme Court"); Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV.

Both of these trends are present in the Court's most recent government speech decision, *Pleasant Grove City v. Summum*.⁸⁸ In that case, the Summum, a religious group, sought to donate a monument to the city for a park in which eleven of the fifteen monuments had been donated.⁸⁹ After their offer was rejected, the Summum sued.⁹⁰ They claimed that the city's rejection of their monument after accepting so many others constituted viewpoint discrimination that violated their free speech rights, and they sought a preliminary injunction to force the city to accept and install their monument.⁹¹ The district court rejected the Summums' claim, but the Tenth Circuit reversed, concluding that in a public forum such as a park, the government's restriction must survive strict scrutiny.⁹²

The Supreme Court reversed the Tenth Circuit, with seven Justices joining Justice Alito's majority opinion and Justice Souter concurring in the judgment.⁹³ No Justices dissented. The Court held that the park, while "a traditional public forum for speeches and other transitory expressive acts," was not a public forum for the purpose of permanent display of monuments.⁹⁴ It further clarified that "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program."⁹⁵ While a park can accommodate an incredible number of orators—especially over the course of years—the same park can only accommodate a limited number of monuments, especially if it is to retain any of the open area that makes it useful as a gathering space.⁹⁶ Thus, the Court held that the city was not acting as a neutral arbiter of a forum when it decided which monuments to accept, but rather was

113, 132 (2009). Scholars propose various nuanced ways of understanding the distinction between these two categories. One approach is to ask whether the government is the patron of speech (government speech doctrine), or the regulator of speech (forum analysis). Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047, 1051 (2009). Another way of understanding the difference is to ask whether the court's analysis turns on the speaker's identity (government speech doctrine) or on the location of the speech (forum analysis). Blocher, *supra* note 10, at 2, 20, 42; *see also* Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1416–17 (2011).

88. *Summum*, 555 U.S. at 463–66.

89. *Id.* at 464.

90. *Id.* at 466.

91. *Id.*

92. *Id.*

93. *Id.* at 462, 485.

94. *Id.* at 464.

95. *Id.* at 478.

96. *Id.*

acting as a speaker.⁹⁷ This is important because, in the Court's words, "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."⁹⁸ Stated differently, a private speaker cannot use the Free Speech Clause to force the government to express a message the government does not want to convey. According to the Court in *Summum*, the only clear limits of the government speech doctrine are the Establishment Clause and also "limit[ing] . . . law, regulation, or practice."⁹⁹

These core principles lead naturally to one somewhat surprising doctrinal change and also create a few important open questions. The surprising change is this: in *Summum*, the Court acknowledged the "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."¹⁰⁰ However, the Court did not address that concern in detail.¹⁰¹ The presumption that the government

97. *Id.* at 481.

98. *Id.* at 467.

99. *Id.* at 468. First, in his opinion concurring in the judgment, Justice Souter expressed great concern about the need to clarify the relationship between the Establishment Clause and the government speech doctrine. *Id.* at 485–86 (Souter, J., concurring). The relationship is complicated: if Pleasant Grove had accepted the Summum's monument and thus adopted the monument as government speech, the city arguably could have been liable for violating the Establishment Clause. See Bowman, *supra* note 68, at 423–24 (analyzing *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005)).

Second, what is included in "limit[ing] . . . law, regulation, or practice" is as yet unknown. Helen Norton argues that the Equal Protection Clause prohibits the use of the government speech doctrine to shield the government from liability for hate speech. Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159 *passim* (2012); see also Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587, 626–35 (2011) (tracing different approaches in scholarly literature on the imposition of values in public schools). See generally, David W. Burcham, *School Desegregation and the First Amendment*, 59 ALB. L. REV. 213 (1995) (discussing the relationship between school desegregation and the inculcation of racial values in schools); Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980) (exploring the relationship between freedom of speech and the imposition of values in schools). Additionally, William Thro suggests that if a government contract constitutes government speech (which seems likely given the broad scope of the actions that the Court has included as government speech), *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), may limit government speech because it prohibits the government from retaliatory nonrenewal of a contract with a party who was critical of the government, and also that state constitutional law may limit government speech. E-mail from William Thro to author (Aug. 21, 2012) (on file with author).

100. *Summum*, 555 U.S. at 473.

101. See *id.*

cannot discriminate among speakers' viewpoints has long been a foundational aspect of First Amendment law, and it is one of the few First Amendment principles on which a range of scholars agree.¹⁰² In a practical sense, it appears that the ultimate effect of this presumption is weakening because it is easier for the state to invoke the government speech doctrine if the speech at issue expresses a strong viewpoint. As Joseph Blocher explains, "to prevail in a government speech case[, the government] is to show that a private speaker's message is contrary to, and interfering with, its own [message]. Under government speech doctrine, however, one can avoid First Amendment scrutiny altogether by embracing the fact that a regulation is viewpoint specific."¹⁰³

To those who litigate and write about free speech in the unique context of public schools, practical limitations on the presumption against viewpoint discrimination are perhaps not as shocking because de facto viewpoint discrimination is necessarily a part of the educational process.¹⁰⁴ Schools often present various viewpoints about a given issue, but they simply do not have time to instruct students about all viewpoints on a given subject.¹⁰⁵ Furthermore, even if presenting all viewpoints were possible, complete neutrality is not the goal of the government-as-educator or the goal of most parents who enroll their children in public schools; for example, neither states, schools, nor the vast majority of parents in the United States probably want students to learn that holocaust deniers' viewpoint is as valid as mainstream historians'. Finally, as scholars have argued, myself among them, some viewpoint discrimination already is a part of regulating students' speech in schools under the Court's seminal student free speech cases.¹⁰⁶ This

102. Blocher, *supra* note 84, at 696 ("The prevention of viewpoint discrimination has long been considered *the* central concern of the First Amendment, and yet in some cases government speech doctrine seems to allow—if not outright encourage—viewpoint discrimination in the extreme."); *see also* Bezanson & Buss, *supra* note 85, at 1377.

103. Blocher, *supra* note 84, at 716.

104. As Randall Bezanson and William Buss have eloquently stated, "viewpoint discrimination is inextricably a part of education. One cannot communicate the messages involved in an educational process without exercising choice—without choosing some messages and not others; and without making these choices on the basis of the content of the available alternatives." Bezanson & Buss, *supra* note 85, at 1420; *see also* Brownstein, *supra* note 10, at 737–38, 813–16; Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 420–21 (2011).

105. Norton, *supra* note 15, at 1276–77.

106. *See generally* Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187 (2007); Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111 (2008); John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. 569 (2009);

is not to say that schools are free to discriminate against viewpoints arbitrarily or maliciously, even independent of the government speech doctrine, but rather that the presumption against viewpoint discrimination has never been as strong inside the schoolhouse gates as it has been outside of them. This is important to remember when considering the impact the government speech doctrine would have on school speech cases.

B. Open Questions in the Government Speech Doctrine

Because the purpose of this Article is to apply the government speech doctrine in a unique institutional context and critique the results of that application rather than to critique the doctrine more generally, I have presented a relatively brief and straightforward summary of the government speech doctrine. However, it is also important to discuss some of the most significant open questions regarding this doctrine because these vagaries will influence how the doctrine would play out in the public school context, and also whether it should apply there.¹⁰⁷ This Subpart engages three leading open questions that cut across all potential applications of the government speech doctrine.

1. How Do We Know that the Government Is Speaking?

It may seem as though it should be clear when the government is speaking, but in fact the Court's government speech cases have created an incredible amount of confusion about how obvious the government's connection to speech must be in order for the government to invoke the government speech doctrine as a defense.¹⁰⁸ This confusion is not new: in *Rust v. Sullivan*, which is commonly described as the first major government speech case, the government regulated what doctors could say to patients in family planning programs via a Spending Clause restriction—but there was no reason to suspect that the patients receiving the medical services understood that a government regulation was influencing the medical advice they received.¹⁰⁹ The government speaks through its policies, through its agents, through permanent displays—and the fact that individuals have a role in creating the

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

107. See *infra* Parts II–III; see also Bezanson & Buss, *supra* note 85, at 1382–83 (summarizing the many open questions about the government speech doctrine in 2001, most of which remain unanswered today).

108. Blocher, *supra* note 10, at 26.

109. Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 629–30 (2008).

speech does not automatically give the state and the individual a claim to the speech.¹¹⁰

So how do courts determine whether speech is the government's? This question is a common one courts confront when analyzing an Establishment Clause challenge, and as noted above, Establishment Clause cases are a subset of government speech cases.¹¹¹ However, the answer to the question "is the government speaking?" has very different consequences in an Establishment Clause case and in a non-Establishment Clause case such as a Free Speech case: If the government is speaking in an Establishment Clause case, then it can be liable for a constitutional violation, whereas if the government is speaking in a Free Speech case, then it is generally immune from liability.¹¹² Courts' determinations of whether the government is speaking also differ in Establishment Clause and Free Speech Clause cases. In the latter, several circuits determine whether the speech belongs to the government or to a private individual by analyzing the following factors:

- (1) the central 'purpose' of the program in which the speech in question occurs; (2) the degree of 'editorial control' exercised by the government or private entities over the content of the speech; (3) the identity of the 'literal speaker'; and (4) whether the government or the private entity bears the 'ultimate responsibility' for the content of the speech . . .¹¹³

Scholars have suggested that this multifactor test belies a high level of confusion about the doctrine¹¹⁴ and also that it conceals some circuits' resistance to the doctrine.¹¹⁵ Some have proposed alternative tests that vary in their specifics, but mostly seem to focus on the government's intent as the speaker and the effect of the

110. YUDOF, *supra* note 10, at 42–50; Leora Harpaz, *School Speech: Whose Speech Is It Anyway and Why Does the First Amendment Care?*, 6TH COMMONWEALTH ED. L. CONF. 69, 69–70 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972270; Lidsky, *supra* note 73, at 1992.

111. Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 586–87 (2011).

112. Olree, *supra* note 87; see also Blocher, *supra* note 10, at 50–51 (describing differences between the government speech analysis and the commercial speech analysis).

113. Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008); see also Lilia Lim, *Four-Factor Disaster: Courts Should Abandon the Circuit Test for Distinguishing Government Speech from Private Speech*, 83 WASH. L. REV. 569, 570 (2008); Norton & Citron, *supra* note 83, at 917.

114. See, e.g., Gey, *supra* note 86, at 1304.

115. Norton & Citron, *supra* note 83, at 916–17.

speech as measured by the recipient's perception of the speech.¹¹⁶ Many of these proposals share a common focus with the "reasonable observer" test from the Court's Establishment Clause doctrine, and some would apply in both Establishment Clause and Free Speech Clause determinations about who is speaking.¹¹⁷

Scholars also argue that if the government is permitted to employ the government speech doctrine, the government's identity as speaker should be clear. This is not only to resolve ambiguity in the doctrine¹¹⁸ but also for normative reasons: when citizens know the government is speaking, they can better evaluate the message because they know its origin and also hold the government accountable for expressing that viewpoint in various ways, including the political context.¹¹⁹ These considerations weigh heavily in the public school context because of one of the central purposes of public education: to create the next generation of citizens who share a common core of knowledge and values, including knowledge and values that perpetuate democracy. As discussed earlier, education is not value or viewpoint neutral, and, for practical as well as normative reasons, it will never be. Thus, both transparency of speaker and transparency of message arguably are especially important in the context of public schools, if government is to be accountable for the values and viewpoints it advocates.¹²⁰

116. Norton, *supra* note 109, at 599, 604–05, 610, 612–13 (summarizing various scholars' proposals); Norton & Citron, *supra* note 83, at 917; Olree, *supra* note 87.

117. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1052–55 (2005). For a summary of the development of the "reasonable observer" test in the Establishment Clause context, see Bowman, *supra* note 68, at 445–61; Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 608 (2008); Olree, *supra* note 87.

118. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 566–67 (2005) (upholding a federal statutory requirement that beef producers be required to pay into a fund for generic beef advertisements as permissible compelled funding of government speech).

119. Lee, *supra* note 117, at 988–89; Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 27 (2009); Norton & Citron, *supra* note 83, at 902; see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

120. Gia Lee distills social science research about the many factors that influence the impact of speech, whether belonging to the government or to a private speaker. See Lee, *supra* note 117, at 994–1004 ("The implicit assumption in contemporary Supreme Court doctrine is that the public approaches government communications as message-focused evaluators. . . . By contrast, much of the legal scholarship takes a rather dim view of people's abilities to evaluate or resist governmental messages. . . . A related, although less extreme, conception envisions the public as made up of not passive recipients, but rather vulnerable recipients. . . . Rather . . . the ways in which people process and respond to all messages, including those emanating from the

Reasonable adult observers in the community are also likely to understand that the government is controlling the content of that communication, and sometimes courts assume that students vaguely understand this, as well.¹²¹

At the same time, although a good deal of the government's speech in schools (curriculum, instruction, et cetera) will fairly clearly belong to the government, there is also the possibility that the government, by controlling what is taught in schools, distorts the public's ability to provide an effective check on government speech through the political process. Many government speech scholars emphasize the importance of the political process check on government speech,¹²² and yet the potential problem of distortion in the political process is not often raised—probably because the type of distortion that can occur through public schools is in many ways unique, potentially very powerful, and also difficult to measure with any degree of specificity as discussed earlier.¹²³

2. *What If the Speech Is Governmental and Private?*

Some of this Article is focused on speech that appears, at least at first, to involve both a governmental speaker and a private speaker—the state and a teacher, the state and a student, or the state and a group of students. Courts and commentators regularly assume that speech is either private or governmental and cannot be both at the same time, but this binary does not reflect the reality of much school speech.¹²⁴ Caroline Mala Corbin has analyzed “mixed” speech, that which is both public and private, in great and thoughtful detail. Corbin provides a helpful way to think about speech in this category: “[M]uch speech is the joint production of both the government and private speakers and exists somewhere along a continuum, with pure private speech and pure government speech at each end.”¹²⁵ A common example of mixed speech is the specialty license plate, where a state permits an organization to

government, turn on a complex interplay of a variety of factors, including message, speaker, recipient, and context; none of those factors alone is necessarily controlling.”)

121. Brownstein, *supra* note 10, at 768 (“Courts typically conclude that young children in elementary school are particularly likely to believe that any expressive activity in their classes or during an assembly is approved by teachers and administrators.”); White, *supra* note 45, at 492 (discussing this issue in the Pledge of Allegiance context).

122. See, e.g., Lee, *supra* note 117, at 989; Norton, *supra* note 119; Norton & Citron, *supra* note 83, at 902; see also *Sumnum*, 555 U.S. at 468–69.

123. See White, *supra* note 45, at 492.

124. As Lyrissa Lidsky notes, the public-private binary is a “false choice.” Lidsky, *supra* note 73, at 2011–12; see also Blocher, *supra* note 84, at 711; Corbin, *supra* note 117.

125. Corbin, *supra* note 117, at 607.

print a message on the plate and vehicle owners can elect to purchase a plate with that particular message.¹²⁶ As Corbin documents while analyzing that example and others, circuits are split about whether to classify the mixed speech as private or governmental.¹²⁷ This classification is incredibly important and in many cases outcome-determinative: if the speech is the government's, then the government may choose what message it wants to convey (for example, a pro-choice or pro-life message) and is not required to give voice to the contrary viewpoint. If the speech is private speech, then the traditional presumption against viewpoint discrimination applies and the individual has some speech rights, as opposed to none.

As only a few federal judges have even flirted with the idea of an official mixed speech category, the governmental/private speech binary remains good law.¹²⁸ Yet, as Corbin explains, there are substantial pitfalls of classifying mixed speech into only one of these two categories:

[I]f mixed speech is categorized as private speech, the government cannot discriminate against any viewpoints. Consequently, discounting the government component of mixed speech may lead to government endorsement of undesirable messages (like offensive or hate speech) or government endorsement of religious messages in violation of the establishment clause. . . . [I]f mixed speech is categorized as government speech, the government may censor viewpoints. Viewpoint discrimination, however, may undermine the free speech interests of both speakers and audiences and distort the marketplace of ideas. Furthermore . . . the government's chosen viewpoint could be mistaken for private preferences. The resulting lack of transparency permits the government to advance its policy positions without being held accountable for its advocacy.¹²⁹

Similar to the situations Corbin analyzes, much speech in schools does not easily fall into one category or the other: students' public curricular speech and students' speech at school assemblies are commonplace examples of mixed speech in schools.¹³⁰ Supreme

126. *Id.*; see also Norton, *supra* note 109, at 590.

127. Corbin, *supra* note 117, at 607; see also Norton, *supra* note 109, at 590–91; Olree, *supra* note 87, at 386–400.

128. Olree, *supra* note 87, at 386; see also Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1329–31 (2004).

129. Corbin, *supra* note 117, at 610.

130. Alan Brownstein contends that “[t]here are many occasions where student speech in school-sponsored activities cannot reasonably be understood to express the government's message.” Brownstein, *supra* note 10, at 736.

