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COMMENTS

RECLAIMING *HAZELWOOD*: PUBLIC SCHOOL CLASSROOMS AND A RETURN TO THE SUPREME COURT'S VISION FOR VIEWPOINT-SPECIFIC SPEECH REGULATION POLICY

Brad Dickens^{***}

Federal and circuit courts continue to fiercely debate whether the Supreme Court's 1988 ruling in *Hazelwood v. Kuhlmeier* requires school policies regulating student speech and expression to be viewpoint neutral. However, this note suggests that the language of *Hazelwood* itself shows that the Circuit debate may be misguided. The Supreme Court intended *Hazelwood* to stand as a narrow exception to its earlier holding in *Tinker*, and *Hazelwood* only applies in instances where the government's own voice is implicated, largely in a public context. When the school, and in effect the government, is speaking with its own voice, the school must be able to control the content and nature of such speech as a matter of practicality. Any requirement of viewpoint neutrality in this context is simply unnecessary and conflicts with the Court's own precedent relating to government speech. When schools are allowed to operate the way *Hazelwood* intended, they are able to effectively execute their educational mission, and students are able to appropriately exercise their First Amendment rights via *Tinker* without the overly cumbersome burden of viewpoint neutral speech policies.

I. INTRODUCTION

The public school classroom is on the front lines in the battle of defining the First Amendment. Almost daily, new cases and incidents arise that probe the outer bounds of the First Amendment and the authority of schools to regulate student speech. In Tampa, Florida, in 2012, an elementary school principal prohibited a fourth grade student from distributing invitations to his classmates for an Easter egg hunt.⁷⁹⁴ In Oklahoma City, a

^{***} J.D., Baylor University, expected May 2014; B.A., Texas A&M University, 2011. Thank you to Jeff Shafer, without whose guidance, criticism, insight, and encouragement this note would not have been possible.

⁷⁹⁴ William R. Levesque, *School Sued for Blocking Egg Hunt Flier*, TAMPA BAY TIMES, Aug. 22, 2012,

five-year-old student was forced to take off his shirt on the playground and turn it inside out because it was a University of Michigan shirt and violated the school's policy of only allowing University of Oklahoma or Oklahoma State University shirts.⁷⁹⁵ In Prague, Oklahoma, a high school valedictorian had her diploma withheld indefinitely for saying "hell" in her graduation speech.⁷⁹⁶ In Kountze, Texas, a high school found itself in federal district court over a district policy prohibiting the cheerleading squad from displaying a banner that read, "If God Is For Us, Who Can Be Against Us."⁷⁹⁷ Administrators, teachers, parents, and students in districts and communities across the nation struggle to understand and apply school speech policies that comply with the parameters of the First Amendment.

In 1969, the Supreme Court in *Tinker v. Des Moines* made an effort to define the scope and character of the First Amendment in a classroom context. *Tinker* produced the oft-quoted dictum that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate."⁷⁹⁸ *Tinker* remains a foundational case for school-related speech, and yet its language leaves ambiguities in the analytical framework that cannot be ignored. Just how far does the "schoolhouse gate" go? What precisely is a school's educational mission?

In *Hazelwood v. Kuhlmeier*, the Court supplemented the foundational rule from *Tinker* to answer another difficult question left open by *Tinker*: how far can schools go in restricting speech on campus when the speech appears to carry the school's approval (as in a school newspaper), rather than being a clearly private communication (as in a student wearing an armband in protest)?⁷⁹⁹ 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 legitimate pedagogical concerns".⁸⁰⁰

available at <http://www.tampabay.com/news/courts/civil/lawsuit-alleges-hillsborough-school-blocked-free-speech-religious/1247240>.

⁷⁹⁵ Carrie Coppernoll, *District to Review Dress Code after Boy, 5, Told to Fix Shirt*, OKLAHOMAN, Aug. 21, 2012, available at <http://newsok.com/okc-schools-to-review-dress-code-after-kindergartner-told-to-turn-shirt-inside-out/article/3703012>.

⁷⁹⁶ Emmeline Zhao, *Kaitlin Nootbaar, Oklahoma High School Valedictorian, Denied Diploma For Using 'Hell' In Speech*, HUFFINGTON POST, Aug. 20, 2012, http://www.huffingtonpost.com/2012/08/20/-kaitlin-nootbaar-oklahoma_n_1808618.html.

⁷⁹⁷ Chris Tomlinson, *Judge Rules for Cheerleaders*, HUFFINGTON POST, Oct. 18, 2012, http://www.huffingtonpost.com/2012/10/18/judge-rules-for-cheerlead_0_n_1981865.html.

⁷⁹⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁷⁹⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988).

⁸⁰⁰ *Id.* at 273.

The language of the Court's opinion leaves unanswered the question of whether school policies may restrict speech on the basis of a specific viewpoint or must instead remain viewpoint neutral.⁸⁰¹ This issue is fiercely debated among the circuits and carries with it significant implications for the boundaries of speech rights of students in American classrooms.⁸⁰²

This note surveys the body of circuit case law on school viewpoint neutrality, and ultimately to makes a case in favor of reading *Hazelwood* to authorize viewpoint-specific speech restrictions.

First, *Hazelwood*, by its own language, applies only to speech that could be interpreted as government-endorsed; it acts as a narrow exception to the general rule from *Tinker*, rather than a new separate standard for public school policy.⁸⁰³ Given *Hazelwood's* position as a narrow exception triggered only when the government's own imprimatur is implicated circumstantially, a viewpoint neutrality standard is incompatible with the justification for *Hazelwood's* exception. The government may, and inevitably does, convey and endorse viewpoints, and it has an interest in maintaining integrity and singularity in its voice. Thus, a public school may regulate certain student speech *precisely because of the viewpoint of that speech* when it is reasonably perceived as carrying the school's endorsement.⁸⁰⁴ *Hazelwood* recognizes that schools have an interest in maintaining their own messaging as they carry out their educational function.

Second, this note argues that the actual operation of a viewpoint neutrality requirement perversely incentivizes either a neglect of legitimate speech regulation or unnecessarily broad and inefficient prohibitions on speech, which would yield greater burdens on individual discourse than would result from viewpoint-focused regulation. When schools control

⁸⁰¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) (“[I]t is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination”); Denise Daugherty, *Free Speech in Public Schools: Has the Supreme Court Created a Haven for Viewpoint Discrimination in School-Sponsored Speech?*, 20 GA. ST. U. L. REV. 1061, 1062 (2004); Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 90 (2008).

