Divining *Hazelwood*:
The Need for a Viewpoint Neutrality Requirement in School Speech Cases

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Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary.

—John Milton, *Areopagitica*¹

In the post–September 11 world, freedom of speech is under attack. The Attorney General stated in congressional testimony that anyone who questioned the Bush administration was aiding terrorists;² Justice Department officials seized the contents of a package mailed between two reporters on the grounds that it implicated national security;³ and a man shopping at an Albany mall was forced to leave the building because, according to mall officials, he was upsetting other shoppers by wearing a T-shirt reading “Give Peace a Chance.”⁴ A Michigan student who wore a shirt to school displaying a picture of President Bush and the phrase “international terrorist” was told to turn the shirt inside out. His principal cited an incorrect holding of a Supreme Court speech case to justify her request.⁵ In New York, a student displaying a pin of the Palestinian flag

¹ B.A., Harvard College, 2000; M.Phil, University of Cambridge, 2001; J.D. Candidate, Harvard Law School, 2004. I am especially grateful to Martha Minow for her wise guidance and suggestions throughout the research and writing process and to the staff of the ACLU of Massachusetts, where I first became interested in this topic. Dan Coquillette has also set a model for legal research and writing. My thanks to the excellent editing staff of the *Harvard Civil Rights-Civil Liberties Law Review*, particularly Sarah Boonin, Charu Chandrasekhar, Ben Fitzpatrick, Sara Gutierrez, and Matt Mazur. Arun Bhoumik, Josh Goodman, Anna Lumelsky, Ben Schiffrin, and Beth Schonmuller gave valuable suggestions and encouragement. Finally, I wish to thank John and Rosemary Tobin, for their scholarly high standards and unfailing parental support. Any errors are my own.


³ “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends,” quoted in Eric Lichtblau & Adam Liptak, *Threats and Responses: On Terror, Spying and Guns*, *Ashcroft Expands Reach