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Article

Student-Initiated Religious Speech, the Classroom, and the First Amendment: Why the Supreme Court Should Have Granted Review in *Settle v. Dickson County School Board*

Lisa C. Shaw*

Introduction

Religion has been used to justify the suppression of speech for centuries . . . With the development of a vigorous First Amendment jurisprudence, we have quelled some of the worst abuses. *But points of tension remain.* We must thus remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others. Caution is of the essence; only through

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> a methodical and fact-specific jurisprudence can we hope to achieve proper accommodation.[1]

The case of Brittney K. Settle, a ninth-grade student whose teacher forbade her from writing a research paper on the topic of Jesus Christ, raises two points of tension: (1) the tension in the classroom between the teacher's authority and a student's freedom of expression, and (2) the supposed tension between the Establishment Clause and the Free Speech Clause. Settle's dilemma received national attention when the Supreme Court denied review of her case, and sparked a debate on the proper resolution of these conflicts.[2] *Settle v. Dickson County School Board*[3] demonstrates that teachers and school officials are uninformed regarding the scope of student's free speech rights in the classroom. Especially in the case of religious speech, confusion over what the Constitution permits and forbids has caused school officials to take drastic measures tantamount to censorship. The Sixth Circuit's decision in *Settle* aggravates the ever-

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1. Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 526 (9th Cir. 1994) (Poole, J., concurring in part and dissenting in part), *cert. denied,* 515 U.S. 1173 (1995) (emphasis added).

2. *See* David C. Savage, *Court Rejects Student Plea on Jesus as Topic,* L.A. TIMES, Nov. 28, 1995, at A1; Tom Hirtz, *High Court Lets Teachers Teach,* PITT. POST-GAZETTE, Nov. 30, 1995, at B1; Linda Greenhouse, *Justices Won't Hear Student Who Sought to Write on Jesus,* N.Y. TIMES, Nov. 28, 1995, at B3.

Representative James A. Trafficant (D-Ohio) spoke out on the House floor against the Court's denial of review: "The Supreme Court . . . says Jesus Christ is not an appropriate topic. They sided with the school . . . Wake up, Congress! The Constitution may separate church and state, but the Constitution never intended to separate God and the American people." John McCaslin, *Nation, Inside the Beltway,* THE WASH. TIMES, Dec. 4, 1995, at A7. House Representative Henry Hyde (R-Ill.) invoked Settle's case to introduce the Religious Equality Amendment on the House floor. *See Religious Speech Challenge Rejected,* FACTS ON FILE WORLD NEWS, Nov. 30, 1995, at 889 C3.

Without specifically mentioning Settle's case, President Clinton gave a speech on July 12, 1995, in which he stated that the First Amendment does not convert schools into "religion-free zones." He urged that students should, "feel free to express their religion and their beliefs in homework, though art work, during class presentations, as long as it is relevant to the assignment. . . . All these forms of religious expression are permitted and protected by the First Amendment." Remarks by the President on Religious Liberty in America (The White House, Office of the Press Secretary, July 12, 1995) at 6-8 (cited in Petition for a Writ of Certiorari at 24, Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (No. 93-6207), *cert. denied,* 116 S. Ct. 518 (1995) (on file with author) (emphasis omitted)).

3. 53 F.3d 152 (6th Cir. 1995), *cert. denied,* 116 S. Ct. 518 (1995).

growing intolerance toward religious speech in the public schools.

Settle also highlights several unresolved issues concerning student speech in the classroom. Numerous Supreme Court decisions forbid viewpoint discrimination; however, none address the doctrine in the context of the public school classroom. Two Supreme Court cases—*Hazelwood School District v. Kuhlmeier*[4] and *Tinker v. Des Moines Independent Community School District*[5]—specifically address students' free speech rights, but neither pertains to student speech in the forum of a classroom assignment that does not implicate the school in the message. Beyond the specific facts of these two cases, the free speech protection afforded students in the classroom remains uncertain. The Sixth Circuit's opinion in *Settle* purports to apply Supreme Court precedent, but fails to identify the free speech problem posed by the facts of the case and creates an unlimited discretion for teachers to restrict student speech. Had the Supreme Court reviewed *Settle*, the Court could have clarified the analysis to be used in such cases.

In denying review, the Supreme Court missed the opportunity to define the limits of a teacher's discretion to restrict a student's religious speech in the classroom. This article argues that in the context of the classroom, courts should apply a fact-intensive analysis comparable to the First Amendment prohibition against viewpoint discrimination. Part I reviews Supreme Court precedent in relevant areas of First Amendment law. Part II traces the facts and procedural history of *Settle v. Dickson County School Board*. Part III analyzes *Settle* under First Amendment doctrine and explains the problems with the Sixth Circuit's analysis. Part IV locates *Settle* within the current climate toward religious expression in the public schools, and Part V recommends that courts take a proactive approach in applying First Amendment principles to classroom speech.

4. 484 U.S. 260 (1988).
5. 393 U.S. 503 (1969).

I. History

A. *The Free Speech Clause*

Over the years the Supreme Court has developed the contours of the Free Speech Clause contained in the First Amendment to the United States Constitution.[6] Justice Holmes first described one theory of free speech as the "free trade in ideas," which requires that each thought be allowed to test its truth in the marketplace.[7] To insure that the government is not unjustifiably restricting a speaker's ability to express ideas, the Court has determined that the First Amendment proscribes suppression of a particular message because of its content.[8] The Court has recognized as no less than ". . . axiomatic that the government may not regulate speech based on its substantive content or the message that it conveys."[9] Further, the Supreme Court acknowledges viewpoint discrimination as one of the paramount evils at odds with the liberties guaranteed by the Free Speech Clause. Thus, the government may not target the particular ideology or perspective of the speaker.[10]

Another important variable in the Free Speech Clause analysis is whether a forum has been opened for the speech. The context or the forum in which the speech occurs determines the level of protection the speech will receive. The Supreme Court inquires whether the speech takes place in a traditional public forum, such as a street or park, a limited public forum, such as a government facility that has been opened up to the public, or a nonpublic forum.[11] The government must justify the restrictions on speech that occurs in the public forum with a

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6. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging freedom of speech,* or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

7. Abrams v. United States, 250 U.S. 616, 630 (1919) (upholding convictions for illegal incitement under the Espionage Act during World War I) (Holmes, J., and Brandeis, J., dissenting).

8. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

9. Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 828 (1995) (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

10. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391-394 (1992).

11. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

compelling state interest.[12] Restrictions on speech in the non-public forum, as long as they are not designed to suppress speech because of the speaker's view, need only be reasonable.[13]

1. *Free Speech in the School Context*

There are few cases in which the Supreme Court has applied the above principles to student expression within the classroom. *Settle* relies on doctrines found in the following cases which involve a public school student's right to express particular views.

a. *Tinker v. Des Moines Independent Community School District*[14]

In *Tinker,* petitioners, one junior high and two high school students, decided to participate in a program to publicize objection to the Vietnam War by wearing black armbands during the Christmas holidays.[15] Principals of the Des Moines schools became aware of the students' planned protest and issued a policy that any student wearing an armband would be first asked to remove the armband, and if he refused, would be suspended until he returned without it.[16] Petitioners were suspended from school for wearing the armbands, filed an action against the schools for nominal damages and sought to enjoin their suspension.[17] The district court dismissed the complaint, and the Court of Appeals for the Eight Circuit affirmed the district court's ruling without issuing an opinion.[18]

In an opinion by Justice Fortas, the Supreme Court identified the wearing of armbands as "closely akin to 'pure speech'" protected by the First Amendment.[19] The most notable aspect of the Court's holding was its observation that neither the students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[20] Inevitable

12. *See id.* at 678.
13. *See id.* at 678-679.
14. 393 U.S. 503 (1969).
15. *See Tinker,* 393 U.S. at 504.
16. *See id.*
17. *See id.*
18. *See id.* at 504-505.
19. *Tinker,* 393 U.S. at 505.
20. *See id.* at 506.

conflict exists between the school's function as an arm of the states to protect the "free mind at its source," and the school's responsibility to proscribe and control conduct in the schools.[21] The Court struck the balance by requiring school officials to show that the forbidden conduct would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school, or would collide with the rights of other students.[22]

The district court made no such finding, and the Supreme Court found no evidence in the record of potential disruption on which the officials could have based their decision.[23] Rather, the record suggested that school officials feared controversy accompanying a protest against the Vietnam War.[24] Further, school officials did not silence all forms of protest, but merely one particular opinion—the wearing of armbands.[25] The Court forbade schools from attempting in this manner to make students "closed-circuit recipients of only that which the State chooses to communicate."[26]

b. *Bethel School District No. 403 v. Fraser*[27]

Matthew Fraser, a student at Bethel High School, gave a lewd and sexually suggestive speech at a school assembly.[28] The morning after the assembly the Assistant Principal called Fraser into her office and notified him that he had violated a school rule against conduct which "materially and substantially interferes with the educational process . . including the use of obscene, profane language or gestures."[29] Fraser was suspended for three days and was no longer eligible to be a speaker at graduation.[30] Fraser sued alleging a violation of his First

21. *Id.* at 507 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (upholding a student's First Amendment right to refuse to salute the flag)).

22. *See Tinker,* 393 U.S. at 508-09.

23. *See id.* at 509.

24. *See id.* at 510.

25. *See id.* at 510-511.

26. *See id.* at 511.

27. 478 U.S. 675 (1986).

28. *See Bethel,* 478 U.S. at 677-78.