⁸⁰² *Good News Club*, 533 U.S. at 113; Daugherty, *supra* note 8, at 1062; Waldman, *supra* note 8, at 90.

⁸⁰³ *Hazelwood*, 484 U.S. at 272–73 (“[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

⁸⁰⁴ Alexis Zouhary, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227, 2235–36 (2008) (“[T]he only area in which the government may unequivocally make viewpoint-based distinctions is when it is the speaker.”).

speech over concerns of school endorsement of certain messages, viewpoint-neutral regulation is too blunt an instrument, unnecessarily censoring benign speech outside the scope of the concerns that gave rise to regulation. By contrast, viewpoint regulation within the bounds of *Hazelwood* allows schools to identify speech that is especially problematic, restricting only what is necessary to allow the school to maintain the integrity of its pedagogical voice.

II. HAZELWOOD'S FOUNDATION

In 1983, the principal of Hazelwood East High School removed several pages from the final draft of *Spectrum*, the high school student newspaper.⁸⁰⁵ Of concern to the principal were two articles on teen pregnancy and divorce, both of which contained interviews with students from the high school.⁸⁰⁶ The principal decided that there was not enough time to edit the objectionable portions of the stories before the paper went to print, so he chose to remove the two articles entirely in an effort to maintain the deadline.⁸⁰⁷ Students in the journalism class responsible for the articles brought an action against the school alleging that it had violated their First Amendment rights.⁸⁰⁸ The district court found that the principal had a "legitimate and reasonable concern" that readers would be able to easily discern the identities of the anonymous students mentioned in the article.⁸⁰⁹ The district court affirmed this by holding the school had the right to censor the speech based on its belief that the articles could be interpreted as the school's endorsement of certain sexual norms.⁸¹⁰

The Eight Circuit reversed the decision.⁸¹¹ Applying *Tinker*, the circuit court held that the school had established a public forum through the newspaper, and as such, the school could only restrict speech that substantially interfered with school operations.⁸¹²

The Supreme Court reversed.⁸¹³ The Court began its opinion with a tip of the hat to its holding from *Tinker*, acknowledging that the First Amendment

⁸⁰⁵ *Hazelwood*, 484 U.S. at 263–264.

⁸⁰⁶ *Id.* at 263.

⁸⁰⁷ *Id.* at 263–64.

⁸⁰⁸ *Id.* at 264.

⁸⁰⁹ *Id.* at 264–65.

⁸¹⁰ *Id.*

⁸¹¹ *Hazelwood*, 484 U.S. at 265.

⁸¹² *Id.*; see also *Tinker*, 393 U.S. at 508.

⁸¹³ *Hazelwood*, 484 U.S. at 266.

extends into schools, but noting that the school environment is a unique one for civil liberties.⁸¹⁴

Early in the opinion, the Court critically established that a school newspaper is not a public forum, but did not go so far as to label the paper a *non-public forum*.⁸¹⁵ The Hazelwood School District did not open the school newspaper up to “indiscriminate use” by the student body, choosing instead to maintain the intellectual space of the paper as an outlet for student learning within the context of a graded journalism class.⁸¹⁶ Though the Court applied the “policy or practice” standard from *Perry Education Association v. Perry Local Educators’ Association* to defeat any argument that the paper is a classic public forum, it stopped short of giving it non-public forum status with that classification’s accompanying requirement of viewpoint neutrality.⁸¹⁷ This odd designation gave rise to the circuit conflict explored herein.

The Court further clarified the departure from *Tinker* later in the opinion, holding that *Tinker* does not require that its standards apply to speech that could be seen as being officially endorsed by the school.⁸¹⁸ In other words, there is a difference between the effects of students expressing their views as individuals and students speaking in a manner that appears to represent the school (*i.e.*, the government).

Writing for the majority, Justice White explained that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁸¹⁹ However, the “pedagogical concern” standard only represents half of the complete *Hazelwood* authorization. This form of editorial control of speech is only authorized when there is a reasonable perception that the speech to be regulated bears the school’s imprimatur.⁸²⁰ These elements *together* form the *Hazelwood* rule.

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* at 267; Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 772–73 (2009).

⁸¹⁶ *Hazelwood*, 484 U.S. at 270.

⁸¹⁷ *Id.* at 269.

⁸¹⁸ *Id.* at 269 n.2.

⁸¹⁹ *Id.* at 273.

⁸²⁰ *Hazelwood*, 484 U.S. at 270.

III. HAZELWOOD'S LEGACY

The American legal community has viewed the Court's decision in *Hazelwood* as both controversial and polarizing.⁸²¹

Beneath the pedagogical concern standard lies an important but ultimately unanswered question: must school policies restricting speech, while still connected to a pedagogical concern, also be viewpoint neutral? Earlier opinions from the Supreme Court in *Perry*⁸²² and *Cornelius*⁸²³ established a viewpoint neutrality requirement for policies controlling speech in a nonpublic forum. This precedent would normally be controlling without much controversy, but the Court had already spent a great deal of time and text noting that a public school classroom is a different environment and context than "the real world" of the rough and tumble public square.⁸²⁴ Do *Perry* and *Cornelius* apply to classroom policies, or is *Hazelwood's* silence on viewpoint neutrality indicative of a new rule uniquely tailored to the school context?

IV. THE CIRCUIT SPLIT

Circuit Courts remain divided on whether *Hazelwood* requires viewpoint neutrality for school district policies on student speech like those in the case. Some circuits have interpreted the Court's holding in *Hazelwood* as a kind of special exception to viewpoint neutrality, allowing schools to zero in on specific messages in an effort to, for instance, avoid a violation of the Establishment Clause.⁸²⁵ Other circuits, however, see the spirit of *Cornelius* and *Perry* as inherently interwoven into *Hazelwood's* standard, so much so that viewpoint neutrality is understood and does not require a mention.

⁸²¹ Susannah Barton Tobin, *Divining Hazelwood: The Need for A Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 228 (2004); Edward L. Carter, Kevin R. Kemper & Barbara L. Morgenstern, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 161–62 (2006); Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 274–75 (1992).

⁸²² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁸²³ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

⁸²⁴ *Hazelwood*, 484 U.S. at 266–67.

⁸²⁵ *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (viewing prevention of Establishment Clause violations as a potentially compelling justification for viewpoint discrimination).