Court cases have engaged others: a nondenominational prayer offered by an invited clergyperson at a school graduation,¹³¹ a pre-football game prayer conveyed over the stadium PA system by a student elected by his or her peers,¹³² and a student's lewd speech discussed ahead of time with two teachers and delivered at a school assembly.¹³³ The Court treated the speech in the first two of these three instances as the government's and in the last instance as the individual's.¹³⁴

If a court were to explicitly recognize these situations as involving mixed speech, this recognition would more accurately describe the speech itself. Additionally, abandoning the legal fiction that speech is either governmental or private in this context would lead to many of the benefits and avoid many of the pitfalls Corbin describes. However, doing so also would require the use of a different legal test. As I discuss in more detail in Subpart IV.B, though, in the public school setting the *Hazelwood* test and existing Establishment Clause doctrine address these concerns in a way that may not be ideal, but is adequate.

3. *How Unambiguous Must the Government's Message Be?*

One last open question in government speech doctrine is how unambiguous the government's message must be in order for the government to invoke the doctrine as a defense to quashing private free speech rights. This issue, too, is present in many school speech situations. The Supreme Court has recognized government speech as both affirmative (promoting a particular message) and negative (refusing to adopt a private speaker's message);¹³⁵ accordingly, this recognition has created substantial ambiguity in the doctrine. For example, in *Summum*, the city did not want to accept the Summums' monument, and the Court held that it did not have to because the city could not be forced to convey a message it did not want to adopt.¹³⁶ But what message was the city intending to send—and what message was a reasonable observer in that community absorbing—when the city accepted the other monuments for the city park and rejected the Summums'? Does exclusion express disapproval of the speaker? Does inclusion express approval? If so, are these general messages specific enough to

However, it appears that Brownstein reaches this conclusion within the public-private speech dichotomy rather than evaluating the speech as mixed speech.

131. *Lee v. Weisman*, 505 U.S. 577, 581 (1992).

132. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

133. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986).

134. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302–03; *Bethel Sch. Dist. No. 403*, 478 U.S. at 685–86; *Weisman*, 505 U.S. at 586.

135. Norton, *supra* note 128, at 1320–21.

136. *Pleasant Grove City v. Summum*, 555 U.S. 460, 479–81 (2009).

constitute a government viewpoint? And, in other situations, how would the public know that the exclusion was not based on aesthetics?

Furthermore, what if multiple messages are conveyed by one speech act—does this reduce the impression that the government is speaking or that it is conveying a particular viewpoint and thus allowed to exclude contrary viewpoints?¹³⁷ If we consider school curriculum, over the course of just one day students are exposed to countless messages, sometimes about the same issue. Similarly, when a school building (or stadium, gymnasium, library, classroom, et cetera) is named for an individual or for a sponsor, what message is communicated?¹³⁸ Joseph Blocher asks: “Does the name on a school really send a message of endorsement? Or is it simply the equivalent of allowing a private sponsor to use the school as a billboard? If it is the latter, is that acquiescence enough to constitute an endorsement?”¹³⁹ If the government is conveying multiple messages, the government speech doctrine seems to give the government a wide berth to quash a broad range of “contrary” speech without suffering constitutional consequences.¹⁴⁰

C. *Why the Government Speech Doctrine Could Apply in School Speech Cases*

As the Supreme Court regularly reminds us, public schools are unique First Amendment institutions—in other words, the Free Speech Clause rules are different inside the schoolhouse gates.¹⁴¹ Thus, it is not a foregone conclusion that the government speech doctrine would apply in this context. In fact, the most obvious way to distinguish away the government speech doctrine in school speech cases would be to rely on the binary formed by the government speech doctrine and forum analysis doctrine, and resolve school speech cases under the forum analysis approach. After all, the

137. Norton, *supra* note 109, at 615.

138. Blocher, *supra* note 10, at 27.

139. *Id.* at 29.

140. Park, *supra* note 87 (“If the government exercises approval authority in creating a message (*Summum, Johannis*), the government can pick and choose among private speakers that it will support based on vague criteria such as the speaker’s ‘excellence,’ ‘decency’ or ‘respectfulness’ (*Finley*), the government can exercise editorial discretion based on what it determines to be newsworthy (*Forbes*), or exercise judgment about what information is best for research or learning (*American Library Ass’n*). These broad criteria are extremely flexible and adaptable to new circumstances.”).

141. See *supra* Part I.A; see also 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, 1436–38 (2011) (summarizing and discussing the academic debate about the uniqueness of schools as First Amendment institutions).

Court resolved the two most recent higher education student speech cases with forum analysis reasoning, while specifically rejecting the government speech doctrine, even though the speech was arguably at least partially that of the school.¹⁴² Those two cases, however, do not transfer to the elementary/secondary school context. First, they both involve student organizations speaking outside of classroom settings and thus are not a good factual fit for most of the school speech conflicts. Second and even more importantly, despite the Court's flirtation with forum analysis in a public school setting in *Hazelwood*, courts have consistently held that elementary and secondary school classrooms are not public fora or even designated/limited fora.¹⁴³ Thus, although forum analysis may have some utility in elementary and secondary schools, it is inadequate to address the incredible range of speech controversies that occur there.¹⁴⁴

142. In *Rosenberger v. Rector and Visitors of the University of Virginia*, decided in 1995, the Court held that when a university provided funding and space for student organizations, it created a forum in which it could only impose viewpoint-neutral regulations, and that it did not violate the Establishment Clause because some of the organizations were religious in nature. 515 U.S. 819, 830, 834, 845–46 (1995). Additionally, the Court made it clear that by providing funding and meeting space, the university was not speaking directly or adopting a private message as its own. *Id.* at 834. This was true even when an organization used the funding to print a religious publication in accordance with its mission—unlike the school newspaper in *Hazelwood*, the student organization publication at issue here did not bear the imprimatur of the school. *Id.* at 841.

Similarly, in 2000, the Court held in *Board of Regents of University of Wisconsin System v. Southworth* that a university could assess a mandatory student activity fee even over the opposition of some students who did not want to financially support all student organizations, so long as the fee was disbursed in a viewpoint-neutral manner. 529 U.S. 217, 220–21 (2000). As in *Rosenberger*, the Court made clear that *Southworth* was a public forum case, not a government speech case. *Id.* at 229–30.

143. Brownstein, *supra* note 10, at 730–34. Indeed, it is difficult to conceive of how teachers could make their way through lesson plans, much less grade assignments or satisfy the state standards, if they had to be receptive to whatever views students, parents, or community members wanted expressed in schools. For these reasons and others, I find Alan Brownstein's "nonforum" argument quite compelling. In short, he proposes that public elementary and secondary schools are one example of what should be recognized as a new category in forum analysis—the "nonforum"—which is unique because the purposes of the government property and activity (here, the school and education, respectively) are inconsistent with protecting the free speech rights of many individuals on that property and involved in that activity. *Id.* at 770–75.

144. William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GEN. RACE & JUST. 213, 251 n.220 (1999) (citing *Burnham v. Ianni*, 98 F.3d 1007 (8th Cir. 1996); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994); *Silano v. Sag Harbor Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Bishop v.*

So why should the government speech doctrine potentially apply in the public school context, other than the reason that the forum analysis doctrine is of little use? This is an important question because there is no shortage of government speech in schools. In Steven Smith's words, "In public schools . . . government gets to speak to captive audiences; it speaks to them for hours and days on end at the formative period in life—childhood—when people are most susceptible to indoctrination. No other speaker comes close to enjoying these discursive advantages."¹⁴⁵ None of the Court's canonical government speech cases have involved the public elementary and secondary school context. Yet, public schools are obviously government entities and are subject to the constraints of the Constitution, even if individuals' constitutional rights are sometimes slightly different in the public school context than outside the schoolhouse gates.¹⁴⁶ If schools are proper targets of alleged free speech violations, it follows that they should have the benefit of a defense generally available to government in other free speech cases. Additionally, the higher education forum analysis cases discussed earlier have alluded to the potential application of

Aranov, 926 F.2d 1066 (11th Cir. 1991); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989); *Murray v. Pittsburgh Bd. of Pub. Educ.*, 919 F. Supp. 838, 843 (W.D. Penn. 1996); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994); *Burns v. Rovaldi*, 477 F. Supp. 270 (D. Conn. 1979)) ("[S]everal federal courts have rejected the argument that a public school or college classroom is a public forum."); *see also* Bezanson & Buss, *supra* note 85, at 1422; Brownstein, *supra* note 10, at 772–73 (noting that the public forum doctrine is rarely employed in case law and that in a "great majority of cases the court" holds that no public forum exists, although "many cases involve long and sometimes tortured discussions attempting to reconcile *Hazelwood* with forum analysis"); Buss, *supra*, at 276 ("The characterization of a classroom as a designated public forum seems far more likely to occur at the university level [than at the K–12 level].").

145. Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 950 (2010); *see also* White, *supra* note 45, at 451.

146. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that student speech cases should be decided by rules unique to the school environment); *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *see also* *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002) (holding that student search and seizure cases, both suspicion based and suspicionless, should be decided by rules unique to the school environment); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985); *Bd. of Educ. v. Pico*, 457 U.S. 853, 861 (1982) ("Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom. For example, *Meyer v. Nebraska* struck down a state law that forbade the teaching of modern foreign languages in public and private schools, and *Epperson v. Arkansas* declared unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school." (citations omitted)).

the government speech doctrine to teaching and scholarship in colleges and universities, so the leap to public-elementary-or-secondary-school-as-government-speaker, especially when considering the classroom setting, is not a huge one.¹⁴⁷ The Court alluded to this in its 1988 decision in *Hazelwood v. Kuhlmeier*, a case about a high school student newspaper that largely predated the government speech doctrine but bears much of the same legal architecture.¹⁴⁸ Finally, the Court in dicta has listed “a public school prescribing its curriculum” as an example of a government entity engaging in speech.¹⁴⁹ Deciding that the government speech doctrine could potentially apply to public elementary and secondary schools is merely the beginning of the inquiry, though.¹⁵⁰

III. STATES’ AND SCHOOL DISTRICTS’ SPEECH IN SCHOOLS

As Steven Shiffrin noted over thirty years ago, “the essence of public education is that the state and not parents will ultimately decide what is best for children.”¹⁵¹ A large part of deciding what is best involves choosing which ideas students will be exposed to, and particularly what they will be taught is true and/or morally good.¹⁵² Schools’ messages generally are broad and usually reflect the dominant perspective of academic disciplines, but the messages also reflect value choices.¹⁵³ Indeed, as discussed earlier, education is not viewpoint neutral.¹⁵⁴ Existing case law acknowledges this. So,

147. See *infra* notes 267–75 and accompanying text. Universities “speak” more than public schools, however. As Bezanson and Buss explain: “Public universities do more than allocate fees, of course. They set curricula, support research by their employees, review the teaching and scholarly records of faculty for purposes of merit pay and tenure, operate museums, publish books, sponsor speakers, and launch academic programs and symposia.” Bezanson & Buss, *supra* note 85, at 1435.

148. 484 U.S. 260 (1988); see also *supra* Part III.A.1 (discussing *Hazelwood*).

149. Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 674 (1998); Bezanson & Buss, *supra* note 85, at 1419, 1421–22 (explaining the significance of this statement and the many questions it raises); see also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“[P]ublic education in our Nation is committed to the control of state and local authorities.”).

150. Bezanson & Buss, *supra* note 85, at 1382–83 (asking a long list of questions regarding the government speech doctrine and its application).

151. Shiffrin, *supra* note 79, at 648.

152. Bezanson & Buss, *supra* note 85, at 1421–22.

153. *Id.* at 1421–22, 1489; Mark G. Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 697 (1988).

154. Given the general presumption against viewpoint discrimination discussed earlier, it may sound shocking to admit this, but scholars have long acknowledged that the context of public education is different in many ways, including the prevalence of de facto viewpoint discrimination. Randall Bezanson and William Buss have written, “[a]chieving or approaching government neutrality in education is not only practically impossible, it is also highly inconsistent with the general understanding of what education is trying

how would and how should the government speech doctrine apply to curriculum and textbook selection by a state or school district; teachers' in-class instructional speech; and schools' (de)selection of library books?

A. *Textbook Selection and Curriculum Determination*

The first category of school speech cases involves state and local governments' decisions to select textbooks and determine various aspects of the curriculum. These cases usually involve challenges by students and parents who disagree with the viewpoint(s) presented by the government.¹⁵⁵ Several Supreme Court cases establish guiding principles for resolving these situations, although circuits take various approaches to the current controversies.

1. *Deference to Schools, but with Limits*

Battles over the content of public schools' academic curriculum, mandatory nonacademic classroom practices, and textbooks are hardly new. Two of the Court's earliest decisions involving public schools addressed these issues. The first, *Meyer v. Nebraska*,¹⁵⁶ was decided in 1923. *Meyer* involved a state statute that prohibited public schools from teaching students in any language other than English prior to ninth grade and punished any teachers doing so with liability for a misdemeanor as well as a fine or jail time.¹⁵⁷ In *Meyer*, the Court expressed support for the idea that public schools can help to create loyal American citizens, but ultimately struck down the regulation under a rational basis test as violating the teacher's and parents' Fourteenth Amendment liberty rights.¹⁵⁸ *Meyer's* focus on the Due Process Clause limits its application today; even though *Meyer* was initiated by a teacher, it remains best known as a foundational parental rights case.¹⁵⁹

to do." Bezanson & Buss, *supra* note 85, at 1421, 1491; *see also* Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047, 1109 (2009); *supra* note 106 and accompanying text.

155. *See infra* Part III.B. As alluded to earlier, it is not a significant leap to infer that states' and school boards' textbook selections and curricular decisions constitute "the government's own expression," especially because the Court has stated precisely that in dicta.

156. 262 U.S. 390 (1923).

157. *Id.* at 397.

158. *Id.* at 401, 403; *id.* at 402 ("The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports.").

159. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000); Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 22 (2009).

The second decision, *West Virginia State Board of Education v. Barnette*,¹⁶⁰ came twenty years later in 1943. *Barnette* involved an extension of the academic curriculum required by the state board of education: daily, mandatory participation in the flag salute and Pledge of Allegiance by teachers and students.¹⁶¹ Nonparticipating students were subject to expulsion until they complied, and parents were liable for their child's truancy with punishment of a fine or jail time.¹⁶² *Barnette* required students to speak; the students could not opt out and had no ability to alter the message.¹⁶³ Thus, the speech could be characterized as either government-compelled private speech or student-articulated government speech, a classification question the Court did not resolve.¹⁶⁴ Similar to *Meyer*, the *Barnette* Court conceded that public schools could use the curriculum to nurture patriotism but held that the requirement that students declare national loyalty went too far.¹⁶⁵ The Court did not make clear the doctrinal basis for its decision in *Barnette*; and thus lawyers' and courts' ability to extrapolate broader precedential value from *Barnette* has been limited.¹⁶⁶

Beginning in the mid-1960s, the Court decided at least a half-dozen cases involving Establishment Clause violations in public school classrooms (these cases are different from the Establishment Clause cases that arose out of events such as a graduation ceremony or a football game's pregame proceedings). This set of classroom-focused decisions clearly identified the government as a speaker, whether through state statute, state board of education policy or recommendation, local school board policy or practice, or through students.¹⁶⁷ These cases include conflicts about the daily classroom recitation of a prayer, Bible readings, and/or a moment of silence;¹⁶⁸

160. 319 U.S. 624, 642 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

161. *Id.* at 625–26.

162. *Id.* at 629.

163. *Id.* at 626, 629.

164. Haupt, *supra* note 111, at 610.

165. *Barnette*, 319 U.S. at 640, 642.

166. Arguably, *Barnette* could be a Free Exercise case, a Free Speech case, or some sort of political Establishment Clause case or case about a right to not participate in a political ceremony. YUDOF, *supra* note 66, at 230–33.

167. Haupt, *supra* note 111, at 610.

168. *Wallace v. Jaffree*, 472 U.S. 38, 40, 58–61 (1985) (holding unconstitutional a series of state statutes (amended while litigation proceeded) that first required a moment of silence for elementary school students, then permitted a moment of silence “for meditation or voluntary prayer” for students in all grades, then authorized participation by “willing students” in a specific prayer); *Abington v. Schempp*, 374 U.S. 203, 205, 210 (1963) (holding unconstitutional two states' requirements that public schools begin each day with Bible readings, and in one state also the Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421, 422–23, 424–25 (1962) (holding that the state's decision to

the required posting of the Ten Commandments in school classrooms;¹⁶⁹ and prohibiting instruction about evolution or requiring instruction about creationism when evolution is taught.¹⁷⁰ Unlike the prior cases involving conflicts about nationalism, the Establishment Clause cases rarely mention the ability of the state and local government to control what happens in public schools.