29. *Id.* at 678.

30. *See id.*

Amendment right to freedom of speech.[31] The district court found that the school had violated Fraser's rights, awarded him damages and attorney's fees, and enjoined the school from preventing him from speaking at graduation.[32] The Ninth Circuit affirmed the district court's judgment, holding that Fraser's expression was indistinguishable from the armband protest in *Tinker*.[33]

The Supreme Court reversed, holding that schools, as instruments of the state, may determine that their message is impeded where lewd, indecent, or offensive speech is tolerated.[34] The Court noted the marked distinction between the political message at issue in *Tinker* and the sexual content of Fraser's speech.[35] Students as speakers do not share rights coextensive with adults; thus, schools may regulate student speech that is offensive, even though in other contexts, the state must let the actor speak.[36] Further, the Court noted that its precedent reveals that a speaker's rights are not unlimited when the speech is sexually explicit and the audience may include children.[37] Within the school environment, First Amendment protection for speech which undermines the school's basic educational mission, and which contravenes the fundamental values of public school education, is precluded.[38]

c. *Hazelwood School District v. Kuhlmeier*[39]

Students of the Hazelwood East High School Journalism II class wrote and edited *Spectrum*, the school newspaper.[40] In the May 13, 1983, edition of *Spectrum*, students prepared articles dealing with high school students' experiences with pregnancy and divorce in the family[41] The journalism teacher and

31. *See id.* at 679.
32. *See* Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d at 1356 (9th Cir. 1985).
33. *See id.*
34. *See id.* at 680, 683.
35. *See id.* at 680.
36. *See id.* at 682 (comparing Cohen v. California, 403 U.S. 15 (1971) (upholding a defendant's right to wear a profane, anti-draft viewpoint on his jacket inside a state courthouse)).
37. *See Bethel,* 478 U.S. at 684.
38. *See id.* at 685-86.
39. 484 U.S. 260 (1988).
40. *See Hazelwood,* 484 U.S. at 262.
41. *See id.* at 263.

student advisor took page proofs to the Principal, who objected to both articles, finding them to be inappropriate.[42] The Principal feared that the pregnancy article jeopardized the anonymity of the girls described, and that the student's parents mentioned in the divorce article should have been given the opportunity to consent to the publication of the article or respond to the information.[43]

The Principal withheld from publication the two pages of the newspaper containing the stories on pregnancy and divorce without consulting the students.[44] The students subsequently sued in the district court for injunctive relief and monetary damages, alleging that their First Amendment rights had been violated.[45] The district court denied the injunction finding no First Amendment violation.[46] The Court of Appeals for the Eighth Circuit reversed, applying the *Tinker* standard and determined that school officials could not have reasonably forecasted a material disruption or disorder as a result of the articles.[47]

The Supreme Court reversed the Eighth Circuit decision. Justice White concluded that school facilities may not be deemed public forums unless school officials have opened the facilities up for indiscriminate use by the general public.[48] The Court analyzed the school policies outlined in the Hazelwood East Curriculum Guide. The guide stated *inter alia* that "[s]chool sponsored student publications [were] developed within the adopted curriculum and its educational implications."[49] This emphasis on the paper's role in the curriculum failed to evince an intent by school officials to relinquish control over *Spectrum* and create a public forum. Thus, the Court found that school officials were entitled to regulate in any reasonable manner.[50]

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42. *See id.*

43. *See id.*

44. *See id.* at 264.

45. *See* Kuhlmeier v. Hazelwood Sch. Dist., 596 F. Supp. 1422 (E.D. Mo. 1984).

46. *See id.* at 1423.

47. *See* Kuhlmeier v. Hazelwood Sch. Dist., 795 F. 2d 1368 (8th Cir. 1986).

48. *See id.* at 268 (citing *Perry Educ. Ass'n,* 460 U.S at 47).

49. *Id.* at 268.

50. *See Hazelwood,* 484 U.S. at 270.

The Court noted that the question in *Hazelwood*, whether a school must affirmatively promote a particular student speech, differed from the question in *Tinker,* which addressed an educator's ability to silence a student's personal expression that occurs on school premises.[51] Rather, *Hazelwood* concerns an

> educator's authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[52]

The Court reasoned that educators should have greater control over this type of material for three reasons: (1) to insure that participants learn the lesson the activity was designed to teach; (2) so that readers or listeners will not be exposed to material that may be inappropriate for their level of maturity; and (3) so that the views of the speaker will not be erroneously attributed to the school.[53] In light of these considerations, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to the legitimate pedagogical concerns*."[54] Applying this standard, the Court concluded that the Principal's deleting the articles was "reasonable under the circumstances as he understood them."[55]

In a dissenting opinion Justice Brennan highlighted a different section of the Hazelwood Guide which described Spectrum as a "forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment[.]"[56] Justice Brennnan stated that the school officials violated the First Amendment's prohibitions against censorship of student ex-

51. *See id.* at 270-71.
52. *Id.* at 271.
53. *See id.*
54. *Id.* at 273 (emphasis added).
55. *Hazelwood,* 484 U.S. at 276.
56. *Id.* at 277 (Brennan, J., dissenting).

pression that neither disrupts class work nor invades the rights of others. Moreover, the censorship was not narrowly tailored to serve its educational purpose.[57]

2. *Religious Speech and Viewpoint Discrimination*

The Supreme Court has decided several cases discussing the protection which the First Amendment affords religious speech. Settle's classroom assignment falls within this category of speech because of the religious topic she choose.

a. *Rosenberger v. Rector and Visitors of the University of Virginia*[58]

The Supreme Court determined the issue of whether the University of Virginia could deny funding to a student-run religious newspaper. In *Rosenberger*, undergraduate students at the University of Virginia established Wide Awake Productions which published a newspaper titled, *Wide Awake: A Christian Perspective at the University of Virginia.*[59] The University refused to fund Wide Awake's printing costs because it was a religious organization.[60] Wide Awake appealed the denial first to the Student Council, and then to the Student Activities Committee, arguing that it was an organization entitled to funding, and refusing financial support violated the Constitution.[61] When the University refused Wide Awake's appeals, Wide Awake filed suit in the district court challenging the University's action under 42 U.S.C. § 1983, on the grounds that Wide Awake's rights to free speech and press, free exercise of religion, and to equal protection of the law, had been violated.[62] The district court ruled in favor of the University, and the Fourth Circuit concluded that although Virginia discriminated on the basis of content, the discrimination was necessary to achieve the "compelling interest in maintaining strict separation of church and state."[63]

57. *See id.* at 278.
58. 515 U.S. 819 (1995).
59. *See Rosenberger,* 515 U.S. at 825-26.
60. *See id.* at 827.
61. *See id.*
62. *See id.* at 827.
63. *See Rosenberger,* 515 U.S. at 828 (quoting Rosenberger v. Rector & Visitors of Univ. of Virginia, 18 F.3d 269, 281 (4th Cir. 1994)).

Justice Kennedy, writing for the majority, found that Virginia discriminated on the basis of content.[64] In a limited public forum that the government has created, it may discriminate on the basis of content to preserve the purpose of that forum. It may not, however, discriminate among the viewpoints.[65] Justice Kennedy explained that religion is a viewpoint:

> It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence on the existence of a divine being have been subjects of philosophical inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake.[66]

The Supreme Court further found that there could be no violation of the Establishment Clause where Virginia would merely be carrying out its responsibilities under the Free Speech Clause.[67] Hence, the Court invalidated Virginia's denial of funding to Wide Awake.[68]

b. *Lamb's Chapel v. Center Moriches Union Free School District*[69]

Similarly, in *Lamb's Chapel*, the Court held unconstitutional a school district's refusal of its school grounds to a religious group.[70] Lamb's Chapel sought to use school facilities after hours to show a Christian film series by Dr. James Dobson discussing family issues. Center Moriches school district generally allowed the community to use the school facilities for "social, civic, or recreational use," but denied Lamb's Chapel the right to use school facilities because it was a religious group.[71]

Justice White invalidated the restriction on free speech grounds, noting that because films dealing with the same subject matter from a nonreligious perspective could be shown, the

64. *See Rosenberger,* 515 U.S. at 830-31.
65. *See id.*
66. *Id.* at 831.
67. *See id.* at 845-46.
68. *See Rosenberger,* 515 U.S. at 845-46.
69. 504 U.S. 384 (1993).
70. *See Lamb's Chapel,* 504 U.S. at 394.
71. *Id.* at 391.

denial amounted to viewpoint discrimination.[72] The Court recognized that even in a nonpublic forum the government may not discriminate among views.[73]

B. *The Religion Clauses*

The First Amendment not only guarantees freedom of speech, but also protects the free exercise of religion and concurrently proscribes a state-instituted establishment of religion.[74] *Settle* involved the Free Exercise and Establishment Clauses because of the religious nature of Settle's expression.[75] The following cases pertain to religious expression under the religion clauses of the First Amendment.

1. *Free Exercise*

The Free Exercise Clause protects an individual's right to practice his or her religion, as well as the right to be free from religious persecution. In the same term as *Lamb's Chapel* the Supreme Court decided *Church of the Lukumi Babalu Aye v. City of Hialeah*,[76] which addressed the issue of religious persecution. Hialeah, Florida, in anticipation of the Santeria religion establishing a church in the area, enacted laws prohibiting animal sacrifice and specific types of animal slaughter utilized by the Santeria religion.[77] The Supreme Court invalidated the Hialeah laws as violative of Lukumi's free exercise of religion.[78] Justice Kennedy stated that the government "may not enact laws that suppress religious belief or practice."[79] He explained that the Court granted review out of concern that the laws in question violated "this fundamental nonpersecution principle of

72. *See id.* at 393-95.

