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INSINCERE APOLOGIES: THE TENTH CIRCUIT'S TREATMENT OF COMPELLED SPEECH IN PUBLIC HIGH SCHOOLS

Nora Sullivan*

As one of fifteen valedictorians at Lewis Palmer High School in Monument, Colorado, Erica Corder was given the opportunity to address her classmates briefly at their 2006 graduation. All of the valedictorians' speeches were approved prior to graduation day by the high school's principal. At the graduation ceremony, Corder's speech started in a typical manner, expressing gratitude to teachers, parents, and peers who had offered her support. Corder then veered from the principal-approved wording of her speech and expressed her appreciation for Jesus Christ. She urged the audience, "If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him."4

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2. Id.
3. Id.
4. Id. The full text of Corder's graduation speech, as delivered at the ceremony, is as follows:

Throughout these lessons our teachers, parents, and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever
After the graduation ceremony, Corder was escorted to the assistant principal's office and informed that she would have to schedule an appointment with the principal. When Corder and her parents met with the principal, Corder was told that she would not receive her diploma unless she apologized for her graduation speech. The principal later conditioned issuing Corder's diploma on her addition of this sentence to the version of the apology that she drafted: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did." Corder agreed and received her diploma after the apology was disseminated by the principal's office via e-mail to the school community. After this incident, Corder filed a lawsuit alleging, among other things, that the school district violated her First Amendment rights by forcing her to issue an apology in order to receive her diploma.

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Imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006.

*Id.*

5. *Id.*

6. *Id.* at 1223. The full text of Corder's draft apology is as follows:

At graduation, I know some of you may have been offended by what I said during the valedictorian speech. I did not intend to offend anyone. I also want to make it clear that [the principal] did not condone nor was he aware of my plans before giving the speech. I'm sorry I didn't share my plans with [the principal] or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff.

*Id.*

7. *Id.*

8. *Id.*
The U.S. Court of Appeals for the Tenth Circuit held that the school district did not violate Corder's First Amendment rights by compelling her to apologize, because the apology was related to a "legitimate pedagogical purpose." The Tenth Circuit rested its conclusion on the notion that if a school can censor speech, then a school can also compel an apology in instances where a student ignores the school's censorship. By using the same standards for censored and compelled speech in public schools, the court failed fully to consider the differences that exist between the First Amendment protections against compulsion and censorship.

The purpose of this Note is to explore the issue of compelled speech in public high schools by examining the Tenth Circuit's opinion in Corder v. Lewis Palmer School District and the underlying case law. This is an important topic because it has not been fully addressed in scholarly literature and, although the Supreme Court ultimately denied Corder's petition for a writ of certiorari, clear First Amendment standards for compelled student speech have not yet been announced by the Court.

In Part I, this Note reviews the Supreme Court student speech cases and analyzes the Tenth Circuit's holding on the censorship issue in Corder. In Part II, this Note reviews the Supreme Court compelled speech cases, analyzes the Tenth Circuit's holding on the compelled speech issue in Corder, and discusses several distinguishing characteristics of the compelled speech in that case that the court should have considered. In Part

9. Id. at 1231.
10. Id.
11. This paper discusses the First Amendment protections only for public high school students and does not analyze the protections available to students in private schools or to college students. The Court has recognized that college students have greater First Amendment protections than high school students. See Healy v. James, 408 U.S. 169, 180 (1972) (finding that college students, unlike high school students, are entitled to full First Amendment protection). Also, this analysis is restricted to public—rather than private—schools, because censorship and compulsion in private schools do not involve state action and, thus, do not trigger a First Amendment analysis.
12. Cases addressing the issue of compelled commercial speech were omitted from this analysis because the Court has recognized different First Amendment standards for commercial speech. See, e.g., Johanns v. Livestock
III, this Note concludes by proposing that the Corder court should have applied the Supreme Court precedents on compelled speech, rather those on student speech, in that case.

1. THE SCHOOL DISTRICT'S POWER TO CENSOR CORDER'S SPEECH

Corder raised several claims against the school district based on the graduation incident. First, Corder alleged that the school district violated her First Amendment right to freedom of speech by requiring her to submit her speech to the principal for review prior to graduation. The court concluded that the school was free to review Corder's speech prior to the event because the graduation ceremony was a school-sponsored event and Corder's speech was ""reasonably related to legitimate pedagogical concerns."" The court built on this finding to establish a test for the constitutionality of the principal's order compelling Corder to apologize after she delivered her speech. This section will briefly examine the relevant Supreme Court holdings on censorship of public high school students' speech and the Tenth Circuit's application of these rules to the facts in Corder. The analysis that follows will demonstrate that Supreme Court precedent supports the Tenth Circuit's holding on the censorship issue. However, the

Mktg. Ass'n, 544 U.S. 550, 557 (2005) (distinguishing between "true 'compelled-speech' cases, in which an individual is obliged by the government personally to express a message with which he disagrees; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity.").

13. Corder, 566 F.3d at 1223. Corder raised several claims in addition to the censored and compelled speech issues. She alleged that the school district violated the First Amendment's freedom of religion and Establishment clauses, the Fourteenth Amendment right to equal protection, and a Colorado statute protecting the free expression rights of public school students. Id. The Tenth Circuit rejected Corder's freedom of religion, equal protection, and state law claims. Id. at 1232-36. Corder did not pursue the Establishment Clause claim on appeal. Id. at 1223 n.1. This paper will focus only on the Tenth Circuit's analysis of the censored and compelled speech issues.

Tenth Circuit’s reliance on the censorship cases to support its holding on the compelled speech issue is less convincing.

The Corder court began its analysis of the censorship claim by reviewing the precedents established by the Supreme Court in *Tinker v. Des Moines Independent Community School District*,15 *Bethel School District No. 403 v. Fraser*,16 *Hazelwood School District v. Kuhlmeier*,17 and *Morse v. Frederick*.18 The court also relied on binding Tenth Circuit precedent related to student speech rights.19 Ultimately, the Tenth Circuit relied on the student speech standard established in *Hazelwood*, rather than the more speech-protective standard in *Tinker*, in its analysis of the censorship issue.20

In *Tinker*, the Court held that the First Amendment protected public high school students’ right to wear black armbands in protest of the Vietnam War.21 While recognizing the “special characteristics of the school environment,”22 the *Tinker* Court stated that student speech may only be curtailed if the speech threatens to cause a material interference or a substantial disruption with school activities.23 The Court’s seemingly broad protection of student speech in *Tinker* was limited by three subsequent opinions.24

19. *Corder*, 566 F.3d at 1228-30 (discussing and applying *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002)).
20. *Id.* at 1226-30.
22. *Id.* at 506.
23. *Id.* at 509.
24. See *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding that a school district did not violate the First Amendment by punishing a student who displayed a banner that read “BONG HiTS 4 JESUS” at an off-campus school-sponsored event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding that a school district did not violate the First Amendment by refusing to print a story about teen pregnancy and a story about divorce in a newspaper published by students and supported with funds from the board of education); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 690 (1986).
In one of these cases, Hazelwood, the Court held that a school district did not violate the First Amendment by refusing to print a story about teen pregnancy and a story about divorce in a newspaper published by students and supported with funds from the board of education. The Court distinguished Hazelwood from Tinker by noting that the former dealt with a situation where the school was being asked to promote the student's speech, namely by publishing the articles in dispute, rather than simply to tolerate student speech. In Hazelwood, the Court established a new standard for determining when a school may properly censor student speech without violating the First Amendment. According to the Hazelwood Court, a school may censor school-sponsored student speech when the censorship is "reasonably related to legitimate pedagogical concerns."