The two antievolution cases are the exceptions to this rule, and perhaps that is because they focused squarely on conflicts about the academic curriculum as opposed to daily mandatory practices that were not studied or tested. First, in *Epperson v. Arkansas*,¹⁷¹ decided in 1968, the Court struck down a decades-old state statute prohibiting instruction about evolution and the adoption of textbooks that included information about evolution; teachers violating the provision were liable for a misdemeanor and could be fired.¹⁷² The *Epperson* Court noted that the state has an “undoubted right to prescribe the curriculum for its public schools” but held that the statute was invalid because it violated the Establishment Clause.¹⁷³ This language about the state’s authority to prescribe curriculum has often been cited in non-Establishment Clause classroom speech cases.¹⁷⁴ Second, in *Edwards v. Aguillard*,¹⁷⁵ decided in 1987, the Court rejected the idea that Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in

authorize and the school board’s decision to implement an optional, nondenominational Judeo-Christian prayer recited in classrooms at the beginning of the school day violated the Establishment Clause).

169. *Stone v. Graham*, 449 U.S. 39, 39–40 (1980) (granting certiorari and summarily reversing, rejecting Kentucky’s statutory requirement that the Ten Commandments be posted on each public classroom wall across the state as a violation of the Establishment Clause).

170. *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

171. 393 U.S. 97.

172. *Id.* at 98–99. The state trial court below focused on the teachers’ and students’ rights and held that the statute violated the First Amendment because it “tend[ed] to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach.” *Id.* at 100. The Arkansas Supreme Court reversed, holding that the statute was a valid exercise “of the state’s power to specify the curriculum in public schools.” *Id.* at 101.

173. *Id.* at 107.

174. *See, e.g., Mercer v. Mich. State Bd. of Educ.*, 379 F. Supp. 580, 585 (E.D. Mich. 1974), *aff’d mem.*, 419 U.S. 1081 (1974). In 1974, the Court affirmed a lower court’s decision without issuing an opinion. The district court upheld a Michigan statute that prohibited schools from discussing birth control in sex and health education classes. *See id.* at 582 (discussing statute). The three-judge district court cited *Epperson* for the principle that the state had the authority to control the curriculum; it held that the state had neither exceeded its authority by exercising the statute nor violated other constitutional provisions, including the Establishment Clause. *Id.* at 584–87.

175. 482 U.S. 578 (1987).

Public School Instruction Act” was motivated by academic freedom concerns as a sham and for various reasons concluded that it violated the Establishment Clause.¹⁷⁶ Similar to *Epperson*, the *Aguillard* Court noted the “considerable discretion” normally enjoyed by local authorities “in operating public schools.”¹⁷⁷ Yet, it also emphasized the “coercive power” of the school in molding the next generation of citizens, which underscored the importance of not violating the Establishment Clause.¹⁷⁸

The next year, in 1988, the Court decided *Hazelwood v. Kuhlmeier*. *Hazelwood* is customarily classified as a student speech case, and of course it is that. But because the speech at issue occurred in the context of the classroom and as part of the curriculum, *Hazelwood* also fits naturally into this synthesis of instructional speech cases in ways that the core traditional student speech cases (*Tinker*,¹⁷⁹ *Fraser*,¹⁸⁰ and *Morse*¹⁸¹) do not. In *Hazelwood*, students in a journalism class produced the school newspaper; when the school principal excised two pages of one newspaper issue because of concerns about age appropriateness and confidentiality raised by some of the articles, the student journalists challenged that action.¹⁸² Unlike in *Meyer* and *Barnette*, in *Hazelwood* the school ultimately won.¹⁸³ In its decision, the Court set forth what has become known as the *Hazelwood* test: when speech bears the “imprimatur of the school,” schools’ restrictions on that speech are allowed if they are “reasonably related to legitimate pedagogical concerns.”¹⁸⁴ It is undisputed that the government speech doctrine was “inchoate” when *Hazelwood* was decided. Still, some scholars view *Hazelwood* as a case that “shares many of the features and has a lot of the legal DNA of the modern” government speech doctrine,¹⁸⁵ and others view it as a case about “government’s role as regulator” of private speech.¹⁸⁶ Either way, *Hazelwood* has

176. *Id.* at 593–97.

177. *Id.* at 583.

178. *Id.* at 584–85.

179. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

180. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

181. *Morse v. Frederick*, 551 U.S. 393 (2007).

182. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988).

183. *Id.* at 266.

184. *Id.* at 273 (“[E]ducators 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.”).

185. E-mail from Frank Ravitch to author (Aug. 10, 2012) (“*Hazelwood* is like the Homo Erectus of government speech. It had not yet evolved into the modern doctrine, but it shares many of the features and has a lot of the legal DNA of the modern doctrine.”).

186. Bezanson & Buss, *supra* note 85, at 1418; Yudof, *supra* note 153, at 685.

great relevance to the situations discussed here. The school district defendant in *Hazelwood* won at the Supreme Court level and the theme of deference to states and schools dominated that decision.

Taken together, these cases illustrate an important overall theme: in curricular speech cases, the Court strongly encourages deference to the state as educator, but the deference is not unqualified. This dynamic was present in *Meyer*,¹⁸⁷ *Barnette*,¹⁸⁸ *Epperson*,¹⁸⁹ *Aguillard*,¹⁹⁰ and *Hazelwood*.¹⁹¹ However, except for *Hazelwood*, the Court ultimately found for the plaintiffs, noting the general presumption of deference and then explaining that the state action in question was so far beyond the pale that the Court simply could not let it stand.¹⁹² Those outcomes stand in stark contrast to the outcomes of contemporary circuit-level textbook and curriculum disputes, which the state almost always wins.

2. *Current Controversies and Circuit Splits About Curriculum and Textbooks*

Recently, evolution and intelligent design controversies have constituted many of the most visible controversies about curricular determination and textbook selection. These disputes include a local school board's 2006 decision in Dover, Pennsylvania, to teach intelligent design,¹⁹³ the Kansas State Board of Education's seemingly biannual debates about the state's evolution-related state

187. *Meyer v. Nebraska*, 262 U.S. 390, 400, 402 (1923).

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

189. *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968).

190. *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987).

191. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 276 (1988).

192. In *Meyer* and *Barnette*, the Court ultimately stepped in and imposed limits on the state's ability to indoctrinate students with patriotic beliefs; in *Epperson* and *Aguillard*, the Court rejected states' attempts to present religious beliefs in public school classrooms. Cases focused on challenging the indoctrination of patriotism have been rare since *Barnette* was decided in the 1940s; however, Establishment Clause cases have been much more common since then. When considering curricular speech cases, it is in this latter area—the Establishment Clause—that states and school districts have most consistently lost at the Supreme Court level and in lower courts; judicial opinions often seem to imply that these sorts of violations are beyond the pale in ways that other classroom speech decisions are not, even if those controversies arise out of decisions different than ones individual Justices would have made. See *supra* notes 187–91 and accompanying text.

193. Bowman, *supra* note 68, at 419–20, *passim*. Although states have increasingly specific standards, many still leave room for more specific curricular decisions to be made at the school- and school-district level. These decisions may be made by the locally elected school board members, by professional educators in the district's central administration or building administration, or in the case of an elective course or a permissive district, by individual teachers.

science standards,¹⁹⁴ and the Texas Board of Education's debates about which science textbooks to approve.¹⁹⁵ Textbook and curricular controversies are neither new nor limited to those issues, though. States require instruction about a variety of potentially controversial issues and have done so since before the colonies declared independence from England.¹⁹⁶ For example, today states mandate instruction about sex education (abstinence-only or comprehensive approaches; many of the former, in particular, perpetuate traditional gender roles);¹⁹⁷ the holocaust (Illinois);¹⁹⁸ the Armenian genocide (Massachusetts);¹⁹⁹ the superiority of democracy and the free market (Alabama);²⁰⁰ and the historical contributions of various groups of people, including gays and lesbians (California).²⁰¹ States also are taking steps to explicitly limit what is taught: one state has prohibited a critical race studies curriculum designed by a

194. *Id.* at 421 n.11. All states but one have subject-matter content standards which stipulate, in varying levels of detail, what should be taught in required subjects at various grade levels. These standards are customarily established and modified by the state board of education, a body whose members may be elected or may be appointed by the governor depending on the state. State standards have gained teeth increasingly over the past decade with the rise of the "accountability" movement and its focus on testing, because the tests in each state should be designed to assess the degree to which students are acquiring knowledge and skills contained in that state's standards.

195. Kate Alexander, *State Board of Education Delves Again into Science Debate*, AUSTIN AM.-STATESMAN, July 20, 2011, available at <http://www.statesman.com/news/texas-politics/state-board-of-education-delves-again-into-science-1629355.html>. Some states exercise greater control over curriculum by selecting a single textbook, or approving various textbooks, that schools may use at given grade levels. State involvement in textbook selection is an extension of a state's involvement with setting and modifying standards and thus standardizing the education students receive across the state. If states do not select/approve textbooks, then local school boards usually do so, although (as with curriculum), teachers of elective courses may have more discretion over the textbook(s) they use.

196. Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 774-76 (1995) ("[A]s early as 1647, the colony of Massachusetts enacted a law requiring that children be taught such virtues . . ." linking religion and morals education. Explicit values education continued through the Civil War era and beyond.).

197. Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587 *passim* (2011).

198. 105 ILL. COMP. STAT. 5/27-20.3 (2012) (Holocaust and Genocide Study).

199. 1998 Mass. Acts 1154.

200. ALA. CODE § 16-40-3 (2012).

201. CAL. EDUC. CODE § 51213 (Deering 2000) (no disparagement of the same groups); *id.* § 51500; *id.* § 51530; Erik W. Robelen, *Calif. Governor Signs Gay-History Bill*, EDUC. WK., Aug. 10, 2011, at 6; Erik W. Robelen, *California May Mandate Inclusion of Gay History in Curricula*, EDUC. WK., Apr. 27, 2011, at 10.

local school district (Arizona),²⁰² and in another, a bill is pending that would “bar discussion of homosexuality in K–8 classrooms” (Tennessee).²⁰³ Additionally, since her retirement from the Court, Justice O’Connor has been an advocate for civic education in public elementary and secondary schools; recently, Justice Breyer has joined her cause.²⁰⁴

Textbook selection and curricular determination disputes often reach the courts. Over the past thirty-five years, nine circuits have decided non-Establishment Clause cases in which students, parents, or others challenged a state or local government decision regarding school curriculum or textbook selection.²⁰⁵ States and school districts almost never lose these cases.²⁰⁶ Circuits employ three different tests to decide these cases, although the circuit split can be explained in large part as reflecting a particular chronology. First,

202. Litigation is ongoing in *Acosta v. Huppenthal*, No. 10–CV–623–TUC–AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013). Mary Ann Zehr, *Ethnic-Studies Classes Tense Subject in Tucson*, EDUC. WK., July 13, 2011, at 30–31; *Litigation, SAVE ETHNIC STUDIES*, <http://saveethnicstudies.org/litigation.shtml> (last visited Jan. 19, 2013).

203. Richard Fausset, *Tennessee ‘Don’t Say Gay’ Bill Clears a Hurdle in State House*, L.A. TIMES, Feb. 16, 2012.

204. Debra Cassens Weiss, *For Justice Breyer, the Need for Civic Education Is as Clear as Blue and Red*, A.B.A. J. (Aug. 6, 2011), http://www.abajournal.com/news/article/for_justice_breyer_the_need_for_civic_education_is_as_clear_as_blue_and_red/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

205. I focus on non-Establishment Clause cases here because Establishment Clause cases are governed by a distinct set of doctrinal rules, and the Court has already declared that the Establishment Clause is an exception to the government speech doctrine. For the curious, two of the most notable circuit-level Establishment Clause curriculum/textbook cases are *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987) and *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

206. See, e.g., *Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010); *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005); *Planned Parenthood v. Clark Cnty. Sch. Dist.*, 887 F.2d 935 (9th Cir. 1989); *Virgil v. Sch. Bd.*, 862 F.2d 1517 (11th Cir. 1989); *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771 (8th Cir. 1982); *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981); *Zykan v. Warsaw Cnty. Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Cary v. Bd. of Educ.*, 598 F.2d 535 (10th Cir. 1979); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976); see also *Bezanson & Buss*, *supra* note 85, at 1422 (“It is widely accepted that education is immune to First Amendment challenges even though the state selects what to communicate in public schools on the basis of content.”); *Waldman*, *supra* note 106, at 75–79 (discussing the application of *Hazelwood* to textbook and curricular decision cases, though considering teacher-initiated cases in the same category as student/parent-initiated cases); *Yudof*, *supra* note 153, at 683 (“If the expression is governmental and not personal, students generally may not interfere with the school’s articulation of its own educational messages. They do not have a constitutional right to add or delete courses from the curriculum, alter the teacher’s lesson plan, or scrutinize the school district’s choice of textbooks.”).

of the five circuits that have not considered these issues since the Court decided *Hazelwood* in 1984, all five discussed the general deference that states and school districts should receive in curricular matters, absent some beyond-the-pale violation of a core constitutional principle (the one case plaintiffs won at the appellate level involved invidious viewpoint discrimination).²⁰⁷ These decisions regularly invoked the Court's language about deference to states and school boards from the Establishment Clause curricular cases and thus picked up the deference theme that runs through all of the Court's cases related to curricular speech.²⁰⁸ Second, the two circuits to consider curricular/textbook cases after *Hazelwood* in 1984 and before the government speech doctrine had gained traction in the mid-2000s employed *Hazelwood's* test as the mode of analysis, although in a recent unpublished decision, one of those circuits employed the government speech doctrine without mentioning *Hazelwood*.²⁰⁹ Given the factual similarity of *Hazelwood* as a case also about curricular speech, the greater specificity of the test in *Hazelwood* as compared to the general deference principles, and the later rise of the government speech doctrine, this timing makes sense.

Third and perhaps most interestingly, the three circuits to consider these issues most recently have invoked the government speech doctrine. The Fifth Circuit held in 2005 that the state's approval of textbooks was properly analyzed under the government speech doctrine as a natural extension of the cases that emphasized deference to states and school districts.²¹⁰ The First Circuit, in an opinion written by Justice Souter in 2010 after his retirement from the Court, held that a state-level advisory curriculum guide was properly evaluated under one of three consistent "strands" of Supreme Court cases: those emphasizing schools' role in creating the next generation of citizens, those emphasizing deference to state and local school boards unless in the face of a constitutional violation, and those establishing the government speech doctrine.²¹¹ Finally, in 2011, the Ninth Circuit's unpublished opinion, alluded to in the previous paragraph, held that a state charter school commission could prohibit "sectarian or denominational texts in public schools" because the textbooks were government speech.²¹²

207. *Pratt*, 670 F.2d at 775; *Seyfried*, 668 F.2d at 217; *Zykan*, 631 F.2d at 1305; *Cary*, 598 F.2d at 543; *Minarcini*, 541 F.2d at 582.

208. *Pratt*, 670 F.2d at 775; *Seyfried*, 668 F.2d at 217; *Zykan*, 631 F.2d at 1305; *Cary*, 598 F.2d at 543; *Minarcini*, 541 F.2d at 582.

209. *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 778 (9th Cir. 2011); *Clark Cnty. Sch. Dist.*, 887 F.2d at 940; *Virgil*, 862 F.2d at 1521.

210. *Chiras*, 432 F.3d at 611–15.

211. *Griswold*, 616 F.3d at 58–59.

212. *Nampa Classical Acad.*, 447 F. App'x at 777–78.

The Ninth Circuit did not discuss an alternate test.²¹³ None of these three cases relied on *Hazelwood* (in fact, the Fifth Circuit explicitly rejected the use of *Hazelwood*),²¹⁴ and the state/school board won all three cases.²¹⁵ As this chronology demonstrates, in curriculum and textbook decision cases, the momentum certainly favors the government speech doctrine.

3. *Curriculum and Textbooks: Government Speech in Many Ways, but the Government Speech Doctrine Should Not Apply*

If the government speech doctrine applies at all to public schools—and, as discussed above, there is no obvious and overwhelming reason why that would not be the case—there are several reasons why it would seem to apply to textbook and curriculum selection disputes. However, even though applying the government speech doctrine would only marginally strengthen the government’s position, the arguments that it should apply are ultimately trumped by the ways in which the government speech doctrine would undermine the public goods created by public education.

The arguments in favor of applying the government speech doctrine are not few or weak. First, and this is not always the case,²¹⁶ in curricular determination and textbook selection cases, the government is more clearly the speaker than in other situations: states and local school boards make decisions about what their agents will communicate in public schools. Because the government is the speaker, the public arguably can hold the government accountable for its speech through democratic processes such as advocating for statutory or policy reform directly, or by voting out legislators and/or state or local school board members.²¹⁷ This consideration is significant.