73. *See id.* at 392-93.

74. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

75. The Sixth Circuit considered neither the Establishment nor Free Exercise Clause because Settle did not challenge Ramsey's actions on those grounds. *See Settle*, 53 F.3d at 153. The district court similarly stated that the religion clauses of the First Amendment were not implicated by the facts of Settle's case. *See* Pet. for Writ of Cert. at App. 29, *Settle*, (No. 93-207).

76. 508 U.S. 520 (1993).

77. *See Lukumi*, 508 U.S. at 525-26.

78. *See id.* at 535.

79. *Id.* at 523.

the First Amendment."[80] The Supreme Court articulated and applied the test for free exercise cases, which requires that a law burdening religion be (1) neutral in its application, and (2) generally applicable to all conduct.[81] A law which is not neutral nor generally applicable must be narrowly tailored to achieve a compelling government interest.[82]

The Court found that Hialeah's laws were not neutral.[83] In determining whether the ordinances targeted the Santeria religion the Court looked beyond the face of the laws to the laws' operation.[84] Practically, the Santeria religious practices were the only conduct subject to the ordinances. Further, evidence surrounding the city council's meetings, including statements made therein, demonstrated an intent by the city to prevent Lukumi from practicing its religion in the city.

The Supreme Court next considered the second requirement of the Free Exercise Clause; that the laws be generally applicable.[85] The Court found that the laws were underinclusive of their stated goals of protecting public health and preventing cruelty to animals because Hialeah failed to prohibit similar nonreligious conduct.[86] Rather, the ordinances were carefully drafted to include only killings related to animal sacrifice.[87]

Finally, the Court found that the Hialeah laws were insufficiently narrowly tailored to pass the strict scrutiny requirement. The ordinances failed to address the goals of public health and preventing cruelty to animals with respect to analogous nonreligious conduct.[88] Further, Hialeah could have achieved those goals using far narrower laws.[89] Thus the Supreme Court struck down the ordinances as violative of the Free Exercise Clause.[90]

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80. *Id.*
81. *See id.* at 531-32 (citing Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990)).
82. *See Lukumi,* 508 U.S. at 531-32.
83. *See id.* at 533-34.
84. *See id.* at 534-35.
85. *See id.* at 542-43.
86. *See id.* at 543.
87. *See Lukumi,* 508 U.S. at 543.
88. *See id.* at 546-47.
89. *See id.*
90. *See id.* at 547.

2. *The Establishment Clause*

The Supreme Court has consistently recognized that under the Establishment Clause the government may not favor or disfavor religion. In an early school case, *Epperson v. Arkansas*,[91] the Supreme Court invalidated an Arkansas criminal statute which forbade the instruction of evolution in the classroom.[92] The Court found that the Arkansas law prohibited the instruction of evolution for the sole reason that it conflicted with a particular religious doctrine.[93] The Court observed that the study of religions and of the Bible presented objectively as a part of a secular program need not collide with the Establishment Clause. However, the State may not adopt programs which "aid or oppose" any religion.[94] Thus, "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[95]

In *Lemon v. Kurtzman*,[96] the Supreme Court defined the current test under the Establishment Clause which requires the law in question: (1) have a secular purpose; (2) have a principle effect that neither advances nor inhibits religion; and (3) does not foster an excessive government entanglement with religion.[97] In cases of religious speech, the Establishment Clause affects the free speech analysis. The Supreme Court has recognized the critical difference between "government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech

91. 393 U.S. 97 (1968).

92. *See generally id.*

93. *See id.* at 103.

94. *See id.* at 103-04.

95. *Id.* at 105 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

96. 403 U.S. 602 (1973).

97. *See id.* at 612. Because of the difficulty the Court has had in applying the *Lemon* test, its continued validity has been questioned; however, the Supreme Court has explicitly declined to overrule *Lemon*. *See Lamb's Chapel*, 508 U.S. at 395, n.7. The proposition that the First Amendment requires government neutrality toward religion remains the essential concern of the Establishment Clause. *See, e.g., Rosenberger*, 515 U.S. at 845-46 ("[T]he University's regulation [which] required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief . . . was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.").

and Free Exercise Clauses protect."[98] Thus, whether the Establishment Clause forbids religious speech in the classroom depends upon the extent to which that speech is endorsed by the state or its actor.

II. *Settle v. Dickson County School Board*

A. *Facts*

During the week of March 15, 1991, Brittney Settle, a ninth-grader at Dickson County Junior High School in the small town of Dickson, Tennessee, received a research assignment in her English class.[99] Settle's instructor, Dana Ramsey, allowed Settle and other students to select their own topics subject to Ramsey's approval, and required four research sources comprised of original and secondary material, including newspaper and magazine articles.[100] Ramsey required only that students' topics be "interesting, researchable, and decent."[101] Students chose topics such as reincarnation, including its relation to Hinduism and Buddhism, witchcraft, black magic and the occult, ghosts, and supernatural encounters with dead persons, all of which were approved by Ramsey.[102]

Settle had originally signed up to do a paper on "Drama."[103] On March 22, Ramsey removed the in-class sign up sheet after which time students could change their topics with her approval.[104] Deciding that "Drama" might be too broad and not sufficiently interesting, Settle changed her topic and on March 26 submitted an outline entitled, "The Life of Jesus Christ."[105] Ramsey immediately rejected the outline, expressing her discomfort with the choice of Jesus as a research topic.[106] On April

98. Board of Educ. of Westside Community Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (emphasis omitted).

99. *See* Settle v. Dickson County Sch. Bd., 53 F.3d 152, 153 (6th Cir. 1995).

100. *See id.*

101. *See id.*

102. *See* Pet. for Writ of Cert. at 3, *Settle,* (No. 93-6207). For example, the paper topic "Magic Throughout History" included sources entitled "Jews believe in Baal," "Demons Are Evil Spirits," and "Gods Are Good Spirits." *See Settle,* No. 91-0562, slip op. at App. 21 n.1 (M.D. Tenn. 1993).

103. *See Settle,* 53 F.3d at 154.

104. *See id.* at 153-54.

105. *See id.* at 154.

106. *See id.*

3, Settle submitted a second outline, this time entitled, "A Scientific and Historical Approach to the Life of Jesus Christ."[107] Ramsey again rejected the topic.[108] Settle's father, Jerry Settle, complained to Ramsey, and later met with Ramsey and the school principal, Reed Evans, who supported Ramsey's decision.[109] Mr. Settle also called the superintendent of the Dickson County school system, George Caudill, who affirmed Ramsey's actions.[110]

Ramsey offered several reasons for her decision, namely: (1) Settle's failure to obtain permission for the topic in advance warranted its refusal; (2) Settle's personal views would prevent her from writing a dispassionate paper and cause Settle to perceive any commentary as criticism of her religion; (3) "personal religion is just not an appropriate thing to do in a public school;"[111] (4) Settle's knowledge of Jesus Christ would prevent her from learning something new and discourage her from conducting significant research; (5) the law prohibits any discussion of religious issues in the classroom; and (6) Settle could not meet the four source requirement because the Bible is the only available source on the reading of Jesus Christ.[112]

On the day that the papers were due Settle handed in her paper entitled, "The Life of Jesus Christ."[113] Ramsey gave Settle a zero without reading the paper.[114]

B. *Procedural History*

1. *District Court*

Settle brought a Civil Rights action in the district court for the Middle District of Tennessee pursuant to 42 U.S.C. § 1983

107. *See id.*

108. *See Settle,* 53 F.3d at 154.

109. *See Settle,* No. 91-0562, slip op. at App. 21-22.

110. *See* Pet. for Writ of Cert. at 3, *Settle,* (No. 93-6207) at 4.

111. *Settle,* 53 F.3d at 154.

112. *See id.* Settle claimed that Ramsey's sole reason for rejecting her outline was its religious content, and that Ramsey offered additional justifications only after her decision in subsequent statements to the school board and at her depositions. Pet. for Writ of Cert. at 5 n.3, *Settle,* (No. 93-6207). This article addresses all reasons given by Ramsey as a potential part of the basis for her decision.

113. *See* Pet. for Writ of Cert. at 6, *Settle,* (No. 93-6207).

114. *See id.*

for injunctive relief against the Dickson County School Board.[115] Settle claimed that her freedom of speech rights were violated when she was not allowed to write her research paper on the life of Jesus Christ.[116] Settle also claimed that Ramsey violated the Dickson County policy on "Religion in the Curriculum" when she denied the paper.[117] Additionally, Settle argued that the Dickson County School failed to maintain a neutral position toward religion, violating the Establishment Clause.[118]

Judge Wiseman stated the "two methods"[119] of analysis to be applied when dealing with student speech in public schools, citing *Tinker v. Des Moines Independent Community School District* and *Hazelwood School District v. Kuhlmeier*.[120] Following a *Tinker* analysis, courts examine whether a student's personal expression on school premises materially and substantially interferes with the school's function or the rights of other students.[121] The *Hazelwood* test applies a reasonableness standard to determine whether a school must accept a student's particular form of speech in a school sponsored setting.[122]

Judge Wiseman distinguished *Tinker* as applying to personal expression and found the *Hazelwood* standard to be more appropriate.[123] Settle's paper was part of the school's curriculum, designed to teach research and writing skills.[124] Additionally, the court considered Ramsey's reasons to be legitimate pedagogical concerns.[125] The court emphasized Settle's failure to follow procedure and Ramsey's concern that Settle might be able to write a paper on Jesus Christ more easily than another subject.[126] Further, the court accepted Ramsey's argument that a ninth grade student would be particularly sensitive to any

115. *See Settle,* No. 91-0562, slip op. at App. 19.