A. Viewpoint Neutral Circuits

The Second, Sixth, Ninth, and Eleventh Circuits have held that school policies limiting student speech and expression must be viewpoint neutral.⁸²⁶

In *Peck ex rel. Peck v. Baldwinsville Central School District*, a kindergarten student created a poster as part of an assignment to demonstrate what he had learned over the year about ways to help the environment.⁸²⁷ Antonio, the student, included pictures of Jesus and several other religious symbols because of his belief that Jesus was the only way to save the planet.⁸²⁸ The school folded over the poster to conceal the religious content.⁸²⁹ On remand from the Second Circuit, the district court held that the school's censorship of the poster was based on legitimate pedagogical concerns, namely that Antonio could not articulate to the class the connection between images of Jesus and saving the environment.⁸³⁰ However before the fact question of viewpoint neutrality could even be decided by the district court on remand, the Second Circuit sought to extract from precedent the applicability of viewpoint neutrality to school policy.⁸³¹ The court aptly began its analysis by acknowledging the circuit dispute into which it was about to involve itself.⁸³² The court recognized the plausibility of arguments on either side, but ultimately folded the *Perry* and *Cornelius* nonpublic forum standards into its interpretation of the *Hazelwood* doctrine.⁸³³ *Hazelwood*, the court noted, never distinguished its facts with *Perry* or *Cornelius*, suggesting that the court did not intend to establish any kind of exception or new rule in its opinion.⁸³⁴ The court ultimately concluded its viewpoint analysis with, "we decline the District's

⁸²⁶ See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 356 (6th Cir. 2001), *reh'g granted and opinion vacated*, 197 F.3d 828 (6th Cir. 1999), *on reh'g en banc*, 236 F.3d 342 (6th Cir. 2001) (holding that state university's withholding of yearbooks on title grounds unauthorized because not viewpoint-neutral); *Planned Parenthood of Southern Nevada, Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991); *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989).

⁸²⁷ *Peck*, 426 F.3d at 621–22.

⁸²⁸ *Id.* at 621–22.

⁸²⁹ *Id.* at 622.

⁸³⁰ *Peck v. Baldwinsville Cent. Sch. Dist.*, No. 99-CV-1847, 2008 WL 4527598, at *23 (N.D.N.Y. Sep. 30, 2008).

⁸³¹ *Peck*, 426 F.3d at 632–33.

⁸³² *Id.* at 631–32.

⁸³³ *Id.* at 632–33.

⁸³⁴ *Id.* at 633.

invitation to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection.⁸³⁵

In *Planned Parenthood of Southern Nevada v. Clark County School District*, a high school prevented Planned Parenthood from placing advertisements in a school-sponsored publication.⁸³⁶ Representatives for the school asserted that to allow the advertisements would present the impression that the high school had taken a stance on one side of the divisive issue of abortion.⁸³⁷ First, the court identified the publication as a nonpublic forum.⁸³⁸ With this analysis in hand, the court then matter-of-factly concluded that any school policy within the nonpublic forum context must be viewpoint neutral in light of *Cornelius*.⁸³⁹ Two paragraphs later, the court made its case for the legitimacy of the school's policy by citing to *Hazelwood* while also including "see also *Cornelius*" in the in-line citation.⁸⁴⁰ In this paragraph, the justices attempted to connect the general viewpoint neutrality requirement from *Cornelius* to the specific school context of *Hazelwood*. By citing the cases together, the court implied that *Hazelwood* was merely an application of a larger principle from *Cornelius*, and there could be no real interpretation of the rule that might deviate (or at least provide an exception to) from the viewpoint neutrality requirement.⁸⁴¹

In *Kincaid*, the Sixth Circuit considered a case in which Kentucky State University confiscated and refused to distribute a version of the school's yearbook.⁸⁴² The editor of the yearbook wanted to "bring Kentucky State into the nineties," and included pictures of current world events, abstract phrases like "Destination Unknown," and pictures without captions.⁸⁴³ The administration objected to the yearbook's design and content as inappropriate and did not allow the yearbooks to be distributed on campus.⁸⁴⁴ The Court appropriately recognized the case's obvious parallels to the facts of *Hazelwood*, but ultimately distinguished the case based on the level of involvement by the KSU administration in the yearbook's

⁸³⁵ *Id.*

⁸³⁶ *Planned Parenthood*, 941 F.2d at 821.

⁸³⁷ *Id.* at 819.

⁸³⁸ *Id.* at 826–827.

⁸³⁹ *Id.* at 829.

⁸⁴⁰ *Id.*

⁸⁴¹ The Ninth Circuit later appears to marginalize its own holding from *Planned Parenthood in Downs*. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000). The *Downs* court points out that *Planned Parenthood* provides no real basis for a viewpoint neutrality requirement in *Hazelwood*. *Id.* at 1010.

⁸⁴² *Kincaid*, 191 F.3d at 722.

⁸⁴³ *Id.* at 723.

⁸⁴⁴ *Id.*

production.⁸⁴⁵ The court spent a considerable amount of time in its opinion analyzing the type of forum created by the yearbook.⁸⁴⁶ The interesting aspect of the court's forum analysis is that the court created its own unnecessary burden;⁸⁴⁷ early in the opinion, *Hazelwood* was described as requiring viewpoint neutrality in a nonpublic forum.⁸⁴⁸ Presumably because the actual language of *Hazelwood* gives no such requirement, the court also cited *International Society for Krishna Consciousness* as the basis for this assertion.⁸⁴⁹ However, *Krishna* occurred in an airport, entirely outside the scope or applicability of *Hazelwood*'s bounds.⁸⁵⁰

In *Searcey v. Harris*, the Atlanta School Board restricted the Atlanta Peace Alliance ("APA") from any involvement in Atlanta public high schools, including involvement in "career days."⁸⁵¹ The school board had adopted a policy stating in part, "participants shall not be allowed to criticize or denigrate the career opportunities provided by other participants."⁸⁵² The policy further stated that any group in violation of this policy would be "totally prohibited from participating in Career Day."⁸⁵³ In its analysis, the Eleventh Circuit applied logic similar to that of the Second Circuit in *Peck*.⁸⁵⁴ Having established the school, and in particular Career Day, as a nonpublic forum, the court placed the facts within the *Hazelwood* framework—which it conceived as adopting that classification. The Eleventh Circuit was not willing to interpret *Hazelwood*'s silence on viewpoint neutrality as indicating an absence of that standard.⁸⁵⁵ Instead, the court concluded, "there is no indication that the [Supreme] Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views."⁸⁵⁶

B. Circuits Authorizing Viewpoint Regulation

Not all courts, however, see viewpoint neutrality as an inherent implication of the *Hazelwood* standard. The First, Third, and Tenth Circuits

⁸⁴⁵ *Id.* at 727.