The Corder court announced that it would apply the Hazelwood standard and cited another Tenth Circuit case in support of its use of that standard. In Fleming v. Jefferson County (holding that the First Amendment did not bar a school district from suspending a student for giving a sexually suggestive speech at a school assembly); see also, e.g., Clay Calvert, Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing, 58 AM. U. L. REV. 1167, 1172 (2009) (arguing that Tinker should be strengthened and followed and that the Supreme Court should stop the practice of finding exceptions to Tinker); Erwin Chemerinsky, How Will Morse v. Frederick be Applied?, 12 LEWIS & CLARK L. REV. 17, 22-26 (2008) (noting that Morse follows the Court's recent trend of siding with schools rather than students in First Amendment cases, but arguing that lower courts should focus on Justice Alito's concurrence which may limit the application of Morse); Douglas Laycock, High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts, 12 LEWIS & CLARK L. REV. 111, 112 (2008) (noting that the Court's post-Tinker opinions have caused confusion regarding the First Amendment protection for student speech, but arguing that political and religious speech are so fundamental that they must be protected).

25. Hazelwood, 484 U.S. at 263.
26. Id. at 270-71.
27. School-sponsored speech is that which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Id. at 271.
28. Id. at 273.
School District R-1, the Tenth Circuit upheld a school’s guidelines for selecting which tiles created as part of an art project in the wake of the Columbine High School shootings would be affixed to the walls of the school. The Tenth Circuit in Fleming relied on the Hazelwood standard, finding that the expression on the tiles constituted school-sponsored speech because the school exercised control over the selection and creation of the tiles. The Corder court found that the Hazelwood standard also applied in Corder because, like Fleming, the graduation speech was school-sponsored. The Tenth Circuit explained:

We resolve this case by first asking: is the “expressive activity” at issue—a valedictory speech at graduation—a “school-sponsored... expressive activity” that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school”? If so, then a valedictory speech at graduation is school-sponsored speech, and the School

30. 298 F.3d 918 (10th Cir. 2002).
31. The court noted that the teachers in charge of the art project received specific instructions: “To assure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy, [a CHS administrator] directed that there could be no references to the attack, to the date of the attack, April 20, 1999, or 4/20/93, [sic] no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive.” Id. at 921.
32. Id. at 923-24.
33. Corder, 566 F.3d at 1229. Arguably, the school district in Fleming exercised far more control over the art project than the school district in Corder exercised over the valedictory speech. In Fleming, the school undertook the tasks of authorizing the art project and creating written guidelines, soliciting participants, supervising participants while they painted tiles, screening and selecting tiles, and overseeing the affixture of the selected tiles to the walls of the school. Fleming, 298 F.3d at 921-22. In Corder, the school undertook the tasks of: holding a graduation ceremony, a common practice; selecting graduation speakers, based solely on their grade point averages; and instituting an unwritten policy of reviewing these speeches prior to the ceremony. Corder, 566 F.3d at 1222. Despite the different levels of control exercised in Fleming and Corder, courts have consistently applied the Hazelwood standard to graduation speeches. See cases cited infra note 37.
District did not violate the "First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 34

The *Corder* court's reliance on *Hazelwood*, rather than the more speech-permissive standard in *Tinker*, was premised on the fear that people might believe the school endorsed the graduation speeches. 35 The court found that the graduation speech was school-sponsored because the school organized and supervised the ceremony, selected the speakers based on their grade point averages, and reviewed the speeches prior to the ceremony. 36 This finding is consistent with other federal courts’ opinions that

34. *Corder*, 566 F.3d at 1229 (citations omitted). The *Corder* court noted that a "court should appraise the level of involvement the school had in organizing or supervising the contested speech" in order to determine if the speech was school-sponsored. *Id.* at 1228. The court explained further that "pedagogical" refers to any concern that is "related to learning." *Id.* (quoting *Fleming*, 298 F.3d at 925).

35. *Id.* at 1229. *But see* Laycock, *supra* note 24, at 129. Laycock contends that censorship of student religious speech, which is arguably one type of speech at the heart of the First Amendment, remains the type of speech that still receives strong protection under *Tinker*.

Religious speech, like political speech, is at the core of the First Amendment. We can infer this relationship textually, from the explicit constitutional protections for religion in the same sentence with the Free Speech Clause. And we can infer it historically. In the early modern era, when the idea of free speech was struggling for acceptance, Europe was embroiled in religious conflict growing out of the Reformation, and the speech that governments most wanted to suppress was very often religious speech. Schools cannot constitutionally interpret their basic educational mission as requiring the suppression of religious speech.

*Id.* at 123-24. The Tenth Circuit, however, held that the school district’s policy was neutral and generally applicable; thus, the district did not violate Corder’s right to the free exercise of religion by forcing her to issue an apology. *Corder*, 566 F.3d at 1232-33.

36. *Corder*, 566 F.3d at 1229.
similarly have held that graduation speeches are school sponsored, thus, justifying the application of lower First Amendment protections under *Hazelwood*.

The *Corder* court next addressed the issue of whether the school district’s policy of reviewing commencement speeches was reasonably related to pedagogical concerns as required by the *Hazelwood* analysis. Generally, courts applying the “legitimate pedagogical concerns” prong of the *Hazelwood* test are extremely deferential to school districts, favoring the permission of censorship. The Tenth Circuit noted that in order to satisfy this requirement, the policy merely needed to be “related to

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37. See Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 985 (9th Cir. 2003) (“[T]he essence of graduation is to place the school’s imprimatur on the ceremony—including the student speakers that the school selected.”); Nurre v. Whitehead, 520 F. Supp. 2d 1222, 1238 (W.D. Wash. 2007) (holding that a performance of “Ave Maria” at a high school graduation “would have borne the imprimatur of the school” because the school exercised control over the ceremony); Lundberg v. West Monona Cmty. Sch. Dist., 731 F. Supp. 331, 339 (N.D. Iowa 1989) (holding that a school district could refuse to allow a pastor to give a prayer during a high school graduation and noting that “the School Board here has a real and legitimate concern that prayer at a school-run function may work to stamp the belief in God with the imprimatur of the school and of the state”). See generally *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (“At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students.”).