116. *See id.*

117. *See id.* at App. 27.

118. *See Settle,* No. 91-0562, slip op. at App. 28.

119. Part III, *infra,* questions the assumption that there are two discrete methods of analysis in this area.

120. 393 U.S. 503 (1969); 484 U.S. 260 (1988).

121. *See Settle,* No. 91-0562, slip op. at App. 23.

122. *See id.* at App. 23-24; *see also* discussion *infra* Part II.A.2.

123. *See* Settle, No. 91-0562, slip op. at App. 25.

124. *See id.*

125. *See id.* at App. 26-27.

126. *See Settle,* No. 91-0562, slip op. at App. 25-26.

criticism of work containing personal religious beliefs.[127] Thus, Dickson Junior High was not bound to accept Settle's speech.[128]

The district court rejected Settle's claim that Ramsey violated the Dickson County Board of Education "Religion in the Curriculum" policy.[129] The court agreed with Ramsey's interpretation of "composition" as an assignment that contains "personal experiences and observations" as opposed to what the instant assignment was: an objective research paper.[130] This interpretation, the court held, was reasonable, "comport[ed] with the learning objective of the exercise," had a valid pedagogical justification," and therefore did not violate the written policy.[131] Similarly, the court disposed of Settle's claim that Ramsey and the school "failed to maintain a benevolent neutrality" toward religion.[132] The court distinguished a research paper from idea expression and found that the former need not accommodate a student's religious faith.[133] The district court entered summary

127. *See id.* at App. 26. Ramsey testified that criticism of a fourteen year old's written work intertwined with personal religious values would lead to the student's assumption that, "[the teacher] just [doesn't] agree with me; therefore, that's why I got a bad grade." *Id.* at App. 26-27.

128. *See id.* at App. 25, 29.

129. *See id.* at App. 27-28. The written policy states in pertinent part:

> Religious institutions and orientations are central to human experience, both past and present. An education excluding such a significant aspect would be incomplete. It is essential that the teaching about – religion and not of religion be conducted in a factual, objective, and respectful manner. Therefore the policy of the Board of Education shall be as follows:
>
> (1) The Board supports the inclusion of religious literature, music, drama and the arts in the curriculum and in school activities, provided it is intrinsic to the learning experience in the various fields of study and presented objectively.
>
> (2) The emphasis on the religious themes in the arts, literature and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies shall never foster any particular religious tenets or demean any religious beliefs.
>
> (3) Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art, music, speech, and debate.

Id.

130. *See id.* at App. 28.

131. *See Settle,* No. 91-0562, slip op. at App. at 28.

132. *Id.* (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

133. *See id.*

judgment for the school.[134] Settle thereafter appealed to the Sixth Circuit Court of Appeals.[135]

2. *Court of Appeals*

The Sixth Circuit held that all six of Ramsey's justifications for rejecting Settle's paper were within the "broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded students."[136] Judge Merit, writing for the majority, emphasized that courts should exercise restraint in classroom conflicts between teacher and student due to the need for effective education.[137] The court reasoned that even in *Hazelwood* where a student was denied access to a school newspaper, a "kind of open forum," the Supreme Court allowed educators to censor the style and context of student speech, so long as the regulation was reasonably related to legitimate pedagogical concerns.[138] Further, the court found that *Tinker* allowed teachers broad discretion when administering the curriculum. Thus, a school may limit otherwise protected speech if it does so as part of a prescribed classroom exercise.[139]

Judge Merritt compared teachers to judges, who must frequently direct the content of speech.[140] Teachers may make mistakes in grading, just as judges make mistakes in deciding cases, but it is the "essence of the teacher's responsibility in the classroom to draw lines and make distinctions."[141] Judge Merritt concluded that within these competing interests, learning is more vital in the classroom than free speech.[142]

Judge Batchelder concurred in the court's decision, but disagreed with the majority's assessment of the facts and the value placed on free speech in schools. First, he noted that Settle's

134. *See id.* at App. 29.

135. *See Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 518 (1995).

136. *Id.* at 156.

137. *See id.* at 155.

138. *See id.* at 155 (citing *Hazelwood*, 484 U.S. at 273). Although an ordinary newspaper would qualify as an "open forum," the Supreme Court clearly identified the high school newspaper in *Hazelwood* as a nonpublic forum. *See Hazelwood*, 484 U.S. at 269-70.

139. *See id.* at 156 (interpreting *Tinker*, 393 U.S. at 509).

140. *See Settle*, 53 F.3d at 155.

141. *Id.* at 155-56.

142. *See id.* at 156.

case did not state a First Amendment free speech claim, and was not workable within the framework of cases such as *Hazelwood* and *Tinker*.[143] Unlike the student material in *Hazelwood*, Settle's paper was not for the publication of a school sanctioned newspaper, but solely to fulfill an assignment in English class. Nor was the research paper an expression of opinion or "pure expression" which happened to take place in the classroom as in *Tinker*. The issue according to the concurrence was solely whether a ninth grade English teacher can determine what topic is appropriate to satisfy a research paper assigned in that class: "The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than the assignment and receive credit for it."[144] Although disturbed by Ramsey's after-the-fact reasons for denying the paper, particularly Ramsey's belief that religion should not be discussed in schools, the concurrence concluded that because Settle's was not an opinion paper, Ramsey did not reject the paper solely on the ground of its religious content.[145]

Settle appealed to the Supreme Court of the United States. The Supreme Court denied Settle's petition for writ of certiorari.[146]

III. Analysis Under Current Doctrine

A. *Freedom of Speech*

The district court began its analysis with the assumption that Settle's case must fit into one of two analytical categories: *Hazelwood* or *Tinker*.[147] These cases only constitute a part of the solution to the question posed by *Settle*. *Settle* offered the Supreme Court the opportunity to resolve the difficult question of the extent to which a teacher may restrict the expression of certain subjects and views in her classroom. Neither *Tinker* nor *Hazelwood* directly address this issue.

143. *See id.* at 157-58.
144. *Id.* at 158.
145. *See Settle,* 53 F.3d at 159.
146. *See* Settle v. Dickson County Sch. Bd., 116 S. Ct. 518 (1995).
147. *See Settle,* No. 91-0562, slip op. at App. 22.

The Sixth Circuit identified the components which make *Settle* a difficult and distinguishable case from *Hazelwood* or *Tinker*. At one extreme, the Sixth Circuit recognized the basic proposition that a teacher cannot limit speech to punish a student for her race, gender, class or religion.[148] At the other extreme, the court concluded that learning is more vital in the classroom than free speech.[149] Somewhere in the middle the Sixth Circuit found an area of "broad discretion" reserved to the teacher alone.[150] The court relied on dicta from earlier Supreme Court school cases[151] and found that both *Hazelwood* and *Tinker* could be used to support broad discretion for teachers to limit classroom speech.[152] Nevertheless, the Sixth Circuit failed to explain the practical limits of a teacher's discretion to restrict speech, and failed to apply those limits to Settle's case.

Had the Supreme Court granted review in *Settle*, it could have defined the precise analysis to be applied in similar cases. Further, the Court could have defined a teacher's discretion to discriminate among views in the classroom. This article attempts to outline the parameters of a teacher's discretion to restrict speech consistent with First Amendment principles.

1. *Relevance of the forum*

Traditionally, the Court begins the free speech analysis with an evaluation of the forum created for speech. The Supreme Court has not created a per se forum category for schools. The Court characterized the high school newspaper at issue in *Hazelwood* as a nonpublic forum.[153] If the school has by

148. *See Settle,* 53 F.3d at 155. Although the court recognized that a teacher could conceivably punish a student because of her religion by assigning a low grade, the court did not articulate how such discrimination could be proven, and discarded Settle's claim made at oral argument that Ramsey punished Settle for her religion. *See id.*

149. *See id.* at 156.

150. *Id.*

151. *See id.* at 155. The court cited *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding unconstitutional as a violation of the Establishment Clause an Arkansas "monkey law" which forbade the instruction of evolution in public schools) and *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (finding no violation of a medical student's substantive due process where she was dismissed for academic deficiency without a hearing).

152. *See* Settle, 53 F.3d at 155-56.

153. *See Hazelwood,* 484 U.S. at 267-70.

policy or by practice opened facilities for indiscriminate public use will it be deemed a limited public forum.[154] However, if no public forum has been created the school may impose reasonable restrictions on student speech.[155]

On the other hand, some scholars view the standard articulated in *Tinker* as exclusive of any consideration of the forum.[156] Similarly, Settle likely interpreted *Tinker* as the only mechanism to invoke the viewpoint discrimination principles that she claimed Dickson Junior High violated. The "material and substantial interference" standard in *Tinker* creates a stricter barrier for the school to overcome than that of "reasonableness." However, even in *Tinker*, the Court conducted its analysis "in light of the special characteristics of the school environment."[157] This implies that the Court considered the competing interests of the government and the speaker implicit in the forum doctrine.[158]

A logical reason exists for the Supreme Court's disparate standards in *Hazelwood* and *Tinker*. In *Tinker*, school officials prevented students from wearing armbands on their persons, expression akin to "pure speech." In other words, the students in *Tinker* did not use the school facilities or curriculum to deliver their message. The silent protest took place during school hours and on school premises, even in the classroom, but the students' antiwar message did not impede the school's ability to perform its function. Additionally, the students' message, conveyed by the armbands which individual students wore on their persons, was not likely to have been attributed to the school. By contrast, the students in *Hazelwood* could not deliver their message without the aid of the school newspaper. The fact that the newspaper was part of the curriculum as well as the fact

154. *See id.* at 267 (quoting *Perry*, 460 U.S. at 47).