⁸⁴⁶ *Id.* at 727–28.

⁸⁴⁷ *Kincaid*, 191 F.3d at 728–29.

⁸⁴⁸ *Id.* at 727.

⁸⁴⁹ *Id.*

⁸⁵⁰ *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 674 (1992).

⁸⁵¹ *Searcey v. Harris*, 888 F.2d 1314, 1315 (11th Cir. 1989).

⁸⁵² *Id.* at 1317.

⁸⁵³ *Id.* at 1317–18.

⁸⁵⁴ *Id.* at 1319–20.

⁸⁵⁵ *Id.* at 1319.

⁸⁵⁶ *Id.* at 1319 n.7.

have held that while school policies must still be grounded in reasonability, student speech can be restricted on the basis of viewpoint.⁸⁵⁷ Avoiding a violation of the Establishment Clause, for instance, constitutes a compelling state interest that justifies a restriction of specific student speech.⁸⁵⁸

In *Ward v. Hickey*, a high school biology teacher facilitated a class discussion concerning abortion of fetuses with Down's Syndrome, specifically as it pertained to a Massachusetts referendum on the issue.⁸⁵⁹ Allegedly due to the content of the discussion, the school committee denied the teacher tenure.⁸⁶⁰ The First Circuit addressed several questions on appeal; of particular concern for purposes of this note was the issue of whether Ward's particular discussion of abortion was protected by the First Amendment or instead subject to regulation under the authority of *Hazelwood*.⁸⁶¹ The court focused its viewpoint analysis around *Perry* and acknowledged the Supreme Court's holding that government policies must not seek to suppress expression due to the viewpoint expressed.⁸⁶² However, the court interestingly concluded that, in light of the *Hazelwood* standard,⁸⁶³ *Perry* is distinguishable from the facts of *Ward*, and its holding did not apply.⁸⁶⁴ The court believed that the greatest difference between these two cases was the presence in *Ward* of a captive audience of impressionable young students (unlike the faculty mail system in *Perry*).⁸⁶⁵

The First Circuit's distinction of *Ward* and *Perry* as they relate to *Hazelwood* is significant, particularly when the court concluded that *Hazelwood* did not require viewpoint neutrality in school policies.⁸⁶⁶ In doing so, the court suggested that the stakes are higher when young impressionable minds are in question. The court interpreted *Hazelwood* as

⁸⁵⁷ See *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172–73 (3d Cir. 1999) *reh'g en banc granted, opinion vacated sub nom C.H. v. Oliva*, 197 F.3d 63 (3d Cir. 1999), and *on reh'g en banc*, 226 F.3d 198 (3d Cir. 2000); *Fleming v. Jefferson Cnty. School Dist.*, 298 F.3d 918, 926 (10th Cir. 2002).

⁸⁵⁸ See *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (“In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the university must therefore satisfy the standard of review appropriate to content-based exclusions. *It must show that its regulation is necessary to serve a compelling state interest.*”); accord *Carey v. Brown*, 447 U.S. 455, 465 (1980).

⁸⁵⁹ *Ward*, 996 F.2d at 450.

⁸⁶⁰ *Id.*

⁸⁶¹ *Id.* at 452–54.

⁸⁶² *Id.* at 454.

⁸⁶³ *Id.*

⁸⁶⁴ *Id.*

⁸⁶⁵ *Ward*, 996 F.2d at 454.

⁸⁶⁶ *Id.* (citing *Hazelwood*, 484 U.S. at 270).

authorizing viewpoint regulation in the interest of preserving the student learning experience, a “legitimate pedagogical concern.”⁸⁶⁷

In *Morgan v. Swanson*, a public elementary school prohibited a student from distributing laminated bookmarks containing a story titled “The Legend of the Candy Cane,”⁸⁶⁸ citing the Plano Independent School District’s policy prohibiting the distribution of “any written material, tapes, or other media over which the school does not exercise control and that is intended for distribution to students” without approval from the school.⁸⁶⁹

One of the more significant arguments raised on appeal by the plaintiff was that the school’s policy was facially unconstitutional because of an absolute rule against viewpoint discrimination.⁸⁷⁰ The Fifth Circuit said, succinctly, “this is not so.”⁸⁷¹ The court noted that the case at issue arose within a public school, an environment the court labeled “a special First Amendment Context.”⁸⁷² The court acknowledged the plaintiff’s citation of a variety of cases suggesting a mandate of viewpoint neutrality, but it then summarily rejected the applicability of the cases, as not one of them involved student speech within a public school.⁸⁷³ Though Judge Benavides identified the contested issue of viewpoint neutrality within the context of an attempt to decide a qualified immunity claim,⁸⁷⁴ it is still worth noting that the Fifth Circuit did not consider viewpoint neutrality an absolute standard in the school context. In this way, *Morgan* suggests a willingness by the Fifth Circuit to isolate the public school classroom from the general mandates in *Perry* and *Cornelius*, implying that the school environment is unique, and it would be inappropriate to apply to it a viewpoint neutrality requirement.

In *C.H. ex rel. Z.H. v. Oliva*, the Third Circuit considered a case in which a kindergarten student created a poster for a Thanksgiving-themed project expressing thankfulness for Jesus, and the school censored the poster.⁸⁷⁵ The same student was also prohibited a year later (as a first grader) from

⁸⁶⁷ *Id.* at 452 (quoting *Hazelwood*, 484 U.S. at 273).

⁸⁶⁸ *Morgan v. Swanson*, 659 F.3d 359, 366 (5th Cir. 2011).

⁸⁶⁹ *Id.* at 366–67.

⁸⁷⁰ *Id.* at 379.

⁸⁷¹ *Id.*

⁸⁷² *Id.*

⁸⁷³ *Morgan*, 659 F.3d at 379.

⁸⁷⁴ *Id.* at 383.

⁸⁷⁵ *C.H. ex rel. Z.H.*, 195 F.3d at 168–69.

bringing a biblical-themed book to share with the class.⁸⁷⁶ In determining the validity of the school's actions against the student, the court appropriately identified *Hazelwood* as the controlling case.⁸⁷⁷ The court ultimately held that instances can and do arise in which a school must be able to take non-viewpoint-neutral action against certain speech, recognizing *Hazelwood's* requirements of both legitimate pedagogical concern and the appearance of the school's imprimatur in that context.⁸⁷⁸ The court acknowledged that while viewpoint neutrality remains crucial to the analysis of speech restrictions in the context of cases like *Rosenberger* and *Lamb's Chapel*, which related to extracurricular speech restrictions, it "is simply not applicable to restrictions on the State's own speech In [teacher-supervised, school-sponsored activity], viewpoint neutrality is neither necessary nor appropriate."⁸⁷⁹ The government must have the ability to control the messages that are reasonably assigned to it, and consequently should not be artificially shackled by an arbitrary requirement of viewpoint neutrality.