38. *Corder*, 566 F.3d at 1230.

learning.\footnote{41} The court concluded that graduation speeches are related to learning because they present "an opportunity for the school district to impart lessons on discipline, courtesy, and respect for authority."\footnote{41} After finding that censorship of graduation speeches was based on a "legitimate pedagogical concern," the Tenth Circuit held that the school district's unwritten policy of reviewing graduation speeches did not violate Corder's First Amendment right to free speech.\footnote{42}

Given the general trend toward applying the Hazelwood test to graduation speeches\footnote{43} and the deferential nature of that standard toward school districts,\footnote{44} the Tenth Circuit's holding on the censorship issue in Corder is supported by current case law.\footnote{45} After reaching this holding on the censored speech issue, the court built on this by applying the same Hazelwood standard to find that the principal had the power to compel an apology.\footnote{46}

\footnote{40.} Corder, 566 F.3d at 1228 (quoting Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)).
\footnote{41.} Id. at 1229.
\footnote{42.} Id. at 1230.
\footnote{43.} See cases cited supra note 37.
\footnote{44.} See supra note 39 and accompanying text. \textit{But see} Josie Foehrenbach Brown, \textit{Representative Tension: Student Religious Speech and the Public School's Institutional Mission}, 38 J.L. & EDUC. 1, 67 (2009) (arguing that Corder's speech was not "school-sponsored" within the meaning of Hazelwood because a valedictorian is clearly not "the school's delegate delivering an official message").
\footnote{45.} \textit{But see} Jay Alan Sekulow, James Henderson & John Tuskey, \textit{Proposed Guidelines for Student Religious Speech and Observance in Public Schools}, 46 MERCER L. REV. 1017 (1995). The authors argued that:
Censoring a valedictory or salutatory speech is especially odious. The opportunity to give a speech as a valedictorian or salutatorian is typically an honor given to a graduating senior to acknowledge four years of work and academic achievement. To censor or preapprove a valedictory or salutatory speech is to tell the student, "we will reward your work by allowing you to address the graduation audience and give the message we (not you) think is appropriate."
\textit{Id.} at 1077.
\footnote{46.} Corder, 566 F.3d at 1231.
section of this Note will explore the concerns raised by applying the same First Amendment standard to censorship and compulsion.

II. THE SCHOOL DISTRICT'S POWER TO COMPEL CORDER'S APOLOGY

While it seems clear that the school district did have the power to censor Corder's speech based on the standards established by the Supreme Court for public high school student speech rights, the Corder court's reasoning regarding the compelled speech issue is weak, at best, for several reasons. There are four major flaws in the Corder court's analysis of the compelled speech issue.

First, the court interpreted Supreme Court precedent to justify its conclusion that the First Amendment grants the same level of protection against compelling and censoring speech. The court erred in its reading of those precedents; they do not stand for the proposition that the same tests should apply to compulsion and censorship. Rather, they stand only for the proposition that compelled speech is fully protected under the First Amendment.

Second, the court briefly noted that the power to compel can be derived from the power to censor. The Corder court cited only one case to support this finding. In that cited case, the Third Circuit expressly stated that it was not determining when a school district may lawfully compel speech.

Third, the court applied the Hazelwood standard to the facts related to the compelled apology in Corder. In doing this, the court erroneously applied a standard for assessing the constitutionality of censoring student speech to government compulsion of student speech.

Finally, the court's application of the Hazelwood standard highlights several distinguishing characteristics between compulsion and censorship, including the difference between the power to censor and the power to compel speech, the difference between compelling a response and compelling the adoption of a particular viewpoint, and the special harms brought about by compelling speech. Taking these distinguishing characteristics into account, it is clear that the Tenth Circuit should have applied different First Amendment standards to compelled and censored student speech.
A. Misinterpretation of Supreme Court Precedent

The Supreme Court has struck down compelled speech requirements on First Amendment grounds several times, most notably in *West Virginia State Board of Education v. Barnette*, Miami Herald Publishing Co. v. Tornillo, Wooley v. Maynard, and Riley v. National Federation of the Blind of North Carolina, and has consistently recognized that the First Amendment protects "the decision of both what to say and what not to say." In *Barnette*, the Court held that the West Virginia State Board of Education violated the First Amendment by forcing students to salute the American flag. The Court noted that, unlike in the case of censorship, compelling speech removes two options from the speaker: the option to remain silent and the option to change his or her message. While this case is the only Supreme Court case to deal directly with the issue of compelled student speech, it was only mentioned in a footnote in the *Corder* opinion, to support the proposition that there is First Amendment protection against the government-compelled speech.

Instead of focusing on *Barnette*, the *Corder* court found that "[t]he Supreme Court has long recognized that, for purposes of the

47. 319 U.S. 624 (1943).
52. *Barnette*, 319 U.S. at 642. In *Barnette*, the West Virginia State Board of Education adopted a resolution requiring all public school teachers and students to salute the flag and stated that refusal to do so would be treated as an act of insubordination. Several Jehovah's Witnesses were expelled from school when they refused to salute the flag, a practice that conflicted with their religious beliefs. *Id.* at 626-30.
53. *Id.* at 633-34. The Court noted that the clear-and-present-danger test was in place for censoring speech at the time of the *Barnette* opinion and stated that remaining silent during a flag salute did not appear to present a clear and present danger. Therefore, the Court reasoned, "[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* at 633.
First Amendment, forced speech is no different than censored speech.” In order to support this proposition, the court cited the Supreme Court’s opinions in *Tornillo* and *Riley*. In *Tornillo*, the Court dealt with Florida’s right-to-reply statute, which required newspapers to publish a response when they criticized a political candidate. The *Tornillo* Court noted that the statute, which compelled speech, “operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish a specified matter.” The Court went on to explain that because of the costs associated with printing a reply, the statute served as a disincentive for editors to publish news or commentary on political candidates. By avoiding the topic altogether, the newspapers would never risk invoking the statute and being forced to publish a reply from a candidate. *Tornillo* does not suggest that the First Amendment allows the government to compel speech in situations where the government also has the power to censor speech. Rather, the Court noted that the particular statute in that case not only compelled speech, but also may have had the effect of chilling speech.

The Tenth Circuit also relied on *Riley* to justify its treatment of compelled speech. In *Riley*, the Court held that a North Carolina law requiring professional fundraisers to disclose to potential donors the percentage of donations actually turned over to charities during the course of the past twelve months violated the First Amendment. The Court noted that it would be constitutional for the state to publish the same information itself, but that the First Amendment was violated when the state forced private actors to do this.

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55. Id. at 1231.
57. Id. at 256.
58. Id. at 256-57.
59. Id. at 257.
60. Id. The Court noted that “under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.” *Id.*
62. Id. at 800.
The Riley Court said that both compelling speech and compelling silence are fully protected against under the First Amendment.63 The Court further noted that both compelled statements of opinion and compelled statements of fact are equally prohibited. The Riley Court explained:

[W]e would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate’s recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.64

The Corder court never fully explained how it made the leap from finding that the First Amendment prohibits the government from compelling speech to the assertion that the First Amendment standards for censoring student speech also apply to compelled speech. While both the Tornillo and Riley Courts noted that compelling speech was prohibited in the same way as censoring speech, this language only seems to be included in the opinion to contradict the argument that compulsion does not raise the same First Amendment concerns as censorship. These Supreme Court cases do not state that the government is free to compel speech in all situations where it is able constitutionally to censor speech. In fact, the Court seems to indicate that when there are available alternatives, like in Riley, the government’s interest in compelling speech may be given less weight.65 In Riley, the Court noted that the government could have published information regarding the

63. *Id.* at 796-97.
64. *Id.* at 798.
65. *Id.* at 800.
amount of money that actually went to charity during the course of
the previous year without requiring the professional fundraisers to
disclose this information during the course of the solicitation. 66 In
_Corder_, the school district could have issued its own notice that
Corder’s speech did not reflect the views of the school and that the
delivered speech differed from the version that was pre-approved
by the school’s principal. The fact that this alternative was
available, in itself, may support the proposition that while the
school district could have censored the graduation speech in
_Corder_, once the speech had been delivered, the school district had
means to advance its interests in separating itself from the speech
that would not invoke First Amendment concerns. The Tenth
Circuit fails to acknowledge this distinction when it makes the jump
between the censorship and compulsion issues.