Second, the government speech doctrine is generally consistent with the deference courts grant to states and school boards in these types of cases. This consistency exists at a macro level: deference to states and school districts has been the most consistent theme expressed by the Supreme Court and by lower courts when they have grappled with curricular and textbook cases for the past ninety

213. *Id.* at 778.

214. *Id.* at 776; *Griswold*, 616 F.3d at 53; *Chiras*, 432 F.3d at 615–18.

215. *Nampa Classical Acad.*, 447 F. App’x at 776; *Griswold*, 616 F.3d at 54; *Chiras*, 432 F.3d at 606.

216. *See supra* Parts I.B.1 and III.

217. *Pleasant Grove City v. Summum*, 555 U.S. 460, 46–70 (2009); *Lee*, *supra* note 117, at 1052–53; *Norton*, *supra* note 119, at 21; *Norton & Citron*, *supra* note 83, at 902.

years.²¹⁸ Neither the Court nor the government speech doctrine would permit unchecked deference; the Court's government speech decisions have made clear that the doctrine does not trump the Establishment Clause, and there may be other exceptions as well.²¹⁹ The consistency reemerges on a practical level: as the circuits' decisions have demonstrated, courts do not favor allowing students and parents to control the curriculum.²²⁰ Thus, applying the government speech doctrine would not substantially change the outcomes of future such cases. Nine of the ten non-Establishment Clause circuit-level legal battles about curricular content discussed here have been decided in favor of schools, even though only one of these decisions relied strongly on the government speech doctrine to reach its result (two, if we include the unpublished decision from the Ninth Circuit).²²¹ If the government speech doctrine were applied, the state would very likely have won all ten of these cases.

Third, employing the government speech doctrine would eliminate doctrinal variations among circuits. Although the two circuits to most recently issue published decisions in these types of cases both invoked the government speech doctrine, only one relied on it exclusively, suggesting uncertainty about the doctrine's status.²²² (Also, as noted above, the circuit to decide this type of case most recently assumed that the government speech doctrine applied, but the decision was not published.²²³)

While the above reasons at first glance seem to demonstrate the doctrine's solid fit with this category of cases, ultimately these reasons are trumped by the substantial ways in which the government speech doctrine could undermine the public goods identified earlier. First, in the foundational Supreme Court decisions in which courts have rejected school boards' and state legislatures' determinations about curriculum, the courts have held

218. The principle of deference reflects the basic relationship among parents, students, and the state regarding public education, expressed in *Meyer* and many other cases, that, by enrolling children in public schools, parents cede substantial, albeit incomplete, control over their children's socialization; and students have an even more limited ability to influence what they themselves learn in public schools. See *supra* Parts II.A.1 and II.A.2.

219. See *supra* Part I.A.

220. Now, *Hazelwood*, which some circuits use to decide these cases, does not press deference as far as the government speech doctrine does. But as Emily Gold Waldman has convincingly argued, *Hazelwood* has never been a good fit for curricular or textbook selection cases, and forcing it to apply to these cases unnecessarily creates circuit splits about the permissibility of viewpoint discrimination, among other issues. Waldman, *supra* note 106, *passim*; see also *supra* Parts I.A and II.A.1.

221. See *supra* Part II.A.2.

222. See *supra* Part I.B.2.

223. *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 778 (9th Cir. 2011).

that the state's decision is constitutionally objectionable because it undermines the proper state goal of creating citizens to sustain our democracy.

Second, and more specifically, consider the situations that gave rise to *Meyer* and *Barnette*—through a distorted political process, state legislatures enacted laws that compelled patriotism in schools. If the judicial process had not been available, the statutes could have remained on the books for quite some time if not indefinitely. When the political process is distorted, the judicial check on government speech becomes even more important. But the government speech doctrine makes the judicial check substantially weaker: although plaintiffs almost never win curricular and textbook selection cases these days, the government speech doctrine would make the resolution of those cases even more certain because it permits marginally more viewpoint discrimination than current case law. Thus, these cases would be more likely disposed of via a motion to dismiss early in the litigation. This likely early resolution and thus inability to recover fees could then further deter plaintiffs from challenging textbook and curricular decisions in the first place, and deter them from bringing cases such as the lone circuit-level case that was decided in favor of the plaintiffs based on a viewpoint discrimination argument.²²⁴ Although plaintiffs could still have brought due process claims, under the government speech doctrine their speech claims would have been foreclosed.

To be sure, since we do have *Meyer*, *Barnette*, and the Court's 2007 decision in the student speech case *Morse v. Frederick* as precedent, a court could rely on those three decisions to articulate some sort of political establishment exception that falls within the "limiting law, regulation or practice" language from *Pleasant Grove City v. Summum*.²²⁵ In fact, in *Morse v. Frederick*, the school argued that it could censor student speech that "interferes with a school's 'educational mission.'"²²⁶ Justice Alito, in a concurrence, was the only Justice to squarely address this claim. In his words: "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment."²²⁷ Justice Alito is not the first Justice or citizen to balk at political

224. See *supra* Part I.A.

225. 555 U.S. 460, 469–70 (2009). Many view the lasting legacy of *Barnette* in particular as carving out patriotism as something, like religion, that the state can support but cannot compel. See *supra* Part II.A.1.

226. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring). *Morse v. Frederick* is the 2007 "BONG HiTS 4 JESUS" banner case that will be discussed in detail, *infra* Part IV.A.

227. *Morse*, 551 U.S. at 423 (Alito, J., concurring).

“establishment” by, or unchecked deference to, public schools. However, hoping that a trial judge or even a federal circuit would rely on the concurring opinion of one Justice and two decades-old cases that are not clearly connected to a specific constitutional provision²²⁸ to cobble together a creative exception to a far-reaching doctrine that has few articulated exceptions is a substantial risk.

In sum, although the government speech doctrine is in many ways a solid fit for cases involving students’ and parents’ challenges to textbook selection and curricular determination, this fit is trumped by overarching concerns about the way in which the doctrine could undermine the creation of the next generation of citizens and also reduce meaningful political and judicial checks on government speech.

B. Teachers’ Instructional Speech

The previous Subpart focused on challenges to textbook selection and curricular content brought mainly by students and parents. This Subpart turns to disputes about messages teachers convey, or want to convey, in the classroom. Some of these disputes are about control over textbooks and formal curriculum, and others are about teachers’ expression of their own viewpoints via less formal instructional speech.²²⁹ When teachers are plaintiffs, the state’s interests are somewhat different than when students and parents are plaintiffs. *Vis-à-vis* students and parents, the state is creating the next generation of citizens in a constitutionally sound manner. By enrolling their children in public schools, parents cede much of their authority over the socialization process to the state; yet as I argued in Subpart III.A immediately above, parents and students should also retain the ability to meaningfully challenge the state’s curricular and textbook decisions through the political and/or judicial process—an enforcement mechanism which is itself a public good.

Teachers share at least some of the state’s interest in creating the next generation of citizens, and they also bring to bear expertise about content and pedagogy. Additionally, unlike students or parents, teachers are state actors, and the core of the relationship between teachers and the school is one of employee-employer. The public goods identified in Part I.A are thus largely irrelevant to teachers’ academic freedom cases. Although it is beyond the scope of

228. See *supra* Part II.A.1.

229. As a short *Harvard Law Review* piece recently noted, “teachers in public schools often act as government agents beyond the confines of their formal curriculum.” *First Amendment – Free Speech in Schools – Ninth Circuit Holds that Teacher Speech in School-Related Settings Is Necessarily Government Speech* – Johnson v. Poway Unified School District, 658 F.3d 954 (9th Cir. 2011), 125 HARV. L. REV. 1868, 1875 (2012).

this Article to argue that teachers should or should not have First Amendment rights in public schools or beyond—that is the subject of a substantial and still-growing literature²³⁰—in this Subpart I analyze only whether there is anything substantially unique about the school environment that justifies protecting teachers’ instructional speech more than the official capacity speech of public employees in other settings.²³¹

1. *Teachers’ Limited Instructional Speech Rights*

In addition to the cases that focus on the textbooks or curriculum selected by the state or the school, another line of Supreme Court cases is relevant to the discussion of teachers’ instructional speech rights. This line of cases, the Court’s public employee speech cases, began in 1968 with *Pickering v. Board of Education*,²³² which involved a teacher who wrote a letter to the editor of the newspaper about proposals for raising school revenue. It continued in 1983 with *Connick v. Meyers*²³³ and concluded in 2006 with *Garcetti v. Ceballos*;²³⁴ the plaintiffs in *Connick* and *Garcetti* were both government attorneys who contested their superiors’ actions.

The rules from these three cases fit together as follows: a public employee must be speaking as a citizen about a matter of public

230. See generally, e.g., Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J. L. & EDUC. 409 (2009); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37 (2008); Emily White Kirsch, *First Amendment Protection of Teachers’ Instructional Speech: Extending Rust v. Sullivan to Ensure that Teachers Do Not Distort the Government Message*, 58 CLEV. ST. L. REV. 185 (2010); Norton, *supra* note 15; Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008); Ronald D. Wenkart, Annotation, *The Free Speech Rights of K-12 Teachers After Garcetti*, 269 ED. L. REP. 1 (2011) [hereinafter Wenkart, *Free Speech Rights*]; Ralph D. Mawdsley, Annotation, *Garcetti v. Ceballos and Classroom Instruction: The Sixth Circuit Creates Diminished Free Speech Protection for Classroom Teachers*, 266 ED. L. REP. 1 (2011); Scott Bauries & Patrick Schach, Annotation, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 ED. L. REP. 357 (2011); Ronald D. Wenkart, Annotation, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 ED. L. REP. 1 (2006).

231. I do not contend that the public school environment justifies giving teachers fewer rights than other public employees, though. For example, it seems entirely appropriate and consistent with the general public employee-employer relationship that teachers receive appropriate notice before being disciplined for making unapproved changes to the curriculum or pedagogy. See Gee, *supra* note 230, at 413–14, 449–52; Hutchens, *supra* note 230, at 62.

232. 391 U.S. 563 (1968).

233. 461 U.S. 138 (1983).

234. 547 U.S. 410 (2006).

concern for his or her speech to have any First Amendment protection. If that requirement is satisfied, then a court applies the presumption that a “government entity has broader discretion to restrict speech when it acts in its role as employer,” and requires that “the restrictions [the government] imposes must be directed at speech that has some potential to affect the entity’s operations.”²³⁵ Specifically, employees “must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”²³⁶ In *Garcetti*, the Court refined this doctrine to clarify that speech made “pursuant to [a public employee’s] official responsibilities” is not protected by the First Amendment, and that “official duty” speech and “private citizen” speech are mutually exclusive.²³⁷ Thus, because the government effectively hires “official duty” speech, it is the government’s speech to control.²³⁸ The Court offered one potential caveat to the broad rule of *Garcetti*, noting that it was not deciding whether “expression related to academic scholarship or classroom instruction” was included in official-duty speech because of academic freedom concerns.²³⁹ This caveat echoes the Court’s respect for teachers’ academic freedom and personal political freedom expressed during the 1960s in *Shelton v. Tucker*²⁴⁰ and *Keyishan v. Board of Regents*.²⁴¹ Although the Court did not specify, it seems much more likely the *Garcetti* caveat applies, if at all, in the higher education context rather than in the elementary/secondary education context because courts historically have been extremely reluctant to recognize academic freedom rights for elementary and secondary teachers, while the concept of academic freedom has become fairly robust in the college and university setting.²⁴²

Four broad principles from these cases are especially relevant to the question of teachers’ instructional speech rights. First, *Garcetti* is a government speech case, although by its own terms it may not apply to educational settings. Second, as numerous commentators have noted, *Garcetti* in particular limits public employees’ speech rights to a point where they have almost wasted away, although

235. *Id.* at 418.

236. *Id.* at 419.

237. *Id.* at 421–22, 424.

238. *Id.*; Norton & Citron, *supra* note 83, at 911.

239. *Garcetti*, 547 U.S. at 425.

240. 364 U.S. 479, 485–86 (1960).

241. 385 U.S. 589, 603 (1967).

242. YUDOF, *supra* note 10, at 16–17; Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 *passim* (2009) (focusing on academic freedom in the higher education context); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 NEB. L. REV. 301 *passim* (1998).

some of this appears due to circuits' application of *Garcetti* to speech that is outside of a teacher's or public employee's official capacity.²⁴³ Third, even before *Garcetti*, teachers' instructional speech rights under *Pickering* and *Connick* were virtually nil.²⁴⁴ Fourth, the Supreme Court's public employee speech cases are consistent with its classroom and textbook cases because all make clear that the rights and interests of the state are substantial and are usually strong enough to trump the rights of individual speakers.

2. *Teachers' Instructional Speech: Current Controversies and Circuit Splits*

Contemporary conflicts about teachers' speech often involve teachers being disciplined for using particular materials or pedagogical approaches other than those that have been approved by the state or by the local school district.²⁴⁵ These types of conflicts may become even more frequent with the rise of common (de facto national) educational standards and accompanying curriculum produced by the standards writers.²⁴⁶ As of March 2013, forty-five states, four territories, and the District of Columbia have voluntarily accepted standards in language arts and math created by the Common Core State Standards Initiative.²⁴⁷ National science standards are in the pipeline, as well.²⁴⁸ Recently, the national standards have come under fire from previous supporters as

243. See, e.g., Norton, *supra* note 15, at 1267–68; Wenkart, *Free Speech Rights*, *supra* note 230, at 27–28; Mawdsley, *supra* note 230, at 16–17; Bauries & Schach, *supra* note 230, at 357–59, 363, 373–83.

244. See, e.g., Gee, *supra* note 230, at 413–14, 440–42.

245. It is these classroom conflicts on which this Article focuses, not teachers' off-duty speech. For a thorough analysis of teachers' off-duty speech, see Norton, *supra* note 119, at 1–2.

246. Catherine Gewirtz, *Standards Writers Wade into Curriculum*, EDUC. WK., Aug. 10, 2011, at 1, 17 (“Barbara Cambridge, the director of the Washington office of the National Council of Teachers of English, said her organization agrees that it’s important to articulate how materials should reflect the standards. But the new publishers’ criteria, [in Cambridge’s words,] ‘signal a usurpation of teacher judgment in ways that are alarming.’”).

247. *In the States*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Mar. 22, 2013). The Initiative is “a state-led effort coordinated by the National Governors Association Center for Best Practices . . . and the Council of Chief State School Officers.” *About the Standards*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards> (last visited Jan. 26, 2013).

248. Erik W. Robelen, *New Science Framework Paves Way for Academic Standards*, EDUC. WK., Aug. 10, 2011, at 8–9. The drafts of the standards are available at NEXT GENERATION SCIENCE STANDARDS (Jan. 28, 2013), <http://www.nextgenscience.org/next-generation-science-standards>. The third draft of the science standards is expected to become public in March 2013.

essentially mediocre.²⁴⁹ Given that at least one commentator and likely many educators are of the opinion that state and local school board members are rarely as well qualified to establish curriculum as teachers and other professional educators, it would not be surprising for teacher-initiated conflicts about these national standards, in particular, to increase in frequency, and to result in litigation.²⁵⁰

The starting point for analyzing such claims is *Hazelwood*, in which the Supreme Court noted: “A number of lower federal courts have . . . recognized that educators’ decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference.”²⁵¹ However, as a practical matter, this deference to individual teachers—at least as compared to entities such as school boards and state boards of education—is a thing of the past. Over the past twenty years, eleven circuits (all but the District of Columbia Circuit) have considered cases directly involving elementary and secondary teachers’ in-class, instructional speech or cases that arise out of slightly different facts but state rules that appear to cover this category of speech.²⁵² The circuits apply or acknowledge that they are deciding between one of three tests. The circuit splits are indeed interesting, if ultimately largely irrelevant to the outcomes of the cases, because, as with the student and parent challenges to curriculum and textbooks, the state somehow almost always wins.

The variation is as follows: First, four circuits focus on the specific context of the speech—a public school—and import *Hazelwood*’s test to determine whether the school’s restriction of the teacher’s speech was appropriate.²⁵³ If circuits apply *Hazelwood*, they start with the presumption that the teacher has at least some speech rights in the classroom, but that the school can restrict the teacher’s speech if it has a legitimate pedagogical reason for

249. Andrew C. Porter, *In Common Core, Little to Cheer About*, EDUC. WK., Aug. 10, 2011, at 24–25. Porter is the dean of the University of Pennsylvania Graduate School of Education. His piece *In Common Core* was published two years after a similar *Education Week* op-ed he wrote with Morgan S. Polikoff in 2009 endorsing the adoption of national common standards; that earlier piece accompanies *In Common Core* in excerpted form.

250. Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don’t*, 76 U. CIN. L. REV. 1281, 1327–28 (2008).

251. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

252. Waldman, *supra* note 106, at 75–87 (discussing these cases).

253. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202–04 (10th Cir. 2007) (holding that *Garcetti* applies to out-of-class speech about curriculum and pedagogy); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Bishop v. Aronov*, 926 F.2d 1066, 1070–71 (11th Cir. 1991) (holding that *Hazelwood* applies to university-level in-class speech of a teacher and impliedly also to the in-class speech of elementary and secondary teachers).

imposing the restriction. This rule is the most protective of teachers' speech rights in theory, though in practice it is so permissive that teachers rarely win.²⁵⁴ Second, two more circuits strongly invoke the theme of deference to the school board but do not use a more specific test. One of these circuits relies on school districts' control of the curriculum without specifically choosing the *Hazelwood* or *Connick/Pickering/Garcetti* approach.²⁵⁵ The other circuit declared in an unpublished opinion in 2008, post-*Garcetti*, that the choice between these two approaches (*Hazelwood* and the public employee speech cases) is an open question.²⁵⁶

Third, six other circuits focus on the status of teachers as public employees and thus apply some combination of *Connick*, *Pickering*, and *Garcetti*, the Court's generally applicable public employee speech cases.²⁵⁷ One of these circuits applies only *Connick* and *Pickering* but has not decided a teacher or school employee speech case since *Garcetti*.²⁵⁸ Another circuit has determined, post-*Garcetti*, that *Garcetti* is not applicable to teachers' instructional speech disputes although *Connick* and *Pickering* remain relevant.²⁵⁹ The remaining four circuits employ the government speech doctrine via *Garcetti* in cases that address or could easily be read to

254. See Brownstein, *supra* note 10, at 753; Dan V. Kozlowski, *Unchecked Deference: Hazelwood's Too Broad and Too Loose Application in the Circuit Courts*, 3 J. MEDIA L. & ETHICS 1, 30–37 (2012); Waldman, *supra* note 106, at 90–94.

255. *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n.13. (3d Cir. 2008) (holding that *Garcetti*'s applicability is an open question to out-of-class speech by a football coach); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (holding that *Hazelwood* does not apply to a teacher's in-class speech).

256. *Panse v. Eastwood*, 303 F. App'x 933, 934 (2d Cir. 2008).

257. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011) (applying *Pickering* and *Garcetti*); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 337 (6th Cir. 2010) (applying *Garcetti*, *Pickering*, and *Connick*); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007) (applying *Garcetti* and *Pickering*); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 692, 694 (4th Cir. 2007) (applying *Pickering* and *Connick* but rejecting *Garcetti*); *Brammer-Hoelter*, 492 F.3d at 1202 (applying *Garcetti* and *Pickering*); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368–69 (4th Cir. 1998) (en banc) (applying *Pickering* and *Connick* pre-*Garcetti*); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007) (applying *Garcetti* in a case in which a high school football coach engaged in nonclassroom speech; read together with *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 797–98 (5th Cir. 1989), in which the Fifth Circuit applied *Pickering* and *Connick* pre-*Garcetti*).

258. *Boring*, 136 F.3d at 368–69.

259. *Lee*, 484 F.3d at 694–95 n.11. For various reasons, even circuits that apply only *Connick* and *Pickering* have concluded that teachers are not permitted to express their opinions about the curriculum by unilaterally modifying that curriculum. *Id.* at 694.

encompass teachers' instructional speech.²⁶⁰ These four circuits reason that school districts hire teachers' speech when the teacher and the district enter into an employment contract; thus, teachers' instructional, official-duty speech does not belong to the teachers themselves, but rather is the speech of the government.²⁶¹

For better or worse, the circuit splits make no difference when it comes to the outcomes of the cases—in the definitive cases in all eleven circuits, the teachers lost their free speech claims.²⁶² The consistency of these outcomes may occur, in part, because ten of the eleven circuits incorporated government speech principles into these decisions, even when the decisions predated the rise and increasing prominence of the government speech doctrine. Specifically, circuits that rely on *Hazelwood* often focus on the teacher's in-class,

260. *Johnson*, 658 F.3d at 967 (holding that teacher speech in the classroom via banners was unrelated to the curriculum); *Brammer-Hoelter*, 492 F.3d at 1204 (involving a charter school, and not involving classroom speech); *Evans-Marshall*, 624 F.3d at 337; *Mayer*, 474 F.3d at 478; *Williams*, 480 F.3d at 692; *Kirkland*, 890 F.2d at 797.

261. *Evans-Marshall*, 624 F.3d at 340 (“[I]f it is the school board that hires that speech, it can surely ‘regulate the content of what is or is not expressed.’” (quoting *Mayer*, 474 F.3d at 479)); *Mayer*, 474 F.3d at 479 (stating that when a teacher teaches, “the school system does not ‘regulate’ [that] speech as much as it hires that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.”). The *Mayer* court also paid homage to the transparency and good-government arguments advanced by several commentators. *Id.* at 479–80.

262. *Evans-Marshall*, 624 F.3d at 337 (applying *Garcetti*, *Pickering*, and *Connick*); *Panse v. Eastwood*, 303 F. App’x 933, 935 (2d Cir. 2008); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008) (holding that *Garcetti*’s applicability is an open question to out-of-class speech by a football coach); *Brammer-Hoelter*, 492 F.3d at 1202 (holding that *Garcetti* applies to out-of-class speech about curriculum and pedagogy); *Mayer*, 474 F.3d at 478–79 (applying *Garcetti* and *Pickering*); *Lee*, 484 F.3d at 694–95 n.11, 699 (rejecting *Garcetti* but keeping *Pickering* and *Connick* for use in deciding faculty speech on issues unrelated to the subject in his classroom bulletin board; it deemed the speech curricular); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1015–16 (9th Cir. 2000) (considering teacher speech on a hallway bulletin board, the court deemed it curricular and applied general government speech principles); *Boring*, 136 F.3d at 368 (holding that *Pickering* and *Connick* are applicable in a traditional curricular dispute); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722 (2d Cir. 1994) (relying on *Hazelwood*); *Ward v. Hickey*, 996 F.2d 448, 449, 452 (1st Cir. 1993) (*Hazelwood*); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775 (10th Cir. 1991) (holding that *Hazelwood* applies to in-class curricular speech); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (holding that *Hazelwood* applies to university-level in-class speech of a teacher, impliedly also applicable to elementary and secondary teachers); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (holding that *Hazelwood* does not apply to a teacher’s in-class speech); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998) (relying on *Hazelwood*); *Kirkland*, 890 F.2d at 797–98 (applying *Pickering* and *Connick*, decided before *Garcetti*).

instructional speech as bearing the imprimatur of the school and thus being an extension of the school's speech,²⁶³ as do some of the circuits focusing on *Pickering*, *Connick*, and/or *Garcetti*.²⁶⁴ Additionally, as mentioned above, the four circuits to rely on *Garcetti* talk about the school hiring the teacher's speech, and one other circuit focuses on the school's control of the curriculum generally.²⁶⁵ The only circuit whose approach does not include government speech principles may have been limited by the facts of the case because the teacher was not affirmatively speaking.²⁶⁶

3. *Teachers' Instructional Speech: A Better Fit with the Government Speech Doctrine*

As the Supreme Court has noted many times, public schools are unique institutions for purposes of the First Amendment. But, the characteristics that make schools unique do not operate to bar the government from using the government speech doctrine as a defense to teachers' instructional speech claims. Reaching this conclusion is not easy.

To begin with, the government speech doctrine is a good fit for these conflicts at a basic level—courts have consistently recognized that the teacher is the agent of the school and the state when

263. *Ward*, 996 F.2d at 453 (“[A] teacher’s statements in class during an instructional period are also part of a curriculum and a regular class activity.”); *Silano*, 42 F.3d at 723 (holding that the teacher’s speech bore the imprimatur of the school); *Brammer-Hoelter*, 492 F.3d at 1204; *Miles*, 944 F.2d at 776–77 (holding that the curriculum and teachers’ speech in the classroom bear the imprimatur of the school); *Bishop*, 926 F.2d at 1078 (“University’s restrictions with respect to classroom conduct issued under its authority to control curriculum.”).

264. *Panse*, 303 F. App’x at 935; *Silano*, 42 F.3d at 722; *Lee*, 484 F.3d at 698–99 (“As a general proposition, students and parents are likely to regard a teacher’s in-class speech as approved and supported by the school, as compared to a teacher’s out-of-class statements . . . Thus, because the Removed Items were posted on school-owned and controlled bulletin boards in a compulsory classroom setting, Lee’s actions in posting these Items would reasonably be imputed to [the school].”); *Boring*, 136 F.3d at 370-71 (“We agree . . . that the school, not the teacher, has the right to fix the curriculum.”); *Johnson*, 658 F.3d at 966 n.11.

265. *Bradley*, 910 F.2d at 1176 (“[N]o court has found that teachers’ First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.”); see also *Kirkland*, 890 F.2d at 795 (“The first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers.”); *Downs*, 228 F.3d at 1005 (“[W]hether the First Amendment compels a public high school to share the podium with a teacher with antagonistic and contrary views when the school speaks to its own constituents on the subject of how students should behave towards each other while in school. The answer to this question clearly is no.”).

266. The teacher failed to enforce the school’s antiprofanity rules in class and on student assignments. *Lacks*, 147 F.3d at 720.

delivering the curriculum, and thus the core idea of the government speech doctrine—that the government cannot be forced to express a viewpoint it does not want to adopt—makes sense as a restriction on teachers' speech.²⁶⁷ In fact, the doctrine has an even better initial fit than in the student- and parent-initiated cases because these are situations where an agent of the state (a teacher) is trying to change the state's message (the curriculum). During the past couple of decades, circuits have trended solidly in the direction of deferring to states and school boards, rather than to teachers, about instructional speech. As the Sixth Circuit noted in 2010: “[W]hen it comes to [a teacher’s] in-class curricular speech at the primary or secondary school level, no . . . court of appeals has held that such speech is protected by the First Amendment.”²⁶⁸ This direction is consistent even with the most employee-protective public employee speech case, *Pickering*.²⁶⁹ Even though teachers would not win future such cases under the government speech doctrine, teachers do not win these cases as it is under the existing doctrinal rules.²⁷⁰ As a result, the government speech doctrine would not change outcomes or, at a practical level, permit more viewpoint discrimination than the current tests allow.

The analytical process in some circuits would change, however, because the government speech doctrine requires substantial

267. *Garcetti v. Ceballos*, 547 U.S. 410, 411, 418–19 (2006). The circuits that apply *Garcetti* adopt this reasoning; however, only four circuits do so. Also, as noted above, this is likely much less clear to the students, especially elementary school children who are experiencing the speech, but the Court shows no signs of engaging that issue. See generally Stuller, *supra* note 242 (discussing the history of academic freedom in high schools).

268. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 343 (6th Cir. 2010).

269. *Gee*, *supra* note 230, at 440–42.

270. *Garcetti*'s academic freedom caveat likely will come into play only in higher education, and it does not strengthen the rights of elementary and secondary school teachers in any way relevant to this discussion. See generally Areen, *supra* note 242 (acknowledging that the application of *Garcetti* to colleges and universities remains an open question and making the case that *Garcetti* should not apply to college and university faculty). Although *Garcetti* carved out a potential exception for academic freedom concerns, courts have never put much stock in the academic freedom claims of elementary and secondary school teachers. *Garcetti*, 547 U.S. at 425; *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 n.12 (9th Cir. 2011). Academic freedom rights and interests are very different at the elementary/secondary and higher education contexts. See, e.g., Buss, *supra* note 144, at 233, 274–77; Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164–65 (1996) (“[A] public university is therefore a managerial domain dedicated to the achievement of education, and, as one might expect, public universities routinely regulate the speech of faculty and students in ways required by that mission.”); Waldman, *supra* note 106, at 105–06. Nonetheless, some commentators have argued for stronger academic freedom rights at the elementary/secondary level. See, e.g., Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001); Stuart, *supra* note 250, at 1319–20; Stuller, *supra* note 242.

judicial deference to the school board and the state.²⁷¹ Specifically, future cases in circuits that currently use the *Hazelwood* test would more likely be disposed of via a motion to dismiss earlier in litigation under the government speech doctrine because teachers' speech rights would be weaker—formally and officially, at any rate—than they currently are in practice under *Hazelwood*. This raises two questions: first, is jettisoning the *Hazelwood* test in this area acceptable, and second, does the weakening of the litigation route undermine the public goods that education produces? As Emily Gold Waldman has emphasized when arguing that *Hazelwood* should not apply to these types of cases, the fundamental relationship at issue in teacher instructional speech cases is an employer-employee relationship.²⁷² That relationship was not at issue in *Hazelwood* and is not accounted for in the *Hazelwood* test.²⁷³ Thus, ceasing the use of *Hazelwood* in these cases would return *Hazelwood* to what Waldman contends, and I agree, is a more appropriate scope.

That is not to say the government speech doctrine is without costs. Using the government speech doctrine to resolve teacher instructional speech cases more generally could have the effect of deterring similar future litigation, especially because of an inability to recover fees from the government when losing on a motion to dismiss. Neither the direct impact of the government speech doctrine nor this chilling effect directly impacts either public good education produces, though. The first public good education produces, the good of creating citizens, is focused on students becoming civically engaged adults because they learn social and democratic values in public schools both through the direct curriculum and indirectly through the school rules.²⁷⁴ Teachers' instructional speech rights (as opposed to students' and parents' rights) are not a part of this public good in any substantial way. Students might benefit from more substantively diverse instruction or pedagogy in a way that enhances citizenship development, but this result is not an interest the law recognizes as one that teachers hold. Additionally, it is important to note that the government speech doctrine would not foreclose all claims teachers could bring in situations that involve disputes about in-class speech. For

271. Waldman, *supra* note 106, at 94–95 (“[A] ruling that *Hazelwood* applies to a teacher’s in-class speech *and* prohibits all viewpoint-based speech restrictions would clearly transfer tremendous authority from democratically elected school boards to individual teachers. Indeed, such a ruling would largely undermine a school board’s ability to shape and control what students learn in their classrooms.”).

272. *Id.* at 102.

273. *Id.*

274. *See supra* Part I.A.

example, *Meyer v. Nebraska*, the Court's 1923 decision striking down Nebraska's ban on foreign language instruction before eighth grade, involved due process claims which would be untouched by the government speech doctrine.²⁷⁵

The second public good, the enforcement public good, is focused on ensuring that public schools create the next generation of citizens in a constitutionally sound way. Thus, a meaningful check on the state's or school district's decision must exist. If the government speech doctrine is not available as a defense in textbook and curricular selection cases initiated by parents and students, then this second public good remains viable because students and parents can bring lawsuits which do not involve the complications of the employment relationship between teachers and schools. As noted above, teachers can only bring suit on their own behalf—any litigation-generated benefit to their students is tangential. Thus, the political process is the only option through which teachers could act as advocates and attempt to create this enforcement public good on behalf of their students.

In sum, the government speech doctrine is a solid fit for teachers' instructional speech cases, and applying it does not materially compromise the central public goods that public education creates.

C. *Library Collections and the Quiet Death of Pico*

Schools' management of their library collections is similar in important ways to states' and schools' textbook selection and curricular determination decisions: most notably, when states and school districts select or deselect library books, they determine what information will be available to their students and, in that way, bear the approval of the school. The school library context is slightly different than the classroom context, and the Supreme Court has treated the two situations as such.

1. *The Pico Case, and Pico as Precedent*

In 1982, the Court resolved the question presented in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*²⁷⁶ via a badly fractured decision that has been troubling to lower courts and commentators ever since. The facts giving rise to *Pico* are relatively straightforward: at a conference organized by a politically conservative organization, three members of a New York school board received lists of library books the organization suggested were inappropriate for students.²⁷⁷ Guided by those lists,

275. *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1923).

276. 457 U.S. 853 (1982).

277. *Id.* at 856.

the board disregarded some of its own policies and procedures for school library book removal and eventually removed copies of nine books by authors including Kurt Vonnegut, Alice Childress, Eldridge Cleaver, and Richard Wright.²⁷⁸ The board described the removed books as “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”²⁷⁹ Students challenged the action, and the case eventually made its way to the Supreme Court.