V. THE CASE AGAINST VIEWPOINT NEUTRALITY

Hazelwood provides an exception to the general requirement of viewpoint neutrality found in *Perry* and *Cornelius*. The case against requiring viewpoint neutrality in school speech policy operates on two levels. First, the *Hazelwood* standard applies to a far narrower and more specific context than some federal courts choose to recognize. Schools must be given the authority they need, though not more than they need, to regulate the kinds of student speech that attach to the name and symbolic voice of the school. Second, a requirement of viewpoint neutral speech regulation can impel school officials to restrict wide categories of speech in order to regulate the single expression of speech bearing the school's imprimatur. Simply, a requirement of administrative viewpoint neutrality substantially limits students' civil liberties by applying a kind of atomic bomb to the free speech landscape when a precision targeting device is better suited.

⁸⁷⁶ *Id.* at 169.

⁸⁷⁷ *Id.* at 171.

⁸⁷⁸ *Id.* at 171–72.

⁸⁷⁹ *Id.* at 173.

A. Reigning in *Hazelwood*

A great deal of the debate over viewpoint neutrality in *Hazelwood* arises not from the language of the opinion itself, but rather from an unnecessary insistence by some federal courts to insert its rule into contexts in which it does not apply.⁸⁸⁰ The school imprimatur standard within *Hazelwood* acts as a kind of jurisdictional trigger, confining the Court's holding to that narrow context. When lower courts ignore the narrow circumstances in which *Hazelwood* applies, they lose sight of the justification for *Hazelwood*'s viewpoint-regulation allowance. This leads to courts' expanding the reach of *Hazelwood* beyond the circumstances justifying its rule; it is hardly surprising that these courts then read an otherwise-alien viewpoint neutrality requirement into the case.

1. *Morse v. Frederick*'s Affirmation of *Hazelwood*'s Scope

In 2007, the Supreme Court considered a school's authority to restrict student speech advocating illegal drug use in *Morse v. Frederick*.⁸⁸¹ The Court held that schools have the authority to limit student speech that promotes drug use.⁸⁸² The majority acknowledged its holding from *Hazelwood*, the last case it had considered regarding student speech, but ultimately held that it did not apply to the present facts.⁸⁸³ The Court reasoned that Frederick's banner displaying the phrase "Bong Hits 4 Jesus" simply would not be reasonably interpreted by a viewer as official school speech; the banner did not trigger *Hazelwood*'s fact-specific imprimatur rule.⁸⁸⁴

Justice Alito, joined by Justice Kennedy, cautioned in concurrence that the Court's holding should stand as a narrow exception to *Tinker*, not as conceptual fodder for a new rule category.⁸⁸⁵ Justice Alito agreed that a public school regulation restricting student promotion of illicit drug use

⁸⁸⁰ Waldman, *supra* note 8, at 64 ("[W]hen evaluating whether *Hazelwood* permits viewpoint discrimination, courts have been influenced, perhaps without realizing it, by the context in which they are applying it. As such, the extension of *Hazelwood* to contexts beyond school-sponsored student speech has directly contributed to the confusion and conflict over whether *Hazelwood* should be interpreted as permitting viewpoint discrimination.").

⁸⁸¹ *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

⁸⁸² *Id.* at 424 (Alito, J., concurring).

⁸⁸³ *Id.* at 405 ("[*Hazelwood*] does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur.").

⁸⁸⁴ *Id.*

⁸⁸⁵ *Id.* at 425 (Alito, J., concurring).

does not conflict with the Constitution, but also identified “such regulation as standing at the far reaches of what the First Amendment permits.”⁸⁸⁶ Alito suggested that *Bethel v. Fraser*,⁸⁸⁷ *Hazelwood*, and now *Morse* all function as a set of exceptions to *Tinker* that only take effect under a highly specific set of circumstances.⁸⁸⁸

Adding clarity to a point raised by the majority, Justice Alito emphasized a critical but often ignored aspect of *Hazelwood*: the “pedagogical concern” standard’s sole application to speech that may reasonably be perceived as coming from the mouth of the school itself. “[*Hazelwood*] allows a school to regulate what is in essence the school’s own speech,” Justice Alito wrote; “that is, articles that appear in a publication that is an official school organ.”⁸⁸⁹

Morse is significant in the way that it emphasizes *Hazelwood*’s limited applicability and scope. If *Hazelwood* were to apply as broadly as some federal courts suggest, the Court in *Morse* presumably would have applied *Hazelwood* to the facts rather than carve out a new public policy exception for drug-related speech. The Court recognized in its opinion that *Hazelwood* is only triggered in highly specific circumstances, circumstances that the Court felt were not at issue in *Morse*.

2. The School Imprimatur Trigger

The Court in *Hazelwood* held that the question of school-sponsored speech arose only within the context of “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.”⁸⁹⁰ Student homework, art projects, and show-and-tell are excluded from *Hazelwood*’s application because they are forms of private expression not entailing government imprimatur. As then-Circuit Judge Alito noted in *Child Evangelism Fellowship v. Stafford*, *Hazelwood* applies only to government-sponsored speech; in other words, speech from

⁸⁸⁶ *Id.* (Alito, J., concurring).

⁸⁸⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (allowing sanctions against a student for offensively lewd and indecent speech despite a First Amendment challenge).

⁸⁸⁸ *Morse*, 551 U.S. at 422 (Alito, J., concurring) (“But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court.”).

⁸⁸⁹ *Id.* at 423 (Alito, J., concurring).

⁸⁹⁰ *Hazelwood*, 484 U.S. at 271.

“a public school or other government entity [that] aims to convey its own message.”⁸⁹¹

Unfortunately, many federal courts have overextended *Hazelwood*, applying it to virtually any speech occurring in a school context in such a way that public school boards have almost unlimited regulatory authority over speech in that environment.⁸⁹² Courts have reconfigured *Hazelwood* from a limited exception into a general rule.

Yet *Hazelwood* presents itself merely as a device to protect schools from having their names attached to speech reasonably perceived as presenting their own points of view. The Supreme Court in *Hazelwood* repeatedly offered the examples of school theater and school newspapers as communication scenarios in which the public would reasonably perceive school imprimatur.⁸⁹³ By contrast, student assignments confined to classrooms and student-teacher relationships involve expressions of exclusively private student voice, and thus operate outside of *Hazelwood*'s bounds. Classroom assignments and projects necessarily solicit personal viewpoints and expression from students; consequently, it is not reasonable to expect those activities to be understood as the official voice of the school.