Furthermore, _Wooley_, a case only cited generally by the
_Corder_ court in the same footnote as the citation to _Barnette_, is
counter to the proposition that the power to compel and the power
to censor are coextensive. 67 In _Wooley_, the Court held that the
state of New Hampshire could not prosecute Jehovah’s Witnesses

66. The Court discussed the importance of the available alternatives:

In contrast to the prophylactic, imprecise, and unduly
burdensome rule the State has adopted to reduce its
alleged donor misperception, more benign and narrowly
tailored options are available. For example, as a general
rule, the State may itself publish the detailed financial
disclosure forms it requires professional fundraisers to
file. This procedure would communicate the desired
information to the public without burdening a speaker
with unwanted speech during the course of a solicitation.
Alternatively, the State may vigorously enforce its
antifraud laws to prohibit professional fundraisers from
obtaining money on false pretenses or by making false
statements. These more narrowly tailored rules are in
keeping with the First Amendment directive that
government not dictate the content of speech absent
compelling necessity, and then, only by means precisely
tailored.

_Id._

67. _Corder v. Lewis Palmer Sch. Dist._, 566 F.3d 1219, 1230 n.7 (10th Cir.
for covering up the state's "Live Free or Die" motto on their license plates when the motto conflicted with the residents' religious beliefs. In reaching this conclusion, the Court noted that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" The term complementary has been defined as "mutually supplying each other's lack." Thus, the Supreme Court's description of compelled speech in Wooley signals that the First Amendment safeguards against compulsion and censorship are not the same, but rather are two different pieces of a puzzle that fit together to form complete protection for free speech.

From a full examination of the Supreme Court precedent on compelled speech, it is clear that the First Amendment generally provides broad protections against compelled speech. The issue of compelled speech in public high schools raises a more complex problem; this exact topic was directly addressed by the Court only in Barnette where full First Amendment protection was granted to the students. The Court's ruling in Barnette, however, was handed down more than twenty-five years before the Court first started to recognize that a lower standard of First Amendment protection may be afforded to public high school students in certain situations. Given that the Supreme Court has consistently recognized strong First Amendment protection against compelled speech, lower courts should continue this trend and find a strong protection against compulsion of student speech. Unlike in the case

68. Wooley v. Maynard, 430 U.S. 705, 707-08 (1977). The Maynards claimed that the state motto was in conflict with their "moral, religious, and political beliefs." Id. at 707.
70. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 235 (10th ed. 1998).
71. Barnette was decided in 1943, and Tinker, the first of the student speech cases, was decided in 1969. See Barnette, 319 U.S. 624 (1943); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either student or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").
of censorship, the fact that the government has several simple alternatives to compelled speech weighs in favor of finding that there is more protection against compulsion than there is against censorship. For instance, the government may avoid First Amendment concerns by providing the information it seeks to compel on its own rather than by forcing a speaker to deliver the information. Compelled speech may also deserve to be protected against more than censored speech because compulsion removes the option of remaining silent. Despite the Supreme Court's recognition of these potential distinctions between compelled and censored speech, the Tenth Circuit applied the same test to compelled speech that the Court advanced for censorship cases.

B. Power to Compel Derived from Censorship Policy

After exploring the First Amendment protections against compelled speech, the Tenth Circuit found that the school district was free to compel an apology from Corder because the school's principal had the power to censor her speech in the first place. The court relied heavily on a Third Circuit case to reach this conclusion. In C.N. v. Ridgewood Board of Education, the Third Circuit found that a survey compiled by community leaders and administered at three public schools did not violate the students' First Amendment rights by compelling them to disclose private information.

The action was brought by three students who claimed that the school forced them to participate in a survey of 156 questions used to gauge students' attitudes and behaviors related to a range of issues, including alcohol, drugs, sex, and suicide. While the

73. Barnette, 319 U.S. at 633-34.
74. Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1231 (10th Cir. 2009), cert. denied, 130 S. Ct. 742 (2009).
75. 430 F.3d 159 (3d Cir. 2005).
76. Id. at 189.
77. Id. at 167-68.
school claimed that participation in the survey was completely optional, the Third Circuit found that there was a material issue as to the voluntariness of the survey.\textsuperscript{78} Nevertheless, the court found that the students' First Amendment rights were not violated because there was no compulsion and no disclosure of each individual student's response, only disclosure of the responses in the aggregate.\textsuperscript{79} The court found no compulsion because the students were not required to adopt a particular viewpoint when they took the survey; the students were merely expected to choose among the possible answers. The court also found no disclosure of the information because survey results were viewed in the aggregate rather than matched with specific students.\textsuperscript{80}

The \textit{Corder} court cited two passages in \textit{C.N.} as its only support for the proposition that the power to compel an apology can be derived from the power to censor. In the first passage, the \textit{C.N.} court said a school district may compel speech for legitimate pedagogical purposes.\textsuperscript{81} In the second passage, the \textit{C.N.} court noted that the right to refrain from speaking is different in a public school than in other contexts.\textsuperscript{82} A reading of \textit{C.N.} as a whole, however, does not support the \textit{Corder} court's reading of \textit{C.N.} In \textit{C.N.}, the Third Circuit noted only that there are situations when compelled speech in schools is permissible, but did not spell out when these situations occur.\textsuperscript{83} In fact, the Third Circuit specifically stated, "[h]ow far a school may go in compelling speech for what it views as legitimate pedagogical purposes is a difficult and unsettled

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} at 176. The court looked at several factors when determining that participation may not have been voluntary: (1) the one student may have been told that she must take the test while two others were told that they would receive a "cut" if they did not participate; (2) results showed that there was a 100% participation rate for students in grades seven through twelve; (3) no parental consent forms were issued; and (4) students were required to stay in the classroom during the duration of the survey, similar to a test. \textit{Id.} at 175-76.
\item \textsuperscript{79} \textit{Id.} at 189.
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Corder v. Lewis Palmer Sch. Dist.}, 566 F.3d 1219, 1231 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 742 (2009) (citing \textit{C.N.}, 430 F.3d at 178).
\item \textsuperscript{82} \textit{Id.} (citing \textit{C.N.}, 430 F.3d at 186).
\item \textsuperscript{83} \textit{C.N.}, 430 F.3d at 178.
\end{itemize}
question. We need not explore that question here . . . .”84 The C.N. court, therefore, expressly stated that it did not address the issue of when a school may compel student speech without violating the First Amendment.

C. Application of the Hazelwood Standard

After reaching its conclusion that the First Amendment extends the same protections against censorship as it does against compulsion, the Corder court found that the forced apology, like the graduation speech, was school-sponsored speech and, thus, the deferential Hazelwood test applied to the apology:

The imprimatur concept [of the school-sponsored test] is satisfied because Corder’s apology was directly related to her school-sponsored speech at the high school graduation. It occurred close in time after that graduation ceremony, and was disseminated through the principal’s office via e-mail to the entire Lewis-Palmer school community. As a result, the School District was free to compel Corder’s speech as long as the School District’s “decision was ‘reasonably related to legitimate pedagogical concerns.’” “We give ‘substantial deference’ to ‘educators’ stated pedagogical concerns.”85

The Tenth Circuit concluded that Corder’s apology was reasonably related to a pedagogical concern because school officials needed to ensure that the public did not believe that Corder’s speech reflected the views of the school.86 The court further found that requiring an apology was “related to learning” because it was the form of discipline required by the school.87 The Corder court

84. Id.
85. Corder, 566 F.3d at 1231 (citations omitted).
86. Id.
87. Id. at 1232 (“As we stated in Fleming, the ‘universe of legitimate pedagogical concerns is by no means confined to the academic for it includes
cited another Tenth Circuit case, as well as an Eighth Circuit case, to support this conclusion.\footnote{566 F.3d at 1277, 1292 (10th Cir. 2004).}