155. *See id.* at 267.

156. *See* Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools,* 46 MERCER L. REV. 1017, 1034 (1995) [hereinafter Sekulow]. Sekulow argues that a forum analysis would diminish the protection of students' speech rights which *Tinker* affords. Rather, students' rights would be subject to the "vagaries of school officials," allowing those officials to restrict speech as long as the restrictions are reasonable. *See id.* at 1034.

157. *Tinker*, 393 U.S. at 506.

158. *See* ISKCON, Inc. v. Lee, 505 U.S. 672, 678-79 (1992).

that its message could easily have been attributed to the school compelled the Court to find the newspaper a nonpublic forum.

Hazelwood examined three concerns with respect to speech within the curriculum. The Court stated one body of concern, that students learn the activity the class was designed to teach, and another, discussed above, that the school maintain control over work perceived by the public to bear the imprimatur of the school.[159] *Hazelwood* applies to this case based on Ramsey's concern that Settle might not learn to prepare a research paper. It is less clear that the public could perceive Settle's paper to be the product of Dickson Junior High.[160] Additionally, the censorship in *Hazelwood* aimed to protect the young readers to whom the school paper was circulated. In this case, Settle's paper could not have adversely affected any other students. Consequently, the high level of deference afforded the school officials in *Hazelwood* does not apply to these facts.

However, Settle's paper was part of the school curriculum, an area generally not open for unlimited student expression. In this particular assignment Ramsey allowed students to choose their own research, but retained the right to approve and grade the topics. Thus, under current doctrine, the facts of *Settle* suggest a nonpublic forum and, following *Hazelwood*, Ramsey's actions must be reasonably related to pedagogical concerns.

2. *Viewpoint discrimination*

After analyzing the type of forum in which speech occurs, the Court determines whether the state has discriminated based on the content of the speech or the viewpoint of the speaker. In most contexts, even in the nonpublic forum, view-

159. *See Hazelwood*, 484 U.S. at 271.

160. Peck explains the function of the forum in distinguishing between protected religious expression and prohibited religious worship in the school context. Where a public forum has been established, and students are free to express themselves on any topic, whatever is expressed is more easily attributed to the student-speaker than the school. It can be inferred from his analysis that, where whatever is expressed is attributed to the student-speaker, a public forum has been established. He explains that a student in biology class may answer a question about evolution with a statement about the Bible because of the forum that has been created. Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 MERCER L. REV. 1123, 1152 (1995) [hereinafter Peck].

point discrimination cannot be justified.[161] Settle relied on this point in her brief, stating that "[e]ven if school officials need not have permitted expression of *any* student views," or "could have imposed *viewpoint-neutral* subject matter restrictions on what topics students could address, it does not follow that schools may prohibit . . . student expression on particular topics because of the religious viewpoint that such a topic is thought to entail."[162] Ramsey's outright rejection of Settle's religious topic would appear to be an indisputable example of content and viewpoint discrimination. Ramsey objected to Settle's paper because of its religious theme, and specifically forbade her from writing on Jesus Christ because of Settle's strongly held beliefs. Even if Ramsey had prohibited all students from writing on a religious topic, her actions would have amounted to viewpoint discrimination. For purposes of free speech, the Court has recognized that the silencing of all viewpoints on a topic is just as offensive as silencing a single viewpoint.[163] Therefore, it would seem as Settle argued in her brief to the Supreme Court, that Ramsey prevented Settle from writing on Jesus Christ "because of the particular religious viewpoint the instructor considered the topic to present *and* because the instructor thought the choice of topic reflected Brittney Settle's personal religious views and interests."[164]

The foregoing fora and viewpoint analyses demonstrate that the issue of student speech in the classroom is far from resolved by these doctrines. A per se prohibition against viewpoint discrimination in the school context is unworkable because, as the Sixth Circuit recognized, "it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions . . . to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject."[165] Yet, to allow viewpoint discrimination because a classroom or assignment is not designated a public forum by the school would provide little protection for students. Courts could

161. *See Lamb's Chapel*, 508 U.S. at 393-393 (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).

162. Pet. for Writ of Cert. at 13, *Settle*, (No. 93-6207) (emphasis in original).

163. *See Rosenberger*, 115 S. Ct. at 2518.

164. Pet. for Writ of Cert. at 10-11, *Settle*, (No. 93-6207) (emphasis added).

165. Settle v. Dickson County Sch. Bd., 53 F.3d 152, 156 (1995).

never discern when a teacher limits speech "in the name of learning" or "as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion."[166] The unique setting of the classroom creates the critical difference between *Settle* and cases like *Rosenberger*,[167] in which the Supreme Court swiftly struck down a university funding policy based on viewpoint discrimination.

B. *Speech in the Classroom*

Teachers may have valid educational reasons for limiting the expression of views. The Supreme Court has recognized that a teacher may proscribe a morally offensive presentation to protect students from sexually explicit messages which conflict with the school's message of decency and appropriate citizenship.[168] Further, a teacher may stifle a student's message that is not harmful but simply interferes with the school's function.[169] As Justice Brennan stated, the teacher may not bar the budding political orator from the cafeteria but may punish him for giving a speech in calculus class.[170] Settle perceived the problem inherent in judicial review of classroom decisions but failed to explain where the boundaries should be drawn:

> It is important to emphasize what is *not* at issue in this case. Students have no free speech right to dictate the content of a public school's curriculum and petitioner does not contend otherwise. Nor do students have a general constitutional right to object to a teacher's (or school's) control over the content and manner of classroom instruction or discussions, including the subjects chosen and, very often, even the viewpoints expressed by students. Teachers and school districts properly are granted substantial latitude on such matters. Moreover, even where a school district (or its teacher) has chosen to allow students to write research papers or essays, or make classroom presentations, on subjects of a student's choosing, the school or teacher may impose limitations on the student's choices for reasons of age-appropriateness, decency,

166. *Settle*, 53 F.3d at 156.

167. *See Rosenberger*, 115 S. Ct. at 2510.

168. *See Bethel*, 478 U.S. at 675.

169. *See Tinker*, 393 U.S. at 503.

170. *See Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting) (citing Consolidated Co. v. Public Serv. Comm'n, 447 U.S. 530, 544-45 (1980) (Stevens, J. concurring)).

> relevance, degree-of-difficulty, lack of originality, duplication of other students' efforts or previous class work, or any other valid educational reason. *This case challenges none of these principles.*[171]

The context of the classroom requires a closer inspection of the teacher's actions to determine whether the teacher has violated a student's freedom of expression. To evaluate the validity of a teacher's restriction on speech, courts must assess the restriction as well as the manner in which the teacher applies the restriction to the class. Even under the *Hazelwood* standard courts must evaluate whether a teacher's decision reasonably squares with the "legitimate pedagogical concerns."[172] Therefore, courts must actually determine whether a teacher's actions are not merely reasonable, but reasonably related to pedagogy—"the art, profession, or science of teaching."[173]

An analysis of different hypotheticals and categories of speech may clarify the parameters of a teacher's discretion within the classroom.

1. *Types of Classroom Speech*

a. *Oral Presentations*

In the case of oral presentations, teachers are primarily concerned with the message a student conveys to other students. Suppose for example that a student wished to fulfill an oral report assignment on a topic of the student's choice by giving a speech on the tenets of Nazism. The student would have a free speech right to express herself in the manner she chose provided that the report was relevant to the assignment. The teacher, however, would probably have the responsibility to separate the school from the message and protect other students from a potentially injurious presentation.[174] On the other hand,

171. Pet. for Writ of Cert. at 11, *Settle,* (No. 93-6207).

172. *Hazelwood,* 484 U.S. at 273.

173. WEBSTER'S II NEW REVISED DICTIONARY 517 (1984).

174. This assertion flows from the Court's repeated reluctance to grant students the rights that adults have to promote offensive messages. *See Bethel,* 478 U.S. at 681-82; *see also* Papish v. University of Mo. Bd. of Curators, 410 U.S. 667, 670-71 n.6 (1973) (upholding expulsion of a student for lewd expression in a newspaper she sold on campus); *c.f.* New Jersey v. T.L.O., 469 U.S. 325, 340-42 (noting that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings).

where little danger exists of imputing the student's message to the school or harming other students, a teacher should not restrict a student's expression because of its content. Thus, for example, a teacher should not punish a student's relevant answer to a question simply because that answer conveys a religious or philosophical viewpoint.[175]

b. *Written Assignments*

In terms of a student's written work, it follows that a teacher should not forbid an otherwise relevant assignment because of its particular view. As one commentator notes:

> Suppose a teacher tells his class to write a book report on *Moby Dick*. A student could receive an "F" for submitting a report on another book—for example, the book of Jonah in the Bible, because it, like *Moby Dick*, involves a whale—because a teacher may legitimately expect students to complete the assignment the teacher assigns, and to reward work that does not meet that expectation would materially disrupt the teacher's legitimate purpose. But suppose a student handed in a report that drew parallels between *Moby Dick* and religious imagery. The teacher could not punish the student (for example, by assigning a lower grade) simply because of the report's religious viewpoint.[176]

When a teacher's restriction applies to the entire class, the mere exclusion of a particular subject summons the specter of discrimination and makes the teacher's motives suspect. Consider the following variation on a hypothetical posed by Professor Michael McConnell.[177] Suppose a teacher forbids her class from submitting papers on matters related to race. A black stu-

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The teacher's actions would *not* be justified solely because of the offensiveness of the Nazi message. *See* National Socialist Party v. Skokie, 432 U.S. 43 (1977) (overturning an Illinois injunction against a Nazi demonstration in a largely Jewish community); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding unconstitutional as a prohibited point of view restriction a law which proscribed cross-burning).