In specific situations of reasonably perceived government imprimatur, *Hazelwood* gives schools the ability to pinpoint specific speech that departs from their pedagogical objectives. Schools do not need to restrict broad categories of speech or limit student expression altogether; rather, they need to restrict and limit specific student communication within those contexts, to avoid a perception that the school is advancing a point of view it does not want associated with its educational voice.

B. Viewpoint in School Curriculum and Messaging

The absence of a viewpoint neutrality mandate in *Hazelwood* is also sensible given the inseparability of viewpoints and pedagogical messaging in the school environment. In *Abington v. Schempp*, the Supreme Court noted that “public schools serve a uniquely public function: the training of

⁸⁹¹ *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3rd Cir. 2004) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)) (internal quotations omitted).

⁸⁹² See Waldman, *supra* note 8, at 64.

⁸⁹³ *Hazelwood*, 484 U.S. at 271–72.

American citizens...⁸⁹⁴ *Abington* and other cases emphasize the point that American public schools exist as a device by which students are prepared to enter the larger society as citizens of the sort the government prefers.⁸⁹⁵ While it can certainly be debated what objectives should be incorporated into “the training of American citizens,” the fact remains that such training requires the advocacy of particular viewpoints and the disapproval of others:⁸⁹⁶

Postmodernism has helped us to an appreciation that even the “information” conveyed in school curricula is never “hard facts and figures” but screened data presented from a cultural perspective. Accordingly, when a society educates its youth, it cannot escape making judgments about the kind of citizens it wants its children to become. Education is inevitably about ultimate truths or perceptions thereof [.]⁸⁹⁷

To insert viewpoint neutrality into the *Hazelwood* rule (directed as it is to essentially government speech) is both to mistake the nature of the educational enterprise and to drastically affect the ability of schools to control their educational function.⁸⁹⁸ Viewpoint neutrality makes it impossible for a public school to effectively accomplish its pedagogical mission.⁸⁹⁹ Simply, viewpoint regulation of government speech allows schools to do what they were established to do.

⁸⁹⁴ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 241–42 (1963) (Brennan, J., concurring).

⁸⁹⁵ See *Bethel Sch. Dist.*, 478 U.S. at 681; *Bd. of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (“It . . . seems entirely appropriate that the State use ‘public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.’”).

⁸⁹⁶ Martin H. Redish & Kevin Finnerty, *What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic Educational Paradox*, 88 CORNELL L. REV. 62, 84 (2002) (“Both the selection of topics to be taught and decisions about what is to be taught concerning each topic inherently imply certain choices as to social, moral, or political values Regardless of which side of this debate one ultimately favors, the implications for present purposes should be clear: it is unrealistic to believe that seemingly value-neutral curricular choices are completely free from significant, if often unstated, substantive value judgments.”).

⁸⁹⁷ Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 94 (1998).

⁸⁹⁸ Helen Norton, *Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1334 (2004) (“[I]n situations where the government is the ‘literal speaker’ – i.e., the entity that is actually saying, writing, or otherwise directly delivering the message – it should be permitted to decline to serve as the ‘dummy’ through which a private ventriloquist projects her views.”); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 187–88 (2007) (“[A] public school’s refusal to sponsor speech it deems incompatible with the shared values of a civilized social order will typically be mediated by someone’s possible acceptance or rejection of the viewpoint of the speech in question, and will therefore be viewpoint-based regulation, reflecting approval of or hostility toward one or more points of view.”).

⁸⁹⁹ R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 117 (2008) (“A school should not be legally handicapped for fairly taking its democratically

C. *Hazelwood's* Implication of the Policy Behind the Government Speech Rule

The Supreme Court has acknowledged the State's interest and authority to promote its own favored viewpoints.⁹⁰⁰ In *Pleasant Grove City v. Summum*, the Court recited the relevant law as follows:

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Ass'n*, 544 U. S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 139, n. 7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression”). A government entity has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000). “[I]t is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995), and to select the views that it wants to express. See *Rust v. Sullivan*, 500 U. S. 173, 194 (1991); *National Endowment for Arts v. Finley*, 524 U. S. 569, 598 (1998) (SCALIA, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”).⁹⁰¹

In *Rosenberger v. Rector and Visitors of University of Virginia*, the University of Virginia refused to direct funds generated from student fees toward paying a printing bill for a Christian student newspaper.⁹⁰² The Supreme Court reversed the decision from the Fourth Circuit and held that withholding the funds was viewpoint discrimination, which inappropriately infringed on the Free Speech Clause and undermined the neutrality toward religion the Establishment Clause contemplated.⁹⁰³ Critically, the Court explained that the allocation of student fees did not blur the line “between the University’s own favored message and the private speech of students.”⁹⁰⁴ The Court thus distinguished the rule that the government may

assigned and democratically supervised vital mission seriously on school grounds and during school hours”).

⁹⁰⁰ See e.g., *Gonzalez v. Carhart*, 550 U.S. 124, 157 (2007) (“[T]he government may use *its voice* and its regulatory authority to *show its profound respect for the life within the woman.*”) (emphasis added); Blake R. Bertagna, *The Government’s Ten Commandments: Pleasant Grove City v. Summum and the Government Speech Doctrine*, 58 DRAKE L. REV. 1, 8 (2009) (“[T]he Court observed that ‘when the State is the speaker, it may make content-based choices.’”) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833(1995)).

⁹⁰¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

⁹⁰² *Rosenberger*, 515 U.S. at 822–23.

⁹⁰³ *Id.* at 845–46.