In the Tenth Circuit case, \textit{Axson-Flynn v. Johnson},\footnote{356 F.3d 1277 (10th Cir. 2004).} a university sought to compel a theatre major to deliver all of the content of assigned scripts, including certain expletives and references to God, during her classroom acting exercise.\footnote{Id. at 1279-1283.} The university claimed that it promoted three interests by compelling the student to perform the pieces as written in this case:

1. it teaches students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue;
2. it teaches students to preserve the integrity of the author’s work; and
3. it measures true acting skills to be able convincingly to portray an offensive part.\footnote{Id. at 1291 (citations omitted).}

The Tenth Circuit indicated that these justifications would satisfy the \textit{Hazelwood} standard because the speech was school-sponsored and the compulsion was related to a legitimate pedagogical concern; the case, however, was remanded to determine whether the university’s justifications were presented only to veil religious discrimination.\footnote{Id. at 1291-1293.} The Tenth Circuit argued that it was appropriate to apply \textit{Hazelwood}, a test that arose out of a case involving high school students, to compelled speech of college students.\footnote{Id. at 1288-1290.} The court noted that it was important to weigh

discipline, courtesy, and respect for authority.”) (quoting Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 925 (10th Cir. 2002) (emphasis added)).

88. \textit{Corder}, 566 F.3d at 1232 (citing \textit{Axson-Flynn v. Johnson}, 356 F.3d 1277, 1292 (10th Cir. 2004) (requiring only that the restrictions under \textit{Hazelwood} be reasonable); \textit{Wildman v. Marshalltown Sch. Dist.}, 249 F.3d 768, 771 (8th Cir. 2001) (concluding that there is no constitutional violation in requiring a student to issue an apology).

89. 356 F.3d 1277 (10th Cir. 2004).

90. \textit{Id.} at 1282-83.

91. \textit{Id.} at 1291 (citations omitted).

92. \textit{Id.} at 1291-93. In this case, a Mormon student argued that the university’s stated purposes for the requirement that students perform the scripts as written was simply a “pretext for religious discrimination.” \textit{Id.} at 1293.

93. \textit{Id.} at 1288-90.
the "[a]ge, maturity, and sophistication level of the students" when determining if a particular restriction was "reasonably related to legitimate pedagogical concerns."94

In *Wildman v. Marshalltown School District*,95 the Eighth Circuit held that a school could require a student to issue an apology in order to remain on a sports team after she distributed a letter to her teammates criticizing the program’s coach and using the word "bullshit."96 While this case does, in part, support the notion that a compelled apology may not violate the First Amendment, the Eighth Circuit did not mention *Hazelwood* in its decision. Instead the *Wildman* court relied on *Fraser*, finding that the student’s speech was vulgar and offensive because it included an expletive.97

Furthermore, the *Wildman* court specifically pointed to two characteristics of the student’s letter that distinguish it from *Corder*. First, the *Wildman* court noted that that case dealt with the plaintiff’s ability to play on a sports team rather than on her participation in a classroom.98 *Corder* did not deal with a classroom activity either, but the school district required that the valedictorian issue the apology in order to receive her diploma.99 Thus, the punishment in *Corder* certainly was a more serious punishment than that in *Wildman*, which involved participation in a non-academic, extracurricular activity. Second, the speech for which the school district sought an apology in *Wildman* was profane,100 whereas Corder was expressing her religious views. Punishing profane language may be less offensive to the First Amendment than punishing religious speech, because religious speech is considered at the core of First Amendment protection.101 For these

94. Id. at 1289.
95. 249 F.3d 768 (8th Cir. 2001).
96. Id. at 770, 772.
97. Id. at 771.
98. Id. at 772.
100. *Wildman*, 249 F.3d at 771.
101. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must
reasons, there is more justification for allowing the compelled speech in *Wildman* than there is in *Corder*.

The *Wildman* court also discussed a Tenth Circuit case in which the court came to a much different conclusion about the constitutionality of compelling an apology.\(^{102}\) In *Seamons v. Snow*,\(^ {103}\) the Tenth Circuit held that there was a genuine issue of material fact as to whether the First Amendment was violated when a high school football coach required a player to apologize for reporting a locker room assault to the police in order to rejoin the team.\(^ {104}\) In this case, the Tenth Circuit never addressed the general issue of whether it is constitutionally permissible for a school district to compel an apology, but seemed to indicate that if the student’s apology in this case was compelled, such a compulsion would have violated the student’s First Amendment rights.\(^ {105}\) The *Seamons* court cited *Hazelwood* as precedent for lesser First Amendment protections for student speech, but noted that “extensive case law in 1993 [when the incident took place] supported the proposition that school authorities may not penalize students for their speech when that speech is non-disruptive, non-

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\(^{102}\) See *Wildman*, 249 F.3d at 772 (distinguishing the facts from *Seamons v. Snow*, 206 F.3d 1021 (10th Cir. 2000)).

\(^{103}\) 206 F.3d 1021 (10th Cir. 2000).

\(^{104}\) Id. at 1024 (holding that summary judgment was not properly granted based on the facts and remanding the claim on the First Amendment issue).

\(^{105}\) Id. at 1028. The Tenth Circuit noted:

In summary, there are genuine issues of material fact as to whether Coach Snow required Brian to apologize as a condition of remaining on the team. There is a disputed question as to the scope of the apology Coach Snow asked Brian to give. Finally, there is an issue as to whether Brian’s suspension and dismissal from the team were the result of his refusal to apologize. Considering all of the facts and drawing all inferences in the light most favorable to Brian, we conclude there is evidence to support his First Amendment claim against Coach Snow.

*Id.*
obscene, and not school-sponsored.”\textsuperscript{106} This statement indicates that the Tenth Circuit in this case did not believe that compelled apology of the student athlete in Seamons was “school-sponsored” within the meaning of the Hazelwood standard. The Tenth Circuit in Corder, however, never addressed that same court’s holding in Seamons. If it had, it may have been more likely to find that compelling the apology violated the First Amendment.

It is clear that the Tenth Circuit failed to lay a solid foundation for its finding that the school district in Corder did not violate the First Amendment by compelling an apology. Specifically, the Corder court misinterpreted Supreme Court precedent to support its finding that the First Amendment provides the same protection against compelled and censored speech. The Corder court incorrectly found that the power to compel can be derived from the power to censor. Finally, the Corder court incorrectly applied a standard used to assess the constitutionality of censored speech to the compelled apology.

While there is no case law that directly contradicts the Tenth Circuit’s holding in Corder, the court’s decision to apply the deferential Hazelwood test was crucial to its finding that the First Amendment was not violated. If the court had applied a stricter test to the speech, it seems clear that the school district’s policy would not have passed constitutional muster. Without case law directly on point to support the application of the Hazelwood standard, the Tenth Circuit should have examined the nature and content of the compelled speech to discern the appropriate test. If the court had done this, certain characteristics of the compelled speech in Corder would have pointed to increased First Amendment protection.