175. *See* Sekulow, *supra,* note 156 at 1075.

176. *Id.* at 1075-76.

177. McConnell testified before the Senate Judiciary Committee in opposition to the pending school prayer amendment but in defense of religious liberty in schools. He commented with respect to Settle's case: "I have little doubt that the case would have come out the other way if a racist teacher had forbidden a paper on Martin Luther King, Jr., or an anticommunist teacher had forbidden a paper on the evils of capitalism." Capitol Hill Hearing Testimony of Michael W. McConnell before the Senate Judiciary Committee, Sept. 29, 1995 [hereinafter "McConnell"].

dent who desired to write a paper on Malcolm X would be prevented from doing so based on the policy. Forbidding the student from writing on the topic might effectively punish the student for his or her race. Prohibiting any discussion of race would restrict the views available in the marketplace. It would reduce Malcolm X to a "racial matter," and undermine his significance as a subject of history deserving of thoughtful, researched analysis. It would also reveal that the teacher holds a bias against the student's viewpoint on the subject. To many Christians, Ramsey's decision to reject Settle's paper seems just as anti-religious as the above examples seem racist.[178]

c. *Creative v. Noncreative Writing*

Finally, the distinction between creative and noncreative writing merits some discussion. Presumably, in a creative writing environment, students should have more latitude to choose their own topics. Conversely, research papers or noncreative writing might warrant less student choice and heightened teacher scrutiny. Ramsey relied on this reasoning in rejecting Settle's topic.[179] From a learning perspective, however, the research paper and the creative essay may have much in common. Both teach writing skills which require the learning and involvement of the student. A topic in which the student has an interest should produce, if properly managed, a paper that is a product of the student's active involvement in the learning process—the object of the English classroom.[180]

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178. Had there been a recent racial controversy in the schools and had the students been required to give oral presentations, the teacher here, as in the Nazi example, *supra*, might argue that restricting the presentation would be necessary to protect sensitive students and avoid classroom conflict.

179. *See* Pet. for Writ of Cert. at App. 27-28, *Settle* (No. 93-6207).

180. Some argue that writing in the English classroom has lost its focus on the students' role in the "process" of writing. Kutz and Roskelly explain that too often format takes priority over the student's active involvement: "[S]tudents[ ] [believe] that writing is a task quite separate from themselves, with right and wrong answers determined by the authority of the teacher." ELEANOR KUTZ & HEPHZIBAH ROSKELLY, AN UNQUIET PEDAGOGY 155-56 (1991). Thus, "[w]riting in school is most often seen by students not as an active means of discovering what they think and know, but as a routine and essentially passive kind of decoding, figuring out what someone—the teacher or the text—wants them to do." *Id.* at 156.

These observations suggest that courts can evaluate the legitimacy of a teacher's classroom decision to restrict speech. However, in *Settle*, the Sixth Circuit failed to evaluate Ramsey's decision for the possibility of viewpoint discrimination. The Court of Appeals declined to discuss the plausibility of Ramsey's stated reasons for denying Settle's paper, and rejected Settle's claim at oral argument that Ramsey's reasons were pretextual.[181] Further, although the Court of Appeals purported to apply the *Hazelwood* standard, it failed to examine Ramsey's decision through the lens of pedagogy. Under *Hazelwood*, the Court must evaluate each of Ramsey's stated reasons to determine whether Ramsey's denial violated First Amendment principles.[182]

2. *Analysis of Ramsey's Justifications*

A student's failure to obtain permission for a topic in advance warrants its complete refusal. Ramsey claimed that Settle's failure to obtain permission for the topic in advance warranted its refusal. This would appear to be an issue of classroom management probably better left to the teacher's discretion. Nevertheless, a closer inspection of Ramsey's own statements show that Ramsey would have rejected Settle's paper even if Settle had signed up for the topic of Jesus Christ as her original choice.[183]

A junior high school student cannot distinguish between criticism of written work on a religious topic and criticism of religion. Ramsey also asserted that Sette's strongly held beliefs would cause her to interpret any commentary from Ramsey as criticism of her religion. This justification could be supported on the grounds that it protects a student from criticism which she is not mature enough to receive. The district court accepted this interpretation, citing Ramsey's statement that a fourteen-year-old would likely feel that the teacher, "just [doesn't] agree

181. *See* Settle v. Dickson County Sch. Bd., 53 F.3d 152 (1995).

182. 484 U.S. 260 (1988).

183. In a school board meeting Ramsey was asked, "Had the paper on this subject been the original choice, would you have accepted it?

Ramsey responded, "No, I wouldn't. Just as I wouldn't have accepted one on Buddha or Mohammed. The papers that seemed to be causing so much problem are on religious issues and I was presented a religious paper." Pet. for Writ of Cert. at 5, *Settle* (No. 93-6207) (Transcript of school board meeting).

with me;. . .that's why I got a bad grade."[184] However, Ramsey's concern runs counter to the *Tinker* Court's admonition that, "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"[185] If not for the protection of the student, Ramsey's fear of an uncomfortable situation cannot justify limiting Settle's expression. In fact, properly administered criticism can and should help students develop their writing styles and expression.[186] In Settle's case it is difficult to imagine that Settle would be more harmed by perceived personal criticism stemming from Ramsey's candid assessment of her paper, than by receiving a zero purely because of the religious nature of the topic she chose.

Personal religion is inappropriate at school. Ramsey's primary objection to Settle's paper centered on her belief that personal religion is, "not an appropriate thing to do in a public school."[187] Ramsey believed that Settle's paper would be indistinguishable from personal religion because of Settle's strong belief in Jesus Christ. Two problems arise from this assertion. First, Ramsey's statement presumes that religion may not be discussed in public school, a position which neither the Supreme Court precedent nor the Establishment Clause support.[188] Second, Ramsey discriminates in terms of who may discuss a religious topic. Assume A (Christian) and B (Athiest) prepare a research assignment on a topic of their choice. Ramsey's reasoning would forbid A but not B from discussing Christianity, because for A it would constitute personal religion. In

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184. *See* Pet. for Writ of Cert. at App. 27, *Settle* (No. 93-6207).

185. *Tinker*, 393 U.S. at 511 (quoting Judge Gewin in Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

186. One author suggests six objectives which teachers may follow when correcting student papers:

(1) Give students a reason for wanting to write again;
(2) Help students perceive the process of composing;
(3) Ask students questions about the choices they have made;
(4) Directly point out one or two grammatical, mechanical, or syntax errors;
(5) Always make suggestions about larger rhetorical strategies;
(6) Encourage students to take more responsibility for their own learning.

David A. England, *Objectives for Our Own Composing Processes—When We Respond to Students,* CLASSROOM PRACTICES IN TEACHING ENGLISH (1979-1980).

187. Pet. for Writ of Cert. at 4, *Settle* (No. 93-6207).

188. *See* discussion *supra* part I.B.2.

Settle's case, Ramsey allowed other students to write about topics relating to Buddhism and Hinduism, but only excluded Settle's paper on Jesus Christ. This goes directly to the core of the type of discrimination that the Free Speech Clause prohibits.

A student's existing knowledge of a research subject will prevent her from learning anything new and discourage her from doing significant research. Ramsey also claimed that allowing Settle to complete a paper on Jesus Christ would defeat the purpose of the exercise. Settle could prepare an outline without doing significant research, without taking a dispassionate approach to the issue, and without learning something unfamiliar to her. These reasons resemble the Court's concern in *Hazelwood* that students learn the lesson that a particular activity is designed to teach.[189] Research shows, however, that a student's expression of information taught is profoundly influenced by several factors, including their prior knowledge.[190] Forbidding a student from writing on a subject with which she is familiar forecloses the opportunity for the student to build upon what she already knows, and can inhibit rather than encourage the learning process. Roe notes that the learning process requires

> much more than thinking—schooling also entails extensive listening, speaking, reading, and writing, in which ideas are advanced, exchanged, and evaluated. Schooling should provide students with opportunities to engage in higher cognitive operations because students cannot be expected to function at such levels unless they have the opportunity to employ higher operations in practice.[191]

Additionally, when a teacher precludes only one student from writing on a subject about which that student has some knowledge, that signals a stark singling out of one speaker's message. Ramsey made no general requirement that all students write on a topic with which they were unfamiliar.[192] If

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189. *See Hazelwood*, 484 U.S. at 271.

190. Fred M. Newman et al., *Authentic Pedagogy and Student Performance*, 104 AM. J. ED. 280, 285 (1996).

191. Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L.REV. 1271, 1316 (1991) [hereinafter "Roe"].