⁹⁰⁴ *Id.* at 834; see also *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006) (“We

discriminate based on viewpoint when the speech is the government's own—a proposition for which, notably, the Court cited *Hazelwood*.⁹⁰⁵

In citing *Hazelwood* for that legal standard, the Court signaled that it viewed that case as implicating the policy behind the government speech doctrine. The affinity between *Hazelwood* and the government speech cases is clear enough. Additionally, since the educational context is a pristine instance of government interest in communicative autonomy, a public school's regulation on viewpoint grounds of messages reasonably perceived as bearing its imprimatur is in keeping with the Supreme Court's recognition of government speech prerogatives.⁹⁰⁶

Five years after the Court's decision in *Rosenberger*, the Ninth Circuit reemphasized the distinction between government speech and individual student expression in *Downs v. Los Angeles Unified School District*.⁹⁰⁷ In *Downs*, a teacher brought action under 42 U.S.C. § 1983 against his school district to allow him to post material on a school bulletin board that contrasted with materials placed on the board as part of the district's Gay and Lesbian Awareness Month.⁹⁰⁸ The Ninth Circuit rejected *Downs*'s assertion that *Hazelwood* controlled his case.⁹⁰⁹ The court reluctantly conceded that it was bound under *stare decisis* to interpret *Hazelwood* according to the viewpoint neutrality lens of the court's *en banc* holding in *Planned Parenthood v. Clark County School District*.⁹¹⁰ However, the court concluded that, notwithstanding *Planned Parenthood*'s misguided "viewpoint neutrality microscope," the school's actions in the present case

have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because [it is] legally required to do so.").

⁹⁰⁵ *Rosenberger*, 515 U.S. at 834; see also Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.").

⁹⁰⁶ See *Pleasant Grove City*, 555 U.S. at 464 (holding that placing a permanent monument in a public park constituted an exercise of government speech not subject to Free Speech Clause scrutiny); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, the government has to say something..."). The standards guiding a finding of government speech depart in certain respects from those employed in the *Hazelwood* analysis — due, no doubt, to the unique educational environment at issue in the latter — but the policy justifications are identical.

⁹⁰⁷ *Downs*, 228 F.3d at 1009.

⁹⁰⁸ *Id.* at 1005.

⁹⁰⁹ *Id.* at 1011.

⁹¹⁰ *Id.* Though *stare decisis* forced the *Downs* court to view *Hazelwood* through the flawed interpretation of *Planned Parenthood*, the court's reasoning in *Downs* remained sound. The court correctly concluded that the bulletin board was clear government speech, and the school should consequently not be forced to burden speech bearing its imprimatur with a viewpoint neutrality requirement. *Id.* *Downs* remains an important case in illustrating the legal distinctions and impact of government and student speech.

did not implicate the court's own (albeit flawed) prior interpretation of the *Hazelwood* rule.⁹¹¹ The court noted that the only parties with control over the bulletin board's content were school faculty and staff, and the bulletin board was not open to the public or the student body as a kind of open forum for wide discussion of political views.⁹¹² The Ninth Circuit cited *Rosenberger* directly in its justification for granting the school district control over the bulletin board's content.⁹¹³ The court properly recognized that in situations when the government unequivocally offers its own viewpoint and value system in the public setting, the state must be allowed to protect its voice by restricting content that might be perceived as an extension of the state.⁹¹⁴ A viewpoint neutrality mandate simply does not fit properly into such an analytical context.

In a similar fashion, the Fifth Circuit considered in *Chiras v. Miller* whether a high school student could bring action against the Texas State Board of Education for refusal to approve a specific science textbook for state funding.⁹¹⁵ The court held that when the speech in question is unambiguously the government's own, the state's authority to control and protect its message operates independently from any viewpoint neutrality mandate.⁹¹⁶ Viewpoint neutrality is simply a different requirement for an entirely different kind of speech.⁹¹⁷

⁹¹¹ *Id.*

⁹¹² *Downs*, 228 F.3d at 1012 ("We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth: LAUSD, by issuing Memorandum No. 111, and Leichman High, by setting up the Gay and Lesbian Awareness bulletin boards. The bulletin boards served as an expressive vehicle for the school board's policy of 'Educating for Diversity.'"); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 617 (2008) ("Concluding that the bulletin board's contents continued to reflect the district's own expression even when it invited individuals to join and contribute to it, the court held that the district could not be compelled to allow others to distort its position.").

⁹¹³ *Downs*, 228 F.3d at 1013 ("When the government is formulating and conveying its message, 'it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted' by its individual messengers.") (quoting *Rosenberger*, 515 U.S. at 833).

⁹¹⁴ *Id.*; see also *Burch v. Barker*, 861 F.2d 1149, 1158 (9th Cir. 1988) ("[*Hazelwood*] described the distinction it was drawing between speech protected by standards of *Tinker* and speech which the educators could regulate as the distinction "between speech that is sponsored by the school and speech that is not.") (internal citations omitted).

⁹¹⁵ *Chiras v. Miller*, 432 F.3d 606, 607 (5th Cir. 2005).

⁹¹⁶ *Id.* at 612 (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

⁹¹⁷ Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 827 (2009) ("There is a critical distinction between the government as speaker in setting the curriculum and the government as regulator in punishing student speech.").

D. The Effect of Over-Expanding *Hazelwood*'s Scope

The confusion over the role of *Hazelwood* in public schools gives rise to opinions like *Bannon v. Palm Beach*, a case in which the Eleventh Circuit considered whether a school could compel a student to remove Christian words and symbols from a mural painted as part of a school beautification project.⁹¹⁸ The court ultimately held that the panels constituted school-sponsored expression and that school had the authority to remove religious content from the panels.⁹¹⁹ The problem with *Bannon* does not lie with the court's conclusion; a strong case can be made (and indeed was made) that a painted panel displayed indefinitely in a school would reasonably bear the school's imprimatur. However, the court arrived at its holding by unnecessarily analyzing whether the school's policy was viewpoint-neutral.⁹²⁰ The court acknowledged earlier in the opinion that government expression, even if delivered through the speech of an individual, may be regulated due to its subject matter; no mention is ever made of a viewpoint neutrality requirement.⁹²¹ However, the court relied on its prior ruling in *Searcey* to extrapolate that *Hazelwood* requires viewpoint-neutrality in the regulation of student speech.⁹²² Though the *Bannon* Court may have arrived at the correct decision, its logic represents a dangerous pattern. *Hazelwood*'s actual language and intent is ignored, leaving courts to apply their own language in any number of incorrect contexts.

In *Fleming v. Jefferson County*, the Tenth Circuit considered the constitutionality of Columbine High School's policy against religious references on student-designed painted tiles displayed in the school hallways.⁹²³ The court upheld Columbine's policy, citing concerns over religious debates and painful reminders of the school shooting as reasonable pedagogical concerns.⁹²⁴

In the penultimate paragraph of *Fleming*, the court shored up its argument against a viewpoint neutrality standard with dicta describing the absurd conclusions that can result from a legal standard requiring a school to employ only viewpoint-neutral speech regulation.⁹²⁵ The court considered

⁹¹⁸ *Bannon v. Sch. Dist. of Palm Beach Cnty*, 387 F.3d 1208, 1210 (11th Cir. 2004).