\textit{D. Distinguishing Characteristics of the Compelled Speech in Corder}

After finding the same First Amendment protections against compelled and censored speech, the Corder court assumed that the deferential Hazelwood standard applied to Corder’s

\textsuperscript{106} Id. at 1030.
compelled apology because the court applied that standard to the censorship issue.\textsuperscript{107} The Tenth Circuit never discussed certain distinguishing characteristics of the compelled apology that support the notion that the court should have recognized a stronger First Amendment protection for Corder. Specifically, the court failed to discuss the inherent differences between the power to censor speech and the power to compel it, the differences between compelling a response and compelling the adoption of a particular viewpoint, and the special harms brought about by compelling speech.

1. Inherent differences between the powers to censor and compel

The difference between censorship and compulsion is clear when looking at the available alternatives. A censored party has the option to remain silent or reframe his or her point to comply with the censorship restrictions; a compelled party is required to make statements that reflect the beliefs or opinions of another party and has no alternative. In \textit{Corder}, the school district had other options to distance itself from the Corder’s message after graduation. Similarly, the school district could have punished Corder for presenting an unapproved version of her speech in a host of ways without implicating the First Amendment concerns raised by compelled speech. For instance, the school could have made a notation in her permanent record or required her to complete detention for violating a school policy. These available alternatives bolster the view that compelled student speech should be given greater protection than that afforded through an application of the Supreme Court student speech cases.

The Supreme Court has advanced several reasons for affording lesser First Amendment protections to student speech in a school setting, including avoiding a material interference or a substantial disruption with school activities,\textsuperscript{108} curtailing sexually

\textsuperscript{107} Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1232 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 742 (2009).

suggestive speech, restricting speech that advocates drug use, and controlling the message of speech that might be confused as school-endorsed. It is clear that only the last justification applies in *Corder*.

The school district asserted that it required Corder to apologize because it was concerned that the public would believe the graduation speech reflected the views of the school. However, there was a simple solution to this problem, one that would not offend the First Amendment: the school district could have written and disseminated to the school community a statement clarifying that it did not approve Corder's speech. After all, the school district itself was the entity that actually approved, altered, and sent out Corder's apology via e-mail.

The *Corder* court also expressed the belief that, at least under the *Hazelwood* standard, it is permissible for a school to use compelled speech to punish students. In support of its finding that compelling the speech was constitutionally permissible, the *Corder* court quoted *Fleming*, stating the "universe of legitimate pedagogical concerns . . . includes discipline, courtesy, and respect for authority." The court failed to note that this language in *Fleming* was a direct quote from a Sixth Circuit opinion in which that court noted specifically that the case was about censorship and not about compulsion. Both of these cases cited in support of its finding on the compelled speech issue can be distinguished from *Corder* because they dealt with the issue of censored, rather than compelled, speech. In fact, the Sixth Circuit in *Poling v.*

112. *Corder*, 566 F.3d at 1231.
113. Id.
114. Id. at 1232.
115. *Fleming* v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)).
116. See id. at 1232; *Fleming*, 298 F.3d at 925.
117. See *Fleming*, 298 F.3d 918 (holding school guidelines for selection of tiles that would be affixed to the walls of Columbine High School after the school shooting did not violate the First Amendment rights of the parties involved in decorating the tiles); *Poling v. Murphy*, 872 F.2d 757 (6th Cir.)
Murphy specifically noted that "[i]t is important to bear in mind, we think, that the school officials made no attempt to compel [the student] to say anything he did not want to say." School districts could use other methods to punish students without compelling speech.

2. Compelled speech requiring the adoption of a particular viewpoint

In C.N., an opinion cited in the Corder decision as the basis for the notion that the power to compel can be derived from the power to censor, the Third Circuit pointed out that all forms of government-imposed compelled speech trigger a First Amendment analysis. The level of scrutiny applied, however, changes depending upon whether the government is compelling the speaker to adopt a certain viewpoint. The Supreme Court has explained that content-based speech restrictions are subject to strict scrutiny, while content-neutral speech restrictions are subject to a more deferential test. In justifying this distinction, the Court said:

Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny [as content-based restrictions]. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

1989) (holding that a school district did not violate a student's First Amendment rights when the district removed him from a school election because he made disparaging comments about the school's assistant principal during a campaign speech).

118. 872 F.2d 757 (6th Cir. 1989).
119. Id. at 763.
121. Id. at 188.
123. Id. at 642 (citations omitted).
While *C.N.*, the case dealing with the student survey, recognizes that there are scenarios in which a school may compel student speech without violating the First Amendment, the Third Circuit does little to clarify when this may occur, particularly when the government is not only compelling speech but also forcing the adoption of a particular viewpoint.\(^{124}\)

It has been widely accepted by the courts that compelled speech is permissible in some educational contexts. For example, a teacher may require a student to write a research paper on a specific paper topic or require that a student advocate a particular viewpoint in the course of a classroom debate to develop critical thinking skills.\(^{125}\) In *Corder*, however, the apology was clearly not related to a classroom exercise. The facts of *Corder* demonstrate the two types of compelled student speech described by Seana Valentine Shiffrin, a UCLA School of Law professor.\(^{126}\) She explained that compelled student speech cases should be divided into two categories based on the type of speech involved: compelled recitations, like the Pledge of Allegiance, and “mandatory education efforts,” like classroom exercises designed to teach.\(^{127}\) Shriiffin argued that compelled speech in the context of educational classroom exercises should be permitted under the First Amendment while compelled recitations usually violate the First Amendment.\(^{128}\) She argued that the mandatory education efforts are less troubling from a constitutional perspective because the teacher in that situation is attempting to help students think critically and “arrive at conclusions that are truly their own,”\(^{129}\) rather than showing an indifference for students’ judgments.\(^{130}\)

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124. *C.N.*, 430 F.3d at 178.
125. See *id.*; see also Axson-Flynn v. Johnson, 356 F.3d 1277, 1290-91 (10th Cir. 2004).
127. *Id.* at 883.
128. *Id.* at 884.
129. *Id.*
130. *Id.*
Certainly, the compelled apology in *Corder* can be likened to a compelled recitation, because the apology was not designed to help Corder arrive at her own independent conclusion about the incident. It was required to punish her and to inform members of the community that the school district did not approve her speech. Moreover, the school district in *Corder* not only required the valedictorian to draft and issue an apology, but also required that she add an additional sentence to her draft. If she failed to comply with this requirement, the principal said, she would not receive her diploma. In this way, the school district required Corder to adopt a particular viewpoint—that mentioning Jesus Christ in her graduation speech was wrong—and to issue a statement to that effect. This requirement is troubling from a First Amendment perspective: not only was Corder forced to advance a specific position, but the policy showed little regard for her personal development as well.

3. Special harms caused by compelled speech

In its discussion of the compelled speech issue, the Tenth Circuit never considered the harm that might be caused by requiring Corder to issue an apology. Legal scholars posit that First Amendment protections against compelled speech are essential because of potential speaker-based, listener-based, and society-based harms caused by the compulsion. Courts have traditionally adopted speaker-based considerations in determining whether the First Amendment prohibits compelled speech. Nevertheless,

132. See, e.g., Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 330-33 (2008) (arguing that courts should adopt a listener-based analysis rather than the traditional speaker-based analysis); Shiffrin, *supra* note 126 (arguing that compelled speech violates the First Amendment because of harms that it causes to the speaker and to society). But see, e.g., Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006) (arguing that compelled speech does not cause any harm and, thus, should not be afforded First Amendment protection).
133. See Sacharoff, *supra* note 132, at 337-60 (tracing the courts’ focus on the “freedom of mind” justification in compelled speech cases).
compelled speech like that in *Corder* might give rise to listener-based and society-based harms as well.