192. *Compare* Sekulow's explanatory note:

> This is not to say that a teacher could not further limit the assignment to insure students learn the lesson he wants them to learn. For example,

these risks were not important enough to address to the entire class, presumably Ramsey could have avoided them in Settle's case by offering guidance to insure that Settle was performing research and writing from a sufficiently detached perspective. Patience, rather than censorship, appears to be the key to helping students develop the analytical skills necessary for higher education and adult life:

> While practicing, students will often fall short of intended goals by misunderstanding, misapplying, inaccurately analyzing, poorly creating, and erroneously evaluating the subject matter on which they are working. If they are to derive benefit from this practice, students must be able to make errors without fear of punishment or detriment. Schools must therefore have some tolerance for error—and for student speech—when teaching students how to think critically.[193]

The law prohibits any treatment of religious issues in the classroom. Apart from being incorrect, Ramsey's assertion that "the law" would require her decision to reject Settle's paper demonstrates an important point about the relationship between educators and the courts.[194] The courts properly function as the interpreters of the Constitution, and teachers as well as other state officials rely on courts' pronouncements for guidance.[195] When a teacher purports to interpret the law in a manner inconsistent with precedent, the function of the court has been undermined. The remedy lies with the courts—in proper review and decision of a case in which the law will be clarified. The majority's failure to clarify Ramsey's mistaken view, when it is the court's function to say what the law is, escapes apprehension.

The Bible is the only available source on the life of Jesus Christ. Ramsey argued that there was no other source on the

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> suppose a teacher allowed students to pick their own topics for a research paper, *the only proviso* being that students must pick a topic that is unfamiliar to them. In that case, the teacher could conceivably prohibit a Catholic student from writing about Catholicism; but he could not prohibit that student from writing about Islam, just because the teacher dislikes Islam or religion in general.

Sekulow, *supra* note 156 at 1076 n.327 (emphasis added).

193. *See* Roe, *supra*, note 191 at 1318.

194. *See supra* section I.B.2.

195. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

life of Jesus Christ except the Bible, leaving Settle's paper three sources short of the four source requirement. The Sixth Circuit interpreted Ramsey's statement to mean "only original source."[196] The Bible is not, however, the only original source of information on Jesus Christ.[197] Moreover, many secondary sources document the life of Christ.[198] While the Sixth Circuit observed that Ramsey's reasoning was suspect, the Court concluded that, "all six of Ms. Ramsey's stated reasons" fall within her broad leeway, "even reasons that may be mistaken."[199]

This conclusion departs from the Supreme Court's viewpoint discrimination jurisprudence, and fails to identify the pedagogical weaknesses in Ramsey's justifications. Within the huge gulf of "leeway" envisioned by the Sixth Circuit, even the most ostensibly invidious discrimination would go unquestioned. The Court's opinion left no mechanism for the wrongs to which it alluded in dictum—the punishing of a student based on a forbidden factor such as religion—to be redressed in *Settle* or in future cases based on similar facts.

C. *Freedom of Religion*

1. *The Establishment Clause*

Under the *Lemon* test, the court would inquire whether Ramsey's actions had a secular purpose and a principle effect that neither advanced nor inhibited religion.[200] Ramsey identified a secular purpose—education—when she denied Settle's paper. However, Ramsey's denial prevented Settle's expression on a religious theme and thus had the effect of inhibiting religion. The only way in which the Establishment Clause could protect Ramsey's actions would be if Ramsey, by accepting Settle's paper, would have created an excessive entanglement be-

196. Settle v. Dickson County Sch. Bd., 53 F.3d 152, 154 (1995).

197. *See, e.g.,* FLAVIUS JOSEPHUS, THE COMPLETE WORK OF JOSEPHUS (William Whiston trans., Kregel 1960).

198. *See, e.g.,* JOHN DOMINIC CROSSAN, JESUS: A REVOLUTIONARY BIOGRAPHY (1994); WILLIAM BARCLAY, JESUS AS THEY SAW HIM: NEW TESTAMENT INTERPRETATIONS OF JESUS (1962); JOHN WICK BOWMAN, THE INTENTION OF JESUS (1943); ALBERT SCHWEITZER, THE QUEST OF A HISTORICAL JESUS (1910); Jefferey L. Sheler, *In Search of Jesus New Appraisals of His Life and Meaning*. U.S. NEWS AND WORLD REPORT, April 8, 1996 at 46.

199. *Settle*, 53 F.3d at 156.

200. 403 U.S. 602 (1973).

tween religion and the state. As the Supreme Court noted in *Epperson*, the mere study of religion or of the Bible presented objectively does not collide with the Establishment Clause.[201] This suggests that Ramsey herself could have taught on the life of Christ so long as she presented the material objectively and as part of a secular program.[202] It follows that Settle's written research assignment posed little threat to the neutrality required by the Establishment Clause.

Lamb's Chapel and *Rosenberger* also confirm that schools must tolerate religious views if they tolerate nonreligious ones, and may not use the Establishment Clause to censor religious issues. The Dickson School Board's "Religion in the Curriculum" policy guidelines acknowledges that religious expression should not be eliminated: "Student initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art, music, speech, and debate."[203] Ramsey's statement before the Dickson School Board that, "[t]he law says [teachers] are not to deal with religious issues in the classroom," evinces a fundamental misunderstanding of the Establishment Clause. In refusal on the grounds of religious content, Ramsey was, "dead wrong in her view that Brittney [Settle]'s paper topic . . . is impermissible in the public schools."[204]

2. *Free Exercise and the Nonpersecution Principle*

The Supreme Court decision in *Lukumi* recognizes that the individual free exercise of religion should be protected from laws and policies targeted at religious beliefs or practices. *Lukumi* would permit a court to look beyond the face of Ramsey's policy to its actual operation. Ramsey gave an assignment

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201. The circumstances of the particular lesson would determine whether such a presentation would violate the Establishment Clause. For example, if Ramsey had taught on Jesus Christ consistently for an extended period of time, even an objectively presented study might cast a "pall of orthodoxy" over the classroom. *Epperson,* 393 U.S. at 105 (quoting Keyishian v. Bd. Of Regents, 385 U.S. 589, 603 (1967)).

202. Pet. for Writ of Cert. at App. 27-28, *Settle* (93-6207); *see supra* note 124, for text of policy.

203. *Settle*, 53 F.3d at 154.

204. *Settle*, 53 F.3d at 159 (Batchelder, J., concurring).

to the whole class, but administered the policy to exclude Settle's discussion of a religious subject from a religious perspective. Had Ramsey forbidden all students from writing on a religious topic the Free Exercise Clause might not be implicated. In that case, religionist students would have to demonstrate that Ramsey intended to restrict religious beliefs and practices. Settle was prevented from writing on Jesus Christ because it was a matter of her "personal religion," discussing her "personal redeemer."[205] Thus Ramsey's non-neutral regulation of Settle's paper could violate Settle's free exercise of religion.

Application of *Lukumi* in this context raises a potential conflict. Settle's right to free exercise is subject to the school's right to prevent an excessive entanglement with religion. As discussed *supra,* Settle's paper would not have violated the Establishment Clause.[206] Settle's rights are also subject to a general requirement that her work be relevant to the assignment. For example, Ramsey could preclude Settle from submitting an evangelical rather than informative paper to satisfy an assignment which calls for objective research. The key distinction is whether Ramsey deemed Settle's paper inappropriate to satisfy the assignment, or whether she denied Settle's paper because of Settle's beliefs.

Settle's proposed paper topic, "A Scientific and Historical Approach to the Life of Jesus Christ," would seem capable of satisfying the requirements of a research assignment. Given Ramsey's own statements, it would appear that she excluded Settle's paper expressly because of Settle's religious beliefs. Further, Ramsey's policy was not one of general applicability because Ramsey made no restriction that the other students not write on topics relating to their personal religious beliefs and practices—Settle's paper was the only one excluded because of its religious content. Insuring that Settle learn how to write a research paper would suffice as a government interest, but Ramsey's complete ban on Settle's topic would fail the narrowly tailored requirement.[207] Ramsey could have taught Settle to write a detached research paper through far less restrictive

205. Pet. for Writ of Cert. at 4-6, *Settle* (No. 93-6207).
206. *See supra* part III.C.
207. *See generally, Hazelwood*, 484 U.S. 260.

means than forbidding Settle from writing about a figure central to Settle's religion. Thus, Ramsey's conduct illustrates the precise concern that the Supreme Court faced in *Lukumi*, involving state officials who, "failed to perceive, or chose to ignore the fact that their official actions violated the Nation's commitment to religious freedom."[208]

IV. Putting Religious Speech on Equal Ground With Other Speech.

The Supreme Court has stated that, "[r]eligionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."[209] In the school context, this guarantee of equality exists in theory but is less protected in fact.[210] Teachers and school officials need proper information regarding the scope of students' First Amendment rights in the classroom.

A. *Phenomena of Persecution in the Schools*

Settle's case is one of many in which a school official has singled out and suppressed religious speech. Scholars disagree on the extent of the actual opposition that students face. Strossen notes that incidences of actual religious persecution in schools are greatly exaggerated by those affiliated with the so-called "Religious Right."[211] Rather, she warns of the danger of government involvement in religion when it occurs in the school context.[212]

On the other hand, lawyers in the field litigating cases on behalf of religious freedom report that many school officials still face the problem of how to deal with religious speech.[213] Profes-

208. *Lukumi*, 508 U.S. at 524.

209. McDaniel v. Paty, 435 U.S. 618, 641 (1978)(Brennan, J., concurring).

210. The concurrence in *Settle* observed: "On the contrary, religious speech, like all speech, does have a place in the classroom. . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Settle*, 53 F.3d at 159 (concurring opinion)(quoting Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968)).

211. Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607 (1995) [hereinafter Strossen].

212. *Id.*

213. *See* Sekulow, *supra* note 156 at 1018 (discussing the experience of advocates from the American Center For Law and Justice).

sor McConnell cites several district court and court of appeals cases which exemplify school officials' attempts to curtail religious speech.[214] In *Guidry v. Calcasieu Parish School Board*, a school principal forbade a class valedictorian from speaking at graduation because she planned to deliver a portion of her speech on the importance of Jesus Christ in her life.[215] The district court upheld the principal's actions and the court of appeals affirmed on jurisdictional grounds.[216] Similarly in *Hedges v. Wauconda Community School District,*[217] an eighth grader handed out a religious leaflet before the start of the school day.[218] The Principal forbade her from distributing the leaflet, relying on a school policy that prohibited distribution of obscene, pornographic, pervasively indecent, privacy invading, disruptive, or religious material.[219] The district court rejected the school's policy as viewpoint discrimination.[220] McConnell concludes that these cases of discrimination against religious speech are not rare but represent only a small sample of discrimination against religious speakers in schools.[221] Some schools have even silenced the religious speech of teachers outside of the classroom.[222]

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214. *See* McConnell, *supra* note 177 at 26-29 (citing cases from the Courts of Appeal for the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, as well as District Court cases).

215. 9 RELIG. FREEDOM RPTR. 118 (E.D. La. 1989), *aff'd on jurisdictional grounds sub. nom.,* Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990), *reh'g denied,* Guidry v. Broussard, 902 F.2d at 955 (5th Cir. 1990).

216. *See id.* Interestingly, commentators who dispute the claim that students' religious speech and exercise need greater protection would fail to find an Establishment Clause violation on similar facts. Peck and Strossen predict that under a correct interpretation of the Establishment Clause limits on religious speech and worship, a graduation valedictorian may speak of her faith or deliver a prayer, notwithstanding the Supreme Court's school prayer decision in Lee v. Weisman, 505 U.S. 577 (1992). *See* Peck, *supra* note 160 at 1152. *See also* Strossen, supra note 211.

217. 9 F.3d 1295 (7th Cir. 1993).

218. *See Hedges,* 9 F.3d at 1296.

219. *See id.*

220. *See id.*

221. *See* McConnell, *supra* note 177 at 26-29.

222. *See* Peloza v. Capistrano, 782 F. Supp. 1412 (C.D. Cal. 1992) *aff'd in part, rev'd in part,* 37 F.3d 517 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 2640 (1995) (upholding school board's written reprimand of high school biology teacher who shared his own views and answered religious questions posed by students outside of class).

School officials persistently fail to realize, despite the Supreme Court announcements to the contrary, that under the Constitution religious speech is no less favored than secular speech. This dilemma is worsened by the Supreme Court's refusal to grant review in cases like *Settle*, which would define the limits of school authority to suppress religious expression. Where constitutional rights are at stake, the schools appear to be far less suited to determine law than the courts are to determine pedagogy.

B. *At Stake—A Teacher's Right to Control the Classroom?*

Policy concerns arise in the classroom context which could prevent courts from providing ample free speech protection. Justice Black in his dissenting opinion in *Tinker* expressed his concern that the Court's decision would eventually lead to a society of rebellion, in which students would

> defy their teachers on practically all orders . . . Turned loose with lawsuits for damages and injunctions against their teachers . . . students will [ ] soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils.[223]

Indeed some argue that the courts' increased involvement interferes with the school's ability to perform its educational mission.

Particularly in the classroom, judges are wary of attempts to remove teachers' discretion to make judgments regarding the curriculum and the grading process. Because of the line drawing problems courts face when interfering with classroom disputes between student and teacher, courts are reluctant to police even egregious cases of First Amendment violations.[224] The Sixth Circuit compared teachers with judges, acknowledging that both make mistakes, but suggesting that neither should be second-guessed.[225] Judges likely associate teachers' institutional validity with their own, holding teachers practi-

223. *Tinker,* 393 U.S. at 525 (Black, J., dissenting).

224. Professor Douglas Laycock viewed Settle's case as an example of court's general reluctance to interfere in classroom conflicts due to the inevitable line-drawing problems that arise. Capitol Hill Hearing Testimony of Douglas Laycock before the Senate Judiciary Committee, Oct. 20, 1995.

225. *See Settle*, 53 F.3d at 155-56.

cally immune from question regarding their classroom decisions.[226]

It is important to remember, however, that the sanctity of a teacher's decision regarding grades or other matters of curriculum is fostered by the belief that those decisions are neutral and fair. Grades, for example, are supposed to denote a student's accomplishments in a particular subject, and not how well the teacher's personality (or belief system) meshes with that of a student.[227] Courts must enforce the maxim that a teacher may not limit a student's expression solely because of the religious nature of the speech. As courts consistently apply this principle, the law should provide a clearer path for teachers to follow, and over time lead to fewer First Amendment violations. On the other hand, less judicial involvement will result in reduced protection for students' rights, and may lead to the unexpected result of teaching students the opposite of the democratic values which the schools are supposed to inculcate.[228]

V. Toward a Speech Protective Standard

The Supreme Court's current First Amendment jurisprudence does not address how to deal with every aspect of students' free speech rights in the classroom. In matters unrelated to the curriculum *Tinker* dictates that student speech must be shown to materially and substantially interfere with the operation of the school or the rights of the other students. Where the speech in question is part of the curriculum and the speech may be attributed to the school, courts must assess under *Hazelwood* whether a teacher's actions are reasonably related to pedagogical concerns. In contexts other than the classroom, the Court's

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226. *Cf.* Stump v. Sparkman, 435 U.S. 349 (1978) (extending to judges complete immunity from suit for decisions made in their official capacity).

227. Eugene T. Connors, *Student Discipline and the Law,* FASTBACK 121, 50 PHI DELTA KAPPA EDUCATIONAL FOUNDATION (1979). Connors predicts that, "[a]s long as the grade is an indication of student mastery of subject skills and content rather than of subjective elements— personality, behavior, and attendance— the courts will rule for the teacher." *Id.*

228. *See* Betsy Levin, *Educating Youth for Citizenship,* 95 YALE L. J. 1647, 1680 (1986). *But see* Roe, *supra* note 191, who argues that the proper function of the schools is to encourage conceptual development and not to inculcate values.

precedent maintains a stringent prohibition on viewpoint discrimination.[229]

In cases such as Settle, in which a student's speech is part of the curriculum but cannot be attributed to the school, courts should apply a standard consistent with the Supreme Court's viewpoint discrimination doctrine. When a teacher limits a student's view, the court should inquire whether the teacher's actions can be justified. Because of the unique context of the classroom, teachers may have good reasons for discriminating among views. Thus, courts must take a closer look to examine whether the teacher was motivated by a valid, educational reason in making the decision. In making this determination courts can look at the type of assignment or exercise, as well as the impact the presentation may have on other students. If the court determines that the teacher has limited the student's expression merely to suppress a particular view, the court should invalidate the teacher's action.

On the other hand, if the student's message can be attributed to the school, courts must apply the *Hazelwood* standard.[230] Even under *Hazelwood,* however, courts should determine whether the teacher's actions are reasonably related to pedagogical concerns—not mere pretexts raised as post hoc justifications. This will require an analysis of each of the teacher's justifications for restricting speech, and such analysis will necessarily define the limits of a teacher's discretion to restrict speech.

Conclusion

Perhaps in the classroom more than in any other arena, students are vulnerable to the biases of teachers and school officials. Supreme Court precedent has recognized that teachers and schools may not suppress speech merely to limit undesirable views. Rather, the Court's precedent shows that teachers may restrict speech which interferes with the operation of the

229. *See generally,* Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Perry Ed. Ass'n v. Perry, 460 U.S. 37 (1983); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

230. 484 U.S. 260 (1988).

school or the rights of the other students. Schools may likewise restrict speech within the curriculum that contravenes the lesson that the activity was designed to teach, and that imputes the student's message to the school. Schools may suppress student speech which collides with its underlying message of decency and appropriate citizenship.

In terms of religious speech and expression, religion constitutes a viewpoint in direct competition with nonreligion in the "marketplace of ideas." Therefore, a school official may not prohibit religious speech merely on account of its religious nature. The Establishment Clause demands government neutrality toward religion and may not be used as a justification for a school to discriminate against a religious view. Further, the Free Exercise Clause, although not often used in the school context, forbids the targeted persecution of a religious belief or practice.

Most can agree in theory that these rights exist for students, but the difficulty arises in the context of the curriculum. In this arena teachers need the latitude to make day decisions concerning the learning process. An on going tension exists between the teacher's need to determine the nature of his or her curriculum, and the student's right to maintain freedom of thought and expression. Unfortunately, courts appear to resist their responsibility to protect student's rights when faced with this tension. Through application of an essentially hollow reasonableness standard, courts can avoid any review of a teacher's decision to restrict speech.

Particularly in the case of religious speech, viewpoint discrimination threatens to eliminate religious expression from public schools. Several examples of outright censorship, *Settle* being a paradigm, demonstrate that school officials do not understand the constitutional protection afforded religious speech, and apparently think that the Constitution condones anti-religious actions under the Establishment Clause. Courts must develop and apply clear standards to halt this trend and restore First Amendment guarantees to the classroom. Nothing less than vigilance will protect students' free speech rights.