The Court’s decision in *Pico* was complicated. A majority of Justices could only agree about the bare outcome—that the school district’s actions were not permissible.²⁸⁰ The reasoning of three of those Justices went as follows: deference to state and local authorities about education is important but not unlimited (consistent with the relevant Supreme Court cases discussed earlier); students’ rights to freedom of expression include a correlative right to receive ideas; a school has discretion to control the library collection—though not as much discretion as it has to control the curriculum, and this discretion “may not be exercised in a narrowly partisan or political manner.”²⁸¹ A fourth Justice agreed only with the very last step of that reasoning, that “certain forms of state discrimination *between* ideas are improper. . . . [T]he State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.”²⁸² Thus, a total of four Justices appeared to agree that the constitutional harm was the invidious partisan or political viewpoint discrimination exercised by the school board.²⁸³ A fifth Justice joined in the result but found it unnecessary to reach the constitutional issue.²⁸⁴ The dissenting Justices critiqued the plurality’s reasoning and also focused on the importance of deferring to the local, elected school board.²⁸⁵

Pico was not written as a government speech decision. In fact, it was decided almost a decade before the seminal government speech case *Rust v. Sullivan*.²⁸⁶ It was written while the forum analysis doctrine was strong, but it was not a forum analysis

278. *Id.* at 856 & n.3, 857 & n.4.

279. *Id.* at 857.

280. *Id.* at 854.

281. *Id.* at 864–70.

282. *Id.* at 878–79 (Blackmun, J., concurring).

283. Bezanson & Buss, *supra* note 85, at 1418; Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 264–65 (1992).

284. *Pico*, 457 U.S. at 883 (White, J., concurring).

285. *Id.* at 891 (Burger, C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 921 (O’Connor, J., dissenting).

286. 500 U.S. 173 (1991).

decision.²⁸⁷ As explained above, it also was not a decision with a substantive majority on any question other than the bare outcome, and thus, soon after *Pico* was decided, a plurality of the Fifth Circuit en banc held in a public television case that *Pico* had no precedential value.²⁸⁸ In 2009, in a case factually very similar to *Pico*, the Eleventh Circuit adopted the Fifth Circuit's view in *ACLU v. Miami-Dade County School Board*²⁸⁹ and also suggested that because almost none of the Justices who decided *Pico* remained on the Court, it was hardly worth trying to apply *Pico* even in the spirit of reading the tea leaves.²⁹⁰ Then, the Eleventh Circuit declared that although it was "unclear" whether *Pico* or *Hazelwood* governed the case at hand, the school district won because its actions were motivated at least in part by factual inaccuracies in the nonfiction elementary school books in question, and thus the school district's action survived under both *Pico* and *Hazelwood*.²⁹¹ (The Eleventh Circuit's decision is the only federal appellate decision since *Pico* that has presented a school library book removal controversy.²⁹²) In 2010, the First Circuit noted in a case about state curricular requirements that "*Pico*'s rule of decision . . . remains unclear."²⁹³

2. *Pico and the Government Speech Doctrine*

For some of the same reasons discussed in the previous two Subparts, the government speech doctrine at first appears to be a solid fit for library book removal cases. This argument is weaker than in the textbook and curriculum selection cases or in the teacher instructional speech cases, however, and ultimately it is undermined by the impact on the public goods that public education is intended to create.

Applying the government speech doctrine to the facts of *Pico* would result in an outcome opposite from the Supreme Court's: the school board would win, and the viewpoint discrimination that

287. Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1132 (2000).

288. *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982).

289. 557 F.3d 1177, 1200 (11th Cir. 2009).

290. *Id.*

291. *Id.* at 1202, 1207.

292. Book banning disputes remain alive and well, but book removal cases are few and far between. *ABFFE's Banned and Challenged Book List*, AM. BOOKSELLERS FOUND. FOR FREE EXPRESSION, <http://www.abffe.org/?BBWBookList> (last visited Jan. 27, 2013); Claire Mullally, *Banned Books*, FIRST AMENDMENT CENTER (Sept. 13, 2002), <http://www.firstamendmentcenter.org/banned-books>.

293. *Griswold v. Driscoll*, 616 F.3d 53, 57 (1st Cir. 2010). (Justice Souter was appointed to the Court years after it decided *Pico*.) Brownstein, *supra* note 10, at 754–55; Nadel, *supra* note 287, at 1126.

occurred in that case would be permissible. Accordingly, an important point bears repeating—if the government speech doctrine is available, it protects a full range of viewpoints, as long as an expressed view does not violate the Establishment Clause or other “law, regulation, or practice.”²⁹⁴ Thus, to argue that the government speech doctrine should apply, one must be willing to let the government protect speech with which one does not agree. At the same time, if we conclude that the doctrine should not apply, it should not be because we are trying to protect our own agenda(s) but rather because applying the doctrine either does not further the doctrine’s core purposes, or one or more public goods connected to education would be abridged substantially.

In library book removal cases the government is a speaker in much the same way the city was a speaker in *Summum*. Both library books and monuments are semipermanent property that is intentionally acquired and maintained by the government over the course of years.²⁹⁵ Although school libraries and public parks can be public fora for other purposes (public meetings, for example), they are not public fora for the purpose of maintaining a collection of books or monuments—it is not possible to acquire all existing books or accept all potentially donated monuments without defeating the purpose of either space.²⁹⁶ Thus, the government must choose some books and monuments and decline others, and in doing so set forth ideas it declares valuable and with which it is willing to be associated. Removing a book arguably communicates that the book has less value than other books that remain in the collection, whether because it has come to contain outdated information, it contains age-inappropriate information, it appears to support values

294. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). The government speech doctrine also could be limited by the Equal Protection Clause so that it does not permit the further disadvantaging of protected classes—particularly, racial/ethnic minorities (non-Whites) and girls/women. Arons & Lawrence, *supra* note 99, at 349–50; Burcham, *supra* note 99, at 236–37; Hendricks & Howerton, *supra* note 99, at 634–35.

295. *See Summum*, 555 U.S. at 470–71. School districts, with librarians as their agents, have control over their own library collections; books cannot become part of a school library’s collection without the school’s permission. Librarians use school funds to purchase a book or accept it as a donation, at which point the book becomes the school’s property, and the school marks it as such. If an individual leaves a book in a school library, it does not come to have the indicia of being school property until a school official affirmatively takes steps to enter the book into the library’s catalogue and physically mark the book as part of the collection. It is typical for library books, whether belonging to a school or to a public library, to carry a sticker on their spine with Dewey Decimal System classification and other information, and the owner’s name is stamped on the book.

296. *Id.* at 478–79.

school officials find objectionable, or it is almost never used.²⁹⁷ Whether the government adoption of this private speech, and the resulting message of endorsement, is strong enough to constitute a viewpoint is debatable. However, these weaknesses alone do not invalidate the potential classification of this speech as government speech. It seems at least as clear as it was in *Summun* that school libraries' decisions to acquire some books and reject others do constitute speech; that the decisions are government speech, not hybrid speech; and that the government conveys a viewpoint by owning library books and making them available to students.²⁹⁸

Supreme Court and circuit-level case law do not add much to this analysis. *Pico* is hardly solid precedent, and in fact it is such a confusing decision that three circuits have publicly questioned its precedential value.²⁹⁹ On the rare occasions when *Pico* is applied, it does not control the case.³⁰⁰ Additionally, *Pico* can be read as leading to the result that a school has more control over its speech in the classroom than over its speech in the library. In fact, the opposite outcome would make more sense—students in classrooms are captive audiences and thus the government's classroom speech arguably should be subject to greater checks because the speech has the potential to have a more substantial impact. In libraries, students are not captive audiences, in the sense that they are not compelled to read or learn one perspective—students have access to a range of ideas in a school library including access to the internet. The school board's decision to remove a library book is a drop in the bucket; the school board's decision to use or not use a particular textbook is much more than that. This, too, weighs in favor of employing the government speech doctrine: if the impact of the government speech doctrine is minimal and the hearers are elective, then why worry much about what viewpoint the speech conveys?

Well, consider the central mission of a school library—to provide students access to a range of materials and ideas and thus enhance

297. Furthermore, it is important to note that the viewpoint a school conveys by owning library books is weaker than that it communicates by selecting textbooks and approving curriculum. When students are a compelled audience being required to learn certain material in a classroom, the government's viewpoint is stronger. When students must opt in to being an audience, and even then may disregard what they read, as in a school library, the government's viewpoint is weaker. The voluntariness may affect the strength of the viewpoint, but it does not change the government's status as speaker. See Brownstein, *supra* note 10, at 798 (“[W]hen the state restricts speech based on its content, an imprimatur of disapproval is likely to be perceived.”).

298. See *supra* Part I.A.

299. Additionally, Justices and commentators ask whether it applies to putting books in or only taking books out, and whether some right to receive information animates the decision and if so where that right comes from and how far it extends.

300. See *supra* Part II.C.

their knowledge about the world and develop their critical thinking skills. A school library cannot present all possible viewpoints about topics addressed in its collection, and none are required to do so.³⁰¹ As discussed above, substantial de facto viewpoint discrimination happens in schools on a regular basis.³⁰² Yet, it seems widely understood that school libraries are places that contain resources; they are not sources of indoctrination. This is directly tied to the public good of creating citizens; if schools are to train students to become the next generation of citizens and sustain our democracy, they cannot do this by limiting students—especially in the place within the school that is supposed to be the source of a wide range of information—only to the views that the government wishes to convey. Thus, at least at a conceptual level, the school library remains a significant part of how the school creates citizens.

Applying the government speech doctrine to library book removal cases also would have an impact, albeit much smaller than in the classroom curriculum cases, on the enforcement public good. First, the inclusion or exclusion of a few books from a school library would seem to have a limited impact on students' views and thus do little to add to the distortion of the political process. As noted above in the curriculum discussion, though, the political process could already be distorted, and the distortion is what would lead to the decision to remove books from the library. If distortion occurs either way, the litigation check becomes important. And here, as in the situations noted above, the government speech doctrine would essentially eviscerate the litigation check: the government would be much more certain to win early in litigation via a motion to dismiss; if that happened, the plaintiff could not recover fees. For one or both of those reasons the interest in challenging a book removal decision through litigation would be chilled.

In sum, given the decent but not-overwhelming fit between the government speech doctrine and these cases, and the negative (but admittedly also not overwhelming) impact the government speech doctrine could have on the public goods connected to education, it is

301. See, e.g., *Newton v. LaPage*, 789 F. Supp. 2d 172, 192 (D. Me. 2011) (“Since subsequent caselaw has stated that government speech need not be viewpoint-neutral, any suggestion to the contrary in *Serra* and *Pico* is unpersuasive.”).

302. See *Bezanson & Buss*, *supra* note 85, at 1489 (“Without suggesting that all views are included and none generally excluded from the curricular and school library speech markets in public schools, one must acknowledge that the government speech that is communicated in the public schools is characteristically broad and inclusive rather than narrow and exclusive. And the range of views available to students is expanded by reason of the right of students, under the *Tinker* case, to communicate their individual views during the school day.”).

a close call whether the government speech doctrine should apply to library book removal cases.

Although the government properly has substantial authority to decide what materials to include in and exclude from school libraries, it also seems that that authority should not be effectively unlimited. Some scholars have proposed specific ways to cabin in the government speech doctrine,³⁰³ but until those types of exceptions are a part of case law, it is unwise to bank on them. Accordingly, I conclude on balance that the government speech doctrine should not be applied to library book removal cases.

IV. STUDENTS' SPEECH IN SCHOOLS

The state and schools communicate many messages inside the schoolhouse gates, and so do students. Some student speech merely happens to occur in classrooms or at school, other speech is necessary to complete assignments and take tests, and still other speech is made pursuant to curricular requirements but then becomes public in some way. In the universe of school speech disputes, these types of student speech cases outnumber legal disputes about textbooks and curriculum.³⁰⁴ Courts also seek to balance the school's role as educator with the student's rights and interests as a citizen more than in the cases discussed previously. Accordingly, it is especially important to analyze how the government speech doctrine would apply in student speech cases and whether it should do so.

A. *The Student Speech Quartet*

Supreme Court case law contains four core student speech cases.³⁰⁵ The first, *Tinker*, was decided in 1969. *Tinker* was a Vietnam War protest case and established the foundation for the student speech cases that came after. In *Tinker*, the Court held that a school could discipline or quash speech that "materially and substantially interfere[s] with] the requirements of appropriate

303. See Nelson Tebbe, *Government Nonendorsement* 38–40 (Brooklyn Law Sch. Legal Studies Res. Papers Working Paper Series, Paper No. 287, Dec. 2012), available at <http://ssrn.com/abstract=2125243>.

304. See generally, e.g., Kozlowski, *supra* note 254, at 1; Dan V. Kozlowski, *Toothless Tinker: The Continued Erosion of Student Speech Rights*, 88 JOURNALISM & MASS COMM. Q. 352 (2011).

305. *Meyer* and *Barnette* are not considered core student speech cases. *Meyer* was about the language of instruction, and, as discussed above, its legacy is as a parental rights case. *Barnette* was not clearly based on the Free Speech Clause, and, furthermore, it is about a student's right not to speak, rather than a right to speak. The core student speech cases all involve situations in which students spoke and then were punished for that speech in some way, or the speech was quashed.

discipline . . . [or] schoolwork”³⁰⁶ if such an interference actually occurred or was reasonably anticipated,³⁰⁷ or if the speech “collid[es] with the rights of others.”³⁰⁸ This was the test proposed by the school, and although the Court adopted the school’s test, it held for the students. As such, *Tinker* is commonly viewed as marking a sea change because unchecked deference to school districts in these matters became a thing of the past.³⁰⁹ As discussed in Part I.A, *Tinker*, like *Brown v. Board of Education*, justified its outcome by articulating schools’ role as one of creating the next generation of citizens.

Fifteen years after *Tinker*, in 1984, the Court decided its second student speech case, *Bethel School District No. 403 v. Fraser*, in which a student was disciplined for making a lewd speech at a school assembly, nominating his friend for a student government office.³¹⁰ The Court did not apply the *Tinker* test in *Fraser*, but seemed to carve out a further exception to students’ speech rights: the school could restrict speech that was “vulgar,” “lewd,” or “plainly offensive.”³¹¹ As discussed above, the theme that public schools create citizens was present in *Fraser*, as well. Three years after *Fraser*, the Court decided a different type of student speech case, *Hazelwood School District v. Kuhlmeier*, the student newspaper case summarized above in Part III.A.1. Because the facts of *Hazelwood* were different from *Tinker*, especially in that the school had a partial claim to the speech, the *Hazelwood* test has been applied by various circuits to general disputes about curriculum and textbook selection brought by students and parents, to disputes about teachers’ own instructional speech, and also to disputes about students’ speech.³¹² *Hazelwood*, too, contained language about providing students a civic education. Most recently, in 2007, the Court decided *Morse v. Frederick*, in which a student displayed a fourteen-foot long banner reading “BONG HiTS 4 JESUS” while the Olympic Torch parade passed by groups of students who had been released from school to watch the parade.³¹³ Many open questions plague student speech doctrine, but the Court did not resolve any of them in *Morse*.³¹⁴ Rather, it issued the narrow holding that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug

306. *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 509 (1969).

307. *Id.* at 510.

308. *Id.* at 513.

309. Bowman, *supra* note 5, at 1163–65.

310. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

311. *Id.* at 683.

312. See Parts II.A.2 and II.B.2; see also Waldman, *supra* note 106, at 113.

313. *Morse v. Frederick*, 551 U.S. 393, 397 (2009).

314. Bowman, *supra* note 106, at 220.

use.”³¹⁵ The public good of educating for citizenship was not a dominant theme, but the idea of protecting students instead emerged as a thread woven throughout the decision.

More than its three sister cases, *Hazelwood* contains several contributions that are especially important to the question of schools’ authority over students’ curricular speech: First, it officially concluded what many had assumed—that even a journalism class in which students have great leeway over the topics they explore is not a traditional public or limited/designated public forum.³¹⁶ Lower courts have applied this particular holding consistently.³¹⁷ Second, the Court did not go so far as to declare this to be the school’s speech in its entirety.³¹⁸ Rather, it implicitly acknowledged that the speech at issue was mixed speech by noting that the articles were written by the students, and yet also were part of the school curriculum and would bear “the imprimatur of the school” upon publication in the school newspaper.³¹⁹ Third, because of the school’s unique interests in the speech, the Court authorized the school board to exercise broad authority over the student-created curricular speech and even employ this authority in ways that are not viewpoint neutral.³²⁰

315. *Morse*, 551 U.S. at 393; see also Bowman, *supra* note 106, at 215 (describing Justice Alito’s stipulated terms of concurrence which appear not to alter *Morse*’s precedential value because Justice Alito joined the majority opinion in full).

316. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267–270 (1988). As noted earlier, the forum analysis doctrine is of little use in school speech cases. See *supra* Part I.C.

317. Buss, *supra* note 144.

318. In Emily Gold Waldman’s words, “generally, the perception of imprimatur will be strongest in two situations: when the student speech changes the permanent physical appearance of the school or when the student speech changes the nature of other students’ substantive classroom experience.” Waldman, *supra* note 106, at 113.

319. *Kuhlmeier*, 484 U.S. at 270–71 (characterizing this category as including “school-sponsored publications, theatrical productions, and other expressive activities”).