⁹¹⁹ *Id.* at 1217.

⁹²⁰ *Id.* at 1215.

⁹²¹ *Id.* at 1213.

⁹²² *Id.* at 1215 n.4; *see Searcey*, 888 F.2d at 1325.

⁹²³ *Fleming*, 298 F.3d at 921–23.

⁹²⁴ *Id.* at 934.

⁹²⁵ *Id.*

the burden on schools of having to select between the unattractive options of allowing highly offensive speech, or disallowing patently innocuous or favored speech, all in the name of viewpoint neutrality.⁹²⁶ The court drove the point home by concluding that, “when posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it.”⁹²⁷

Some scholars have suggested that the Rehnquist court passed up a golden opportunity to settle this dispute when it denied certiorari to *Fleming* in 2003.⁹²⁸ The facts of the case appeared to set an ideal stage for a firm decision from the court clarifying the gray areas of *Hazelwood*. The permanent presence of the tiles in school hallways, the tension between creative deference and faculty oversight in the project, and the shroud of emotionality surrounding the dispute in the wake of the Columbine tragedy all seemed to point to the Court confronting the issue head on. However, the Court may well have passed over an opportunity, and its denial of certiorari leaves unanswered *Fleming*’s provocative argument in favor of focused regulatory targeting of specific viewpoints to protect and facilitate the pedagogical interests of the school whose voice is implicated in the subject speech.

Fleming nonetheless confronted an important reality in school policy. When schools are required to adopt policies that must turn a blind eye to viewpoint, the schools must swing to either extreme on the spectrum of expressive tolerance. The administration must choose between allowing a wide range of student speech — including speech that misrepresents the school’s own voice and interests — and maintaining its pedagogical function through a kind of Draconian comprehensive ban on all speech on the subject in dispute. The dicta from *Fleming* focus specifically on the latter scenario, but both eventualities are equally plausible and equally unacceptable in a classroom context. In *Fleming*, the Tenth Circuit recognized that the right of students to express themselves within a First Amendment framework is an essential component of the American

⁹²⁶ *Id.*

⁹²⁷ *Id.*

⁹²⁸ Tobin, *supra* note 29, at 256 (“[T]he Court missed an opportunity to clarify the *Hazelwood* test regarding viewpoint neutrality and let stand a holding that suppresses the free speech not only of students, but also of parents and the local community.”); see also Filipp Kofman, *Fleming v. Jefferson County: A Need for Viewpoint Neutrality*, 22 GEO. MASON U. CIV. RTS. L.J. 151, 176 (2012); Katie Hammett, Comment, *School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy*, 55 ALA. L. REV. 393, 407 (2003).

Constitutional experience.⁹²⁹ Yet the court also recognized that a viewpoint neutrality rule manifests its ill fit in the *Hazelwood* context through inducing awkward and unnecessary overregulation of student speech.⁹³⁰

Viewpoint-based regulation provides schools with the tools necessary to maintain control over their own voices and reputation without having to “swing the pendulum” to one end or the other — in other words, either having to leave their apparent imprimatur unregulated, or being forced to protect their interest by eliminating participation in entire categories of speech. Viewpoint-based regulation acts as a kind of precise surgical tool, identifying specific problems without having to forbid student discourse that does not interfere with the school’s educational objectives.

E. A Note on Reasonableness

Critics of this approach to viewpoint-specific restrictions in public schools may well approach a school’s capacity for responsible policy with a certain degree of libertarian cynicism. Government cannot be trusted to implement viewpoint discriminatory policies in a truly responsible and constitutional manner, they might argue, so it is ultimately better to give schools a simple rubric by way of viewpoint neutrality.⁹³¹ This concern is not unfounded; after all, many public schools have routinely abused their power by arbitrarily restricting student viewpoints that do not implicate the imprimatur concerns that give rise to *Hazelwood*’s rule.⁹³²

In light of these concerns, it is important to emphasize that the viewpoint-specific speech restrictions authorized in *Hazelwood* must be bounded not only by the “school-imprimatur” circumstance, but also by *pedagogical reasonableness* in order to be constitutionally authorized.⁹³³

At any rate, the discussion, whether one supports neutrality or viewpoint-specific restrictions, must operate within the bounds of the assumption that courts may regulate school policy within the rational context of *Cornelius* and the curricular bounds set forth in *Hazelwood*.⁹³⁴

⁹²⁹ *Fleming*, 298 F.3d at 934.

⁹³⁰ *Id.*

⁹³¹ See Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 751–66 (2011).

⁹³² Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 316 (1992).

⁹³³ R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U.L.J. 175, 204 (2007) (“A school’s regulation of such speech . . . must always at a minimum promote a legitimate purpose of a public educational system in a reasonably tailored way.”).

⁹³⁴ See *Cornelius*, 473 U.S. at 811; *Fleming*, 298 F.3d at 934 (“A number of constitutional restraints

VI. CONCLUSION

Courts have vigorously debated the limits of school authority over student speech, specifically a school's ability to regulate speech on the basis of viewpoint under the terms of *Hazelwood*. Taken at face value, it is easy to dismiss policies of viewpoint regulation as unduly censorial and instead embrace viewpoint neutrality as the answer to protecting student expression within the schoolhouse gate.⁹³⁵

However, a nuanced and disciplined examination of *Hazelwood* reveals that courts and scholars may be having the wrong argument.⁹³⁶ The Court intended its holding in *Hazelwood* to apply only to a specific set of circumstances: namely, theatrical productions, publications, and other publically accessible activities that could reasonably bear the school's imprimatur. In other words, the Court intended schools to have complete control over speech that appears to be the official voice and opinion of the school and ultimately the government. Viewing *Hazelwood* in this light, it becomes apparent that schools must be given the authority to regulate this kind of speech, and it is appropriate — indeed intuitive — that such regulation be viewpoint-specific. Were schools given any less authority, the government's voice would no longer be its own and would instead find itself under the control of a polarizing noise of individual opinions and contradictory viewpoints. Viewpoint neutrality simply has no place within an accurate reading of *Hazelwood*.

Hazelwood, and the viewpoint regulation it allows, protects schools by granting them the authority they need, no more and no less, to maintain a singular institutional voice and to preserve the learning environment for which they exist to foster in the first place.

continue to operate on public schools' actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and substantive due process.").

⁹³⁵ See Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1566 (2003).

⁹³⁶ Waldman, *supra* note 8, at 123 ("The confusion and dissension over whether *Hazelwood* permits viewpoint-based restrictions has been an unfortunate byproduct of its overextension.").