Compelled speech raises two major concerns from a speaker-based perspective. Compelled speech might interfere with a speaker's freedom of thought and might conflict with the virtue of sincerity. In the context of religious speech, concerns about a speaker's freedom of thought are particularly significant. Thomas Emerson, a former Yale University law professor, noted, "Early struggles for freedom of the mind centered around religious freedom, and legal protection for freedom of belief has developed most explicitly and most extensively in this area." In *Wooley*, the Supreme Court clarified, "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." The Court further noted that the freedom of the mind is protected through the First Amendment protections of "[t]he right to speak and the right to refrain from speaking." Freedom to develop one's religious beliefs includes the freedom to discuss these beliefs unapologetically. This should be particularly true for high school students, who are at an age when they are likely to be searching for their own religious truths. Forcing a student to apologize for discussing her religious views interferes with that student's freedom of mind and may influence her feelings about her beliefs.

More generally, the virtue of sincerity is also an important consideration in *Corder*, where the valedictorian was forced to issue an apology. The search for the truth is one of the main

134. Shiffrin, *supra* note 126, at 853-54. Shiffrin argued that "what one regularly says may have an influence on what and how one thinks," and because compelled speech is delivered without rational deliberation by the speaker, it is particularly dangerous. *Id.* at 855. Shiffrin further stated that sincerity is one of the "character virtues that [is] reasonably precious to citizens, both as individuals and as First Amendment actors," and that compelling speech undermines this value. *Id.* at 860.


137. *Id.* at 714.
justifications for the First Amendment. This process is distorted when government forces citizens to say what they do not believe, or to apologize for making statements they do not regret. While there are certainly instances when sincerity is not required, Shiffrin explained that the "widespread deployment of a general virtue of sincerity is integral to a successful First Amendment culture." Certainly, the government should advance this virtue in instances where people are simply expressing their religious beliefs.

In addition to potential harms to the speaker, listener-based interests are always triggered in compelled speech cases. Most broadly, listeners have an interest in understanding the source of the information they receive. For instance, parties who received Corder's message might have evaluated it differently if they were aware that she only issued the apology in order to receive her diploma. Another problem with compelled speech is that it allows the government to bolster the "perceived social acceptance of its message." In Corder, the government may purport to be punishing Corder for delivering a version of her speech that was not approved by the principal, but this leaves open the possibility that listeners will view the forced apology as a condemnation of her religious views. Furthermore, listeners may believe that Corder's religious views should be considered offensive or that the majority of people in the community were offended. After all, she was forced to apologize for her speech and explicitly made reference in

138. See Shiffrin, supra note 126, at 862.

139. Id. at 863. Shiffrin explained that sincerity is not always necessary, noting, "There is, obviously, room for humor, pretense, sarcasm, and exaggeration." Id.

140. Sacharoff, supra note 132, at 401-02. Sacharoff also noted that compelled speech leads to a "distortion of the total mix of information." Id. at 385. He stated that this happens in a number of ways, including through misattribution where the listener alters the weight that he or she gives to information based on the identity of the speaker, through the government's ability to use compulsion as a form of free advertising for its viewpoint, and through group ritual and recitation where the government is able to amplify its own message. Id. at 385-400.

141. Id. at 401.
her apology to the fact that members of the community may have objected to her speech.\textsuperscript{142}

In addition to these speaker- and listener-based concerns, there are broader societal interests that run counter to permitting compelled speech, particularly based on the facts of \textit{Corder}. Emerson states that free expression serves three societal functions in a democracy, two of which are jeopardized by compelled speech. Emerson defines the central purposes of the First Amendment as facilitating the discovery of the truth\textsuperscript{143} and ensuring a stable community.\textsuperscript{144}

Justice Oliver Wendell Holmes pointed out the paramount importance of the free exchange of ideas in the search for the truth:

\begin{quote}
[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.\textsuperscript{145}
\end{quote}

In \textit{Corder}, forcing an apology reflected little respect for the value of truthful information. It is hard to believe that Corder was genuinely apologetic for talking about her personal religious

\textsuperscript{142} Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1223 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 742 (2009).

\textsuperscript{143} See \textsc{Emerson}, \textit{supra} note 135, at 6-7 ("Discussion must be kept open no matter how certainly true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous.").

\textsuperscript{144} See id. at 7 ("[S]uppression of discussion makes a rational judgment impossible, substituting force for reason . . . "). In addition to these two societal functions, Emerson noted that free expression is important to all members of society to participate in the decision-making process. \textit{Id.} Emerson also noted that there is a fourth, individual function to free expression: namely to assure individual self-fulfillment. \textit{Id.} at 6.

\textsuperscript{145} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
beliefs. Instead, the school district's demand that she issue an apology advanced a view that the free exchange of ideas was not essential. This is particularly troubling from a society-based perspective because public high schools are fora in which students seek constantly to define and understand themselves and the world around them. A policy that requires a student to apologize for her personal religious beliefs does little to protect the value of truthful information in the marketplace of ideas.

Emerson also argued that the First Amendment is important because it enables society to change peacefully. This is based on the notion that "freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." In Corder, the school district did not recognize the value of allowing a student to express her personal beliefs; instead, it sought to punish Corder. Forcing a person to apologize after expressing religious views has dangerous implications; people who feel that their religious views were suppressed and punished may resort to less peaceful means of displaying their dissatisfaction for these policies.

While the school district would most likely argue that it compelled Corder's apology to discipline her for concealing the true text of her speech during the approval process, it still seems that compelling an apology is an inappropriate punishment. If the practice of compelling apologies for religious speech in cases where a school district had the power to censor speech became widespread, this would likely spark controversy and possibly even violence.

Because there was no Supreme Court precedent that dealt directly with compelled speech in schools in the wake of the Court's decision on the student speech cases, the Corder court drew on several opinions to apply a censored-student-speech rule to the


147. See EMERSON, supra note 135, at 7.
issue of compelled student speech. The foundation of the Tenth Circuit’s opinion is shaky, however, and the court should have considered distinguishing factors when examining the facts in Corder. Specifically, if the court looked at the inherent differences between the powers to censor and compel, the requirement that Corder adopt a particular viewpoint, and the special harms caused by compelled speech, the court would have found that compelling the apology violated the First Amendment.

III. CONCLUSION

In Barnette, the Supreme Court announced famously, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\textsuperscript{148} It follows logically that the government should not constitutionally be able to force a student to issue an apology for expressing her religious views. The Tenth Circuit in Corder adopted a divergent view on the issue of compelled student speech and failed to justify convincingly the application of a constitutional test that was extremely deferential to the government censors. The Corder court even noted that it adopted a deferential approach when evaluating an educator’s conclusion as to what type of concerns meet this threshold.\textsuperscript{149} The Tenth Circuit ultimately found that the compelled apology in Corder was constitutionally permissible because the apology was “‘related to learning,’”\textsuperscript{150} and because the compelled apology furthered the school’s interest in ensuring that people did not attribute Corder’s words to the school.\textsuperscript{151}

The Tenth Circuit’s view of this issue suggests that it is permissible under the First Amendment for the government to compel an apology in other situations in which it has the power to

\textsuperscript{149} Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1231 (10th Cir. 2009), cert. denied, 130 S. Ct. 742 (2009).
\textsuperscript{150} Id. at 1232 (quoting Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)).
\textsuperscript{151} Id. at 1231.
censor. For example, the government could compel an apology from a publisher of obscene material\textsuperscript{152} or from an enlisted person who violates the military's "Don't Ask, Don't Tell" policy.\textsuperscript{153} Beyond that, it is possible that courts could apply this same standard in situations where the government does not have the power to censor but does have the power to restrict speech, for example, through time, place, and manner restrictions.\textsuperscript{154} Thus, a city could compel an apology from a protestor who violated a constitutional ordinance restricting speech in a public forum.\textsuperscript{155} If the Tenth Circuit had recognized the distinguishing characteristics of the compelled speech in \textit{Corder} and the implications of its decision, it would likely have applied a standard that provided more First Amendment protection against compelled speech.