320. *Id.* at 271–72 (“Educators are entitled to exercise greater control over this . . . form of student expression to assure that . . . the views of the individual speaker are not erroneously attributed to the school. . . . A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order,’ . . . or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’” (citations omitted)); *id.* at 271 (“Educators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the [curricular] activity is designed to teach.”); see also Bowman, *supra* note 106, *passim*; Waldman, *supra* note 106, *passim*.

How these four cases fit together is a matter of some debate, but they are all still good law.³²¹ What does appear clear is that, taken together, the four core student speech cases are particularly deferential to government officials, especially when compared to nonschool speech cases, and the resolution of the student speech controversies confirms that governmental deference is a consistent theme in student speech cases generally.³²² At the same time, these cases and others also contain substantial language that animates the role of the First Amendment in schools by emphasizing “[t]he importance of public schools in the preparation of individuals for participation as citizens.”³²³ And if schools are to serve this role, then someone must be able to enforce the expectation that they do so.

B. *Mixed Speech*

Students’ mixed speech controversies—cases like *Hazelwood* in which a student and school both have a claim to the speech—are newer on the scene than controversies about curriculum and textbooks. In part, this timing probably reflects the comparatively later recognition of students as rights holders in conflicts about school speech, rather than the rights holders being only adults in the roles of parent or teacher.³²⁴

1. *Two Points on the Mixed Speech Continuum*

The mixed speech cases discussed in this Subpart are split into two groups of cases. The two categories each present a particular balance between the public and private claim to the speech, although both categories involve substantial public and private claims to the speech as well as overlapping considerations that influence the resolution of the normative question of whether the government speech doctrine should apply to cases in either of these groups.³²⁵

321. See, e.g., Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 *passim* (1996); Laycock, *supra* note 106, at 112; Salomone, *supra* note 283.

322. James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338, 1346–60 (2000).

323. *Ambach v. Norwalk*, 441 U.S. 68, 76 (1979); see also *Bowman*, *supra* note 21, at 935–36.

324. *Tinker* was not decided until 1969. Although *Barnette* (1943) involved students’ rights, it appeared important that, under the West Virginia state statute, parents were liable for students’ truancy. For a more general discussion of this, see YUDOF ET AL., *supra* note 66, at 223.

325. Although it is possible that the school in any of these cases could issue a disclaimer, attempting to transform the mixed speech back into private speech alone, the likelihood that the school would still be seen as endorsing the

First are *Hazelwood*-type cases, controversies about speech that a student generates as part of the curriculum but, through the school's actions, the speech becomes public in some way and thus is arguably partially attributable to the school. This category includes not only speech generated pursuant to the curriculum as traditionally defined but also student speech over which the school has substantial oversight and control, such as preparing materials (tiles, murals, et cetera) to be permanently affixed to the school building. Recent cases in this category are dominated by two fact patterns—students' religious speech (for example, a student including Christian images and language on a poster about saving the environment³²⁶) and to a lesser degree, students' violent speech (for example, writing as a wish on a piece of paper to be posted in the hallway: "Blow up the school with the teachers in it"³²⁷). It is not clear whether either type of speech occurs more frequently than it used to, and indeed the more extreme the speech is, the less likely students and parents are to attribute it the school as well as to the student speaker. But, it does appear, at the very least, that students and parents are contesting with increasing frequency schools' decisions to quash the speech or to discipline students for this speech.³²⁸ Eleven circuits—all but the District of Columbia

speech in some way (either because the disclaimer would not be noticed or would not be taken seriously) seems high.

326. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 621–22 (2d Cir. 2005).

327. *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 714 F. Supp. 2d 462, 465 (S.D.N.Y. 2010). To be clear, the district court evaluated *Cuff* under the *Tinker* standard and did not mention *Hazelwood*. *Id.* at 467–68. This is likely because it would be difficult to believe that a school was endorsing speech that advocated violence against the school itself. However, the speech was made in the context of a curricular assignment. *Id.* at 465.

328. *See, e.g., Wilson v. Hinsdale Elementary Sch. Dist.*, 810 N.E.2d 637, 639–41 (Ill. App. Ct. 2004) (explaining that the student was suspended after writing, recording, and bringing to school a song titled "Gonna Kill Mrs. Cox's Baby." Mrs. Cox was the student's pregnant science teacher.). In her article, Emily Gold Waldman expertly analyzes *Wilson* and many other cases in which students have been disciplined for their hostile speech about teachers and administrators. Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 601–03 (2011). The vast majority of the lower-court cases Waldman discusses have been decided in the past ten years, although admittedly her article analyzes speech that occurs online (and is thus much more likely to have been generated during the past decade) as well as speech that occurs on campus, or in other non-Internet media. *Id.* at 591–93.

Religious speech raises concerns about the school appearing to endorse the student's message and thus violating the Establishment Clause; cases focusing on these issues may be on the rise especially as some evangelical Christians in the United States increasingly perceive that their faith is unjustifiably excluded from the public sphere. Bowman, *supra* note 106, at 200 n.54 (listing cases involving students' religious speech given as part of the

Circuit—have spoken about *Hazelwood*'s application to student public curricular speech controversies.³²⁹ Given the fact that *Hazelwood* involved this exact type of speech, it is not surprising that the circuits exhibit more consistency about the rule to be applied in student public curricular speech cases than in textbook and curricular determination cases.³³⁰ All six circuits that have decided cases about students' public curricular speech have applied *Hazelwood*.³³¹ Three other circuits have stated or indicated in teacher speech cases that the *Hazelwood* standard applied to

curriculum, although unlike the violent speech cases, many of these cases had their genesis in the 1990s). For contemporary discussion of Christians in the United States perceiving themselves to be a "victimized minority," see, for example, Elizabeth A. Castelli, *Persecution Complexes*, REVEALER (Apr. 17, 2008, 5:11 PM), <http://therevealer.org/archives/2855>; Andy Rau, *Persecution and the American Christian 'Martyrdom Complex'*, THINK CHRISTIAN (Apr. 24, 2008), <http://www.thinkchristian.net/index.php/2008/04/24/persecution-and-the-american-christian-martyrdom-complex/> (a conservative Christian blog discussing Castelli's essay); Ed Brayton, *Dispatches from the Creation Wars – The Roots of the Christian Persecution Complex*, SCIENCEBLOGS (Apr. 28, 2008), http://scienceblogs.com/dispatches/2008/04/28/the_roots_of_the_christian_per.php (a nonreligious, science-focused blog discussing Castelli's essay).

329. *R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.*, 645 F.3d 533, 540–42 (2d Cir. 2011); *Morgan v. Swanson*, 659 F.3d 359, 375–77 (5th Cir. 2011); *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 577–78 (6th Cir. 2008); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695–96 (4th Cir. 2007); *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005) (en banc); *Peck*, 426 F.3d at 628–29; *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1212–14 (11th Cir. 2004); *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 276–77 (3d Cir. 2003); *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 923–24 (10th Cir. 2002); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1009–10 (9th Cir. 2000); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800–01 (5th Cir. 1989).

330. Waldman, *supra* note 106, at 113–18 (discussing cases where courts applied *Hazelwood*).

331. *Ochshorn*, 645 F.3d at 540–42; *Morgan*, 659 F.3d at 389; *Curry*, 513 F.3d at 577–78; *Peck*, 426 F.3d at 628–29; *Bannon*, 387 F.3d at 1212–15; *Walz*, 342 F.3d at 280–81; *Fleming*, 298 F.3d at 929. One caveat to the summary of circuit law is necessary: four years after the Second Circuit decided a student curricular speech case using *Hazelwood*, it issued an unpublished, summary order in another student curricular speech case using *Tinker*'s substantial or material disruption as echoed in *Morse*, without in fact mentioning *Hazelwood*, much less describing its reasons for not applying *Hazelwood* to the case at hand. *Peck*, 426 F.3d at 628–29; *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 341 F. App'x 692, 693 (2d Cir. 2009). This may be because the type of speech arguably connects to the "imprimatur of the school" factor from *Hazelwood*. Basically, it is more plausible that a school would permit, accept, or endorse a student making a religious statement—although the Second Circuit ultimately rejected the argument that that is what happened—than that a school would endorse a student's violent speech.

general student curricular speech cases.³³² The two remaining circuits, neither of which was considering an elementary/secondary student curricular speech at the time, indicated that *Hazelwood* is good law but may be limited by *Bethel v. Fraser*'s focus on the school's educational mission, or by pertaining to student newspaper cases.³³³

In the six circuits that have decided student public curricular speech cases, the students lost every case, although one case involving students' religious speech was decided on qualified immunity grounds.³³⁴ As suggested above, a number of circuits defined "curriculum" broadly as including activities taking place on school grounds and involving school oversight, even if not a part of the state educational standards or district-adopted mandatory academic curriculum.³³⁵ Additionally, in the one circuit-level student newspaper case to be decided in recent years, the court applied *Hazelwood* and appeared unconcerned that the newspaper was not produced as part of a class for which students regularly received credit.³³⁶ (Some circuits also apply *Hazelwood* to cases involving students' private curricular speech; those cases are addressed in a later Subpart.³³⁷)

The second group of mixed speech cases, less frequently occurring than the first, involves student speech at large school-sponsored events. Recent controversies in this category include student speech at graduation ceremonies, school assemblies, and

332. *Downs*, 228 F.3d at 1010; *Lacks*, 147 F.3d at 724; *Ward*, 996 F.2d at 453; see also *Fleming*, 298 F.3d at 921 (holding that speech of students, parents, and members of the public that might reasonably bear the imprimatur of the school can be controlled, to a degree, by school); *Kirkland*, 890 F.2d at 800–01 (explaining that *Hazelwood* recognized that school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the community in nonpublic forums).

333. *Lee*, 484 F.3d at 695–96; *Hosty*, 412 F.3d at 735, 741.

334. *Peck*, 426 F.3d at 620; *Walz* 342 F.3d at 272, 274–75; *Morgan*, 659 F.3d at 364; *Curry*, 513 F.3d at 573–74; *Fleming*, 298 F.3d at 920; *Bannon*, 387 F.3d at 1210.

335. *Walz*, 342 F.3d at 279–80; *Morgan*, 659 F.3d at 388–89 & n.127; *Fleming*, 298 F.3d at 924; *Bannon*, 387 F.3d at 1214. Justice Thomas's concurrence in *Morse v. Frederick* similarly described *Hazelwood*: "The Court characterized newspapers and similar school-sponsored activities 'as part of the school curriculum' . . ." 551 U.S. 393, 418 (2007) (Thomas, J., concurring) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)); Justice Scalia's dissent in *Lee v. Weisman*, describing *Abington v. Schempp*: "In *Schempp*, for example, we emphasized that the prayers were 'prescribed as part of the curricular activities of students who are required by law to attend school.'" 505 U.S. 577, 643 (1992) (Scalia, J., dissenting) (emphasis added) (quoting *Abington v. Schempp*, 374 U.S. 203, 223 (1963)).

336. *Osborn*, 645 F.3d at 536, 542.

337. See, e.g., *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 270–73 (2d Cir. 2011); *supra* Part IV.C.

student government campaigns. Matthew Fraser's lewd speech is a classic example of this type of case.³³⁸ In these situations, the school has substantial control over the event, but its control is limited to prior approval of speakers and speeches and to cutting off speakers mid-comment. Similar to the student public curricular speech cases, many of these cases involve religious speech, and some constitute part of the Court's Establishment Clause jurisprudence.³³⁹ The test from *Fraser* does not dominate circuit-level case law about these types of cases, likely because lewd speech is only one type of speech that schools would like to prohibit. Surprisingly, it appears that only five circuits have considered cases involving nonreligious student speech at school-sponsored programs. Of those five circuits, three used the *Hazelwood* test,³⁴⁰ one recent unpublished decision employed *Tinker* and *Hazelwood* but used language reminiscent of the government speech doctrine,³⁴¹ and the last used a time, place, and manner test from *Cornelius v. NAACP*.³⁴² Students lost all five cases.³⁴³

2. *Why Hazelwood Should Continue to Apply to Mixed Student Speech Cases*

Although the government speech doctrine would have a marginal effect at most on the outcomes of mixed speech cases—the government would continue to win overwhelmingly³⁴⁴—for multiple reasons, the government speech doctrine is not a solid fit for students' mixed speech cases and should not be applied in these cases. Rather, *Hazelwood*, which was crafted to address these types of situations, should continue to apply to student mixed speech controversies.

338. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–79 (1986).

339. *See, e.g., Lee*, 505 U.S. at 580–81 (discussing middle school graduation remarks made by an invited clergyperson); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 324 (2000) (Rehnquist, C.J., dissenting) (explaining that a student gave a religious blessing at a school football game; the school's role in securing the speaker was more indirect than in *Lee v. Weisman*); Haupt, *supra* note 111, at 611. As noted previously, because the government speech doctrine is not a defense to the Establishment Clause, and because the government can be held responsible for its portion of mixed speech under the Establishment Clause, this Article does not engage the religious aspects of those speech claims.

340. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009); *Henery ex rel. Henery v. City of St. Charles Sch. Dist.*, 200 F.3d 1128, 1136 (8th Cir. 1999); *Poling v. Murphy*, 872 F.2d 757, 758 (6th Cir. 1989).

341. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852, 855 (5th Cir. 2010).

342. *Nurre v. Whitehead*, 580 F.3d 1087, 1093 (9th Cir. 2009) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985)).

343. *See cases cited supra* notes 340–42.

344. *Kozlowski, supra* note 254, at 46–47.

Fundamentally, the basic purpose of the government speech doctrine—to preserve government control over government speech—is not served by applying the doctrine to these cases, which would permit the school to restrict mixed speech for almost any reason.³⁴⁵ As *Hazelwood* implicitly and importantly recognizes, mixed speech is not exclusively the school’s but instead is generated by a student and then becomes public in some way that also results in attribution to the school.³⁴⁶ *Hazelwood*’s rational basis-like test accords substantial, but not unchecked, deference to schools, and, in this way, *Hazelwood* is in line with *Meyer*, *Barnette*, *Epperson*, and *Aguillard*.³⁴⁷ Because *Hazelwood* recognizes shared interest in the speech, its test lets the student retain control over the speech unless the school’s restriction is “reasonably related to a legitimate pedagogical reason.”³⁴⁸

Setting aside the *Hazelwood* test and misclassifying mixed speech as either purely private or purely governmental would lead to substantial problems, as discussed earlier.³⁴⁹ If mixed speech were misclassified as purely private, the speech would be governed by *Tinker*, *Fraser*, and *Morse* and the government would have less control over the speech than it does under *Hazelwood*. Although this may at first be appealing to students’ rights advocates, such a misclassification also would mean that the government would not be held responsible for its role in the speech, which would be inconsistent with various Establishment Clause cases involving mixed speech.³⁵⁰ On the other hand, if the speech were misclassified as purely governmental, then the government could restrict it for nearly any reason, including a viewpoint-discriminatory reason; however, because the speech would still appear to be mixed speech if not entirely student speech, the government would likely not be held accountable through the political process as readily as it could be held accountable for textbook selection, for example, which is clearly

345. As noted earlier, the Establishment Clause and “limit[ing] law, regulation, or practice” are the only limits the Court has set forth. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

346. *Cf.*, *Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005) (rejecting a viewpoint discrimination claim brought by a textbook author). Of course, textbooks and curricula are written by individuals, but those individuals then sell their work to publishers who sell it to schools. Just like the school “purchases” the speech of its teachers, it purchases the books and curricula it uses. The original authors may retain rights such as copyright, but they do not have free speech-type rights regarding their work in the school setting.

347. *See supra* Part III.A.1.

348. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

349. *Lidsky*, *supra* note 73, at 2024 (noting the importance of recognizing mixed speech when applying the government speech doctrine); *see Corbin*, *supra* note 117, at 662; *supra* Part II.B.2.

350. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

government speech.³⁵¹ Recognizing that the speech is mixed and evaluating its restriction under *Hazelwood* avoids all of these undesirable consequences.

Additionally, *Hazelwood* effectively takes somewhat of a middle position when it comes to the permissibility of viewpoint discrimination. To be clear, circuits are split on whether *Hazelwood* permits viewpoint discrimination,³⁵² although I have argued elsewhere that *Hazelwood* permits at least the noninvidious viewpoint discrimination that is necessary for the rule in *Hazelwood* to be fully operational (the same, I have argued, is true regarding *Tinker*, *Fraser*, and *Morse*).³⁵³ The government speech doctrine is not similarly constrained; indeed, the core of the government speech doctrine is the idea that the government can choose to express a viewpoint and cannot be forced by individuals to change its message.³⁵⁴ Thus, given that it is important to recognize students' limited speech rights in public schools and thus train them to be the next generation of citizens,³⁵⁵ it is better to permit limited viewpoint discrimination under *Hazelwood*, rather than to permit unchecked viewpoint discrimination as the government speech doctrine would allow.

Allowing *Hazelwood* to continue to function rather than permitting the government speech doctrine is also consistent with the public goods articulated earlier. When schools must justify their restriction of mixed speech, rather than having the ability to restrict *carte blanche*, then students learn that unpopular and undesirable opinions can be expressed—and yet they also learn that there are limits to what is appropriate in a particular setting such as a school. Additionally, although some advocate for greater protection of students' speech rights, *Hazelwood* by itself provides a meaningful judicial check on schools' restriction of students' mixed speech. And if schools comply with *Hazelwood*, then schools produce adults who engage appropriately in public debate, and thus the political process check is also functional in both the short and long term.

Therefore, continuing to apply *Hazelwood* to student mixed speech is preferable to forcing the government speech doctrine on a category of cases where its fundamental purpose would not be

351. On the importance of the political process to the government speech doctrine, see *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–69 (2009).

352. Brownstein, *supra* note 10, at 781–82; Kozlowski, *supra* note 254, at 21 n.133; Waldman, *supra* note 106, at 90–94.

353. Bowman, *supra* note 106, at 209–14.

354. See *supra* Part I.A.

355. Bowman, *supra* note 21, at 935–36.

achieved and in which it would undermine the public goods most directly connected to education.³⁵⁶

C. *Student Organizations' Speech and "Traditional" Student Speech Conflicts*

There is a point on the school speech continuum when circuits stop recognizing students' in-school speech as mixed because the school no longer has an interest in the speech as an actual or perceived speaker. In these cases, student organizations and individual students are the only speakers; the conflicts are about students' speech on Facebook and other online fora,³⁵⁷ students' message-bearing t-shirts,³⁵⁸ students distributing flyers in school for nonschool events,³⁵⁹ students' private curricular speech,³⁶⁰ religious student groups seeking school recognition while attempting to impose restrictions on their members,³⁶¹ and gay and lesbian alliance student groups seeking school recognition.³⁶² These are the traditional student speech cases for which circuits continue to use *Tinker* primarily, with dashes of *Fraser*, *Hazelwood*, *Morse*, and a time, place, and manner test added in on occasion. In terms of quantity, these conflicts dominate school speech cases.³⁶³ Students win cases in this category more often than in the other categories

356. As Emily Gold Waldman states, the "entire rationale and approach [of *Hazelwood*] are uniquely suited to student speech." Waldman, *supra* note 106, at 99; see also Kozlowski, *supra* note 254, at 49–50.

357. Waldman, *supra* note 328, at 591–93.

358. Bowman, *supra* note 106, at 188–92, 199–201.

359. See, e.g., *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003).

360. See, e.g., *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

361. See Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 896–98 (2009).

362. Doni Gewirtzman, Comment, "*Make Your Own Kind of Music*": *Queer Student Groups and the First Amendment*, 86 CALIF. L. REV. 1131, 1133–35 (1998); Jordan Blair Woods, *Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act*, 34 N.Y.U. REV. L. & SOC. CHANGE 373, 378–81 (2010) [hereinafter Woods, *Gay-Straight Alliances*]; Jordan Blair Woods, *Morse v. Frederick's New Perspective on Schools' Basic Educational Missions and the Implications of Gay-Straight Alliance First Amendment Jurisprudence*, 18 COLUM. J. GENDER & L. 281, 284–86 (2008) [hereinafter Woods, *New Perspective*].

363. See, e.g., *DeFabio v. E. Hampton Union Free Sch. Dist.*, 623 F.3d 71, 77–78 (2d Cir. 2010); *Defoe v. Spiva*, 625 F.3d 324, 330–32 (6th Cir. 2010); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 738–39 (8th Cir. 2009); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672–73 (7th Cir. 2008); *Scott v. Sch. Bd. of Alachula Cnty.*, 324 F.3d 1246, 1248 (11th Cir. 2003); *Walker-Serrano v. Leonard*, 325 F.3d 412, 415–16 (3d Cir. 2003); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1265–66 (10th Cir. 2000); *Burch v. Barker*, 861 F.2d 1149, 1150–53, 1157 (9th Cir. 1988).

discussed in this Article, but even still, a recent study documented that students won only thirty-five percent of circuit-level cases from 2005 to 2010 when *Tinker*, arguably the most student-speech-protective Supreme Court case, was the controlling test.³⁶⁴

The doctrine governing these cases is a mess and circuit splits abound regarding important questions: Which test(s) should be used to evaluate a school's restriction of online speech?³⁶⁵ What is the relationship between the Equal Access Act, which protects student organizations, and the First Amendment?³⁶⁶ How should a school official apply *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, and is the uncertainty of the answer to that question enough to give a school administrator qualified immunity protection if he or she missteps?³⁶⁷ Should *Hazelwood* apply to private curricular speech such as exams and most written assignments, even though the speech never becomes public and thus never gains the imprimatur of the school in that way?³⁶⁸ Doctrinal coherence is desperately needed, but this Subpart does not explore the doctrinal morass in detail because the government speech doctrine is not a proper way to create such coherence.³⁶⁹

Simply put, the government speech doctrine is fundamentally incompatible with this category of cases because the central purpose of the government speech doctrine is to protect the government's ability to control its own message.³⁷⁰ Although circuits are split regarding the many issues discussed in the previous paragraph,

364. Kozlowski, *supra* note 304, at 358–59. Students almost always lose under *Hazelwood*, too. Brownstein, *supra* note 10, at 784.

365. See, e.g., Waldman, *supra* note 328, at 591.

366. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644 (9th Cir. 2008); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 856–57 (2d Cir. 1999); Gewirtzman, *supra* note 362, at 1134; Howarth, *supra* note 361, at 900–07; Woods, *Gay-Straight Alliances*, *supra* note 362, at 375 n.8; Woods, *New Perspective*, *supra* note 362, at 281–82.

367. Transcript of Oral Argument at 48–49, *Morse v. Frederick*, 551 U.S. 393 (2009) (No. 06-278); *Curry ex rel. Curry v. Sch. Dist. of Saginaw*, 452 F. Supp. 2d 723, 742 (E.D. Mich. 2006), *aff'd on other grounds*, 513 F.3d 570 (6th Cir. 2008); Laycock, *supra* note 106, at 111; Francisco M. Negron, Jr., *A Foot in the Door? The Unwitting Move Towards a 'New' Student Welfare Standard in Student Speech Cases After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1235 (2009); Kenneth Starr, *From Fraser to Frederick: Bong Hits and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 676 (2009); Woods, *New Perspective*, *supra* note 362, at 309.

368. See, e.g., *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113 (2d Cir. 2012); *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011); Kozlowski, *supra* note 254, at 21.

369. Brownstein, *supra* note 10, at 811 (“[C]urrent free speech doctrine does not provide federal judges, much less principals and teachers, with adequate guidance to enable them to determine whether restrictions on student speech in school-sponsored activities comply with constitutional standards.”).

370. See *supra* Part I.A.

they are *not* split regarding one foundational issue: that the speech in question is student speech and not mixed speech or the speech of the school. Even what is the closest call—the speech of student organizations, which arguably could be classified as mixed speech between the organization and the school whose name it uses—consistently has been classified by courts as purely student, nonmixed speech.³⁷¹ Case law and statutory law justify schools'

371. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981); Haupt, *supra* note 111, at 609, 615–16. Official student organizations bear the name of the school and thus may appear to be supported or approved by the school when they speak. However, they are composed of individual students who share a common interest, which is in many cases a common viewpoint. Most current disputes in this area involve schools' refusal to recognize gay-straight alliance clubs or conservative Christian clubs; lack of recognition is sometimes related to some of those organizations' restrictions on who can be a member or an officer. *See, e.g.*, *Straights & Gays for Equal v. Osseo Area Schs. Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008); *Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996). These cases are brought mainly under the Federal Equal Access Act, which stipulates that a public school does not have to recognize extracurricular student groups whose focus is noncurricular (e.g., ski club, spirit club, chess club, etc.), although once it does so, it must provide equal access to school resources and facilities for all such clubs, including the recognition of those clubs as official student organizations. 20 U.S.C. § 4071 (2000). The Supreme Court has held that the Equal Access Act's de facto requirement that schools permit student religious groups to meet on their premises and to use the name of the school does not violate the Establishment Clause. *Bd. of Educ. Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 247 (1990). Because the Court has found Establishment Clause violations in other situations involving students' hybrid speech, presumably student organizations are further removed from the school, and thus the school's role in the organization's speech is so minimal that the Court did not hold the school liable under the Establishment Clause. Free speech claims can appear in these cases in two ways—first, the school may refuse to recognize an organization under the theory that the organization would engage in speech that could be proscribed under *Tinker*, *Fraser*, *Hazelwood*, or *Morse*. *See id.* at 226. Second, the organization may argue that its free speech associational rights should allow it to place restrictions on membership and office holding even if such restrictions violate a school's nondiscrimination policy. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644–45 (9th Cir. 2008); *Hsu*, 85 F.3d at 856 (upholding the organization's decision to limit its officers to Christians).

The Court's expressive association cases are *Roberts v. United States*, 468 U.S. 609 (1984), *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). These cases are based on the principle that an organization has a First Amendment right of association and that determining who can become a member or an officer is a core part of that right. When such a determination violates federal, state, or school antidiscrimination laws or policies, the Court's cases determine whether the determination should be allowed to stand. *See* Howarth, *supra* note 361, at 898. These cases are not based on the idea that the speech is hybrid, however; they are based firmly on the understanding that the decision about membership or office-holding qualifications is the speech of the organization. Although the

ability to restrict or punish the speech of students and student organizations because teachers and administrators must maintain order and enforce rules in the school environment so that the school achieves its educational purposes, not because schools have an independent speech interest in that same speech.³⁷² Even the student private curricular speech cases that employ the *Hazelwood* test treat the speech as purely student speech.³⁷³ Because the speech in these cases is so clearly not the government's, it makes little sense to give the government the expansive authority to regulate the speech that it would have if the government speech doctrine were deemed relevant.

The basic conceptual incompatibility between the government speech doctrine and student speech cases is illustrated by attempting to apply the government speech doctrine to a typical student speech case. Consider the following conflict: a student wears a t-shirt to school that says "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL. Romans 1:27."³⁷⁴ May the school punish the student for doing this? To examine the free speech implications under the framework created by the Court, we would first ask whether the student's speech could be restricted because it actually caused a substantial or material disruption to the school or could be expected to do so (*Tinker*³⁷⁵). Then we would ask if it could be punished because it was lewd, vulgar, or otherwise inappropriate (*Fraser*³⁷⁶); because it bore the imprimatur of the school, and the school had a legitimate pedagogical reason for restricting it (*Hazelwood*³⁷⁷); or because it supported alcohol or drug use, or other dangerous or unhealthy behavior (*Morse*³⁷⁸).

Although *Hazelwood* contains some government speech-like ideas, the government speech doctrine would only be analyzed as a defense to the individual's First Amendment claim. To avail itself of the doctrine, the school would need to claim that it also was speaking about these issues, which it might do through citing prior statements about being an "open and affirming" environment or arguably even a nondiscrimination policy or a part of the curriculum

Court has not applied its expressive association cases to the public elementary and secondary school context, lower courts have done so, and there is no reason to assume these cases are necessarily irrelevant.

372. Haupt, *supra* note 111, at 572.

373. See, e.g., Peck *ex rel.* Peck v. Baldwinville Cent. Sch. Dist., 426 F.3d 617 (2d Cir. 2005) (exemplifying a typical student public curricular speech case).

374. See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

375. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

376. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

377. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

378. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

that addressed homosexuality. If the school could not even provide that weak evidence of its “speech” and “viewpoint,” then it would not be able to proceed with the defense. Assuming it could go forward, though, the school would use its prior speech to argue that it has expressed a viewpoint and is not obligated to tolerate contrary speech in that same context.

However, this interpretation of the government speech doctrine, which is necessary if the doctrine is going to apply to traditional student speech at all, is an incomplete reading of the government speech doctrine. The doctrine is focused on the government being able to control its own message. Student speech does not become government speech over which the government has full control merely because it is uttered in a school, and in fact Justice Alito’s concurring opinion in *Morse*, discussed earlier, specifically rejected the argument that a school can censor and punish speech simply because that speech is contrary to its educational mission (the *Morse* majority did not engage that issue).³⁷⁹ This misinterpretation of the government speech doctrine would nullify students’ speech rights under *Tinker*, *Fraser*, *Hazelwood*, and *Morse* wholesale by making all student and student organization speech into government speech over which the government had full control—which sounds precisely like the “enclaves of totalitarianism” the Court found so appalling in *Tinker*.³⁸⁰ It seems highly unlikely that a majority of the Justices who decided *Summum* in 2009 would have intended such a sweeping consequence, especially because all of the Justices who decided *Morse v. Frederick* in 2007 took part in the consideration of *City of Pleasant Grove v. Summum*. Only Justice Thomas wrote in *Morse* that students should not have First Amendment rights in schools.³⁸¹

Last but certainly not least, the central constitutional purpose of protecting students’ free speech rights in schools—to train students to participate as citizens in a deliberative, self-governing democracy—would be lost if the government could quash any speech it desired. The change also would arguably bleed into the political process that would no longer serve as a fully effective check on the state. Because the judicial check would not be available given the reach of the government’s formal power under the government speech doctrine, no meaningful enforcement mechanism would be available. Traditional student speech cases beg for doctrinal coherence, but the government speech doctrine is not the answer.

379. *Id.* at 423 (Alito, J., concurring).

380. *Tinker*, 393 U.S. at 511.

381. *Morse*, 551 U.S. 393, 410–11 (Thomas, J., concurring). Some of the rest of the Justices expressed concern about the vagaries of the doctrine, but no one else cast a vote to reject *Tinker* and its progeny. *Id.* at 422 (Alito and Kennedy, JJ., concurring).

CONCLUSION

Over thirty years ago, Steven Shiffrin was part of the core group of scholars to first explore the content and scope of ideas that eventually would become the government speech doctrine. At that time, he wrote:

[G]overnment subsidies of public school education raise what may be the most difficult questions in the government speech area: how to balance the effect of government speech on a captive audience of small children, a legitimate state interest in educating its citizenry, and a profound countervailing concern with preventing indoctrination and preserving individual choice.³⁸²

Since Shiffrin wrote those words in 1980, the government speech doctrine has become a more cohesive idea, although it has not fully matured: in 2010, Justice Souter described the doctrine as “at an adolescent stage of imprecision.”³⁸³ School speech controversies have continued to evolve, as well, and disputes about students’ online speech, unthinkable three decades ago, now constitute many of the most visible student speech controversies. Much has changed in law and society, but Shiffrin’s words remain true: balancing the considerations he enumerated is not an easy task.

Yet, the doctrine has taken shape just enough that balancing these considerations is the task I have undertaken in this Article. My analysis has asked whether applying the government speech doctrine to various types of school speech cases would achieve the doctrine’s basic purpose of ensuring that the government has control over its own message, while also preserving the role the First Amendment plays in schools and ensuring that such a role is performed in a constitutionally sound manner. Of all the categories of school speech conflicts I have considered, I conclude that it is only in teachers’ instructional speech cases that the government speech doctrine is a solid fit and does not undermine too extensively either of the public goods connected most directly to education. However, in all of the other categories—students’ and parents’ challenges to textbook selection and curriculum determination decisions, school library collection management, school/student mixed speech, and students’ traditional private speech—the government speech doctrine either is not a fit at a fundamental level, or it undermines one or both of the public goods so substantially that applying it to that category of cases is indefensible.

382. Shiffrin, *supra* note 79, at 622.

383. *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010).

Public schools in the twenty-first century face many challenges. One of the most significant ones is that they must continue to fulfill their core constitutional function—educating students to be the next generation of rights-bearing citizens—while maintaining enough order in schools so they can in fact create citizens as the Court and the country expects them to do. This balance is precarious; the difficulty of preserving it is only outpaced by the importance of doing so.

APPENDIX

General Category	Specific Speech	Current Test(s)	Is the government speech doctrine a solid and defensible fit?
States' and School Districts' Speech	Textbook selection/curricular determination (students/parents)	Circuit Split: • Deference to school board • <i>Hazelwood</i> • Government speech	No
	Textbook selection/curricular determination (teachers)	Circuit Split: • <i>Hazelwood</i> • <i>Connick/Pickering/Garceti</i> • Deference to school board	Yes
	Library selection/deselection	<i>Pico</i> (unclear plurality decision)	No
Students' Speech	Students' Speech	<i>Hazelwood</i> (variations)	No
	Student Organizations' Speech and Students' "Traditional" Speech	<i>Tinker, Fraser, Hazelwood, Morse,</i> and Equal Access Act	No