It is clear from Supreme Court precedent that compelled speech is guarded against through full First Amendment protection.\textsuperscript{156} The Court, however, has also recognized that, due to the "special characteristics of the school environment," students may have less First Amendment protection than adults would have in a different setting.\textsuperscript{157} These conflicting precedents caused trouble for the courts when determining the appropriate standard for

\textsuperscript{152} See \textit{Miller v. California}, 413 U.S. 15, 23 (1973) (explaining that the First Amendment does not protect obscene material).

\textsuperscript{153} See 10 U.S.C. § 654(b)(2) (2009) (permitting the discharge of an enlisted person who "has stated that he or she is a homosexual or bisexual, or words to that effect").

\textsuperscript{154} See 16A AM. JUR. 2D Const. Law § 534 (2009) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are content-neutral, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

\textsuperscript{155} See \textit{Kovacs v. Cooper}, 336 U.S. 77, 89 (1949) (upholding the constitutionality of an ordinance that prohibited sound trucks from broadcasting on public streets in a "loud and raucous manner"). In these situations, courts might apply an intermediate scrutiny analysis so it is less likely that a compelled apology would be found to be constitutional. The \textit{Corder} opinion does, however, leave the door open for this type of analysis.

\textsuperscript{156} See discussion \textit{supra} Part II.A.

compelled student speech. Shiffrin's distinction between compelled recitations and "mandatory education" efforts is useful in determining the appropriate standard. In particular, Shiffrin's concepts can be used to establish a framework that courts should use to analyze future compelled student speech cases.

Shiffrin argues that compelled recitations in a school setting, like the Pledge of Allegiance, are particularly troubling from a First Amendment perspective because they offer no opportunity for students to think critically about what they are saying. Consistent with this concern, the Supreme Court held that forcing students to recite the Pledge of Allegiance violated the First Amendment in *Barnette*. In cases of compelled recitations at schools, courts should apply *Barnette*, the only Supreme Court case dealing with the issue of compelled student speech, and grant students full First Amendment protection against compelled speech because this type of speech does nothing to aid in the educational process.

Generally, it is clear from Supreme Court precedent that adults are given full First Amendment protection against compelled speech. Notably, in *Wooley*, the Supreme Court held that the First Amendment precluded a state from requiring Jehovah's Witnesses to display the state's motto on their license plates. The Court explained, "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." Once the *Wooley* Court assessed the First Amendment concerns, it also identified the government's interest in placing the state motto on license plates and considered whether the "countervailing interest is sufficiently compelling" to justify the regulation. The Court held that the government's interests in "(1) facilitat[ing] the identification of passenger vehicles, and (2) promot[ing]

158. See Shiffrin, supra note 126, at 884-85.
159. Id. at 884.
161. See discussion supra Part II.A.
163. Id. at 716.
appreciation of history, individualism, and state pride” were insufficient to overcome the Maynards’ First Amendment claims.164

The balancing test in Wooley is the appropriate standard for assessing whether the First Amendment protects against compelled speech in a particular situation because it considers both the free expression concerns of the individual and the government’s interest. This test is more stringent than the one applied by Corder, which only required that the compelled apology be “reasonably related to legitimate pedagogical concerns,” a test the court acknowledged was extremely deferential to the school officials.165

Regardless of these compelled speech concerns, the Court also noted in subsequent opinions that there is less First Amendment protection for students in some situations.166 Shiffrin argued that compelled speech may be permissible during “mandatory education” efforts. In these situations, teachers use compelled speech to help students develop their critical thinking skills and form their own opinions.167 Because such exercises—requiring a student to argue a particular side in a debate or assigning a research paper topic—show concern for the development of a student’s judgment, Shiffrin found them less offensive to the First Amendment than compelled recitations.168

In light of Supreme Court precedent in the compelled speech cases and the Court’s recognition of public schools as a special setting, courts should adopt the Wooley balancing test for compelled student speech cases that do not involve a compelled recitation. In particular, the court should first consider whether First Amendment concerns are raised, keeping in mind that the First Amendment protects against the government’s compulsion of speech. The court should then balance any potential First Amendment concerns against the government’s interest in compelling student speech. The court should consider, as it did in

164. Id.
165. Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1231-32 (10th Cir. 2009), cert. denied, 130 S. Ct. 742 (2009) (quoting Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002)).
166. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986).
167. See Shiffrin, supra note 126, at 884.
168. Id.
Wooley, whether the government’s interest is “sufficiently compelling” to overcome the First Amendment concerns. Because the Court has noted that public school students may be given fewer First Amendment protections, courts should recognize an exception to the application of the Wooley rule in situations involving “mandatory education” efforts. In these situations, Courts should permit compelled speech because mandatory education efforts are designed to encourage students to think through problems and reach their own conclusions. Allowing for this exception recognizes the special mission of schools to teach children.

In summary, courts should apply the following scheme to compelled student speech cases. In cases involving compelled recitations, courts should follow Barnette and strike down such policies on First Amendment grounds. In cases involving “mandatory education” efforts, courts should allow a school’s compelled speech requirement to stand in order to give teachers enough power to teach critical thinking skills. In all other cases involving compelled student speech, courts should apply the balancing test used in Wooley. The court must determine whether the compelled speech raises First Amendment concerns, and then the court must balance those concerns, if any, against the government’s interest. In order to pass constitutional muster, the government’s interest must be “sufficiently compelling” to outweigh any First Amendment concerns.

If the Wooley test had been applied in Corder, it is likely that the Tenth Circuit would have found that the school district’s requirement that Corder issue an apology violated the First Amendment. Clearly, the compelled apology raises free expression concerns since the First Amendment protects “the decision of both what to say and what not to say.” The school district identified two interests advanced by the compelled apology in Corder. The school district claimed that the apology clarified the fact that the school did not approve the graduation speech, and the school district claimed the apology was a form of punishment. Under the standard established in Wooley, these government interests are not “sufficiently compelling” to overcome the First Amendment concerns.

concerns raised by the compelled apology. In Wooley, the Court noted that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." The same reasoning is true in Corder since the school district had several available alternatives that it could have employed to advance its interests. For these reasons, the compelled apology in Corder would have been found to violate the First Amendment if the court had applied the Wooley standard.

Adopting the proposed standards for compelled student speech cases will make it more difficult for schools to compel student speech outside of typical curricular activities in a classroom setting. This stricter standard is appropriate, however, because public schools are places where society, and the law, should not allow students to be forced to apologize for exploring and expressing their beliefs. After all, it is through this process that students learn how to become active, engaged, and self-aware members of society. Compelling apologies from students who simply reflect their personal beliefs is not only unnecessary, but is likely to have negative effects on the speaker, the listener, and society as a whole. Courts should be skeptical of schools that compel student speech outside of a curricular activity, particularly for disciplinary purposes, and take one step toward fully protecting this "fixed star in our constitutional constellation.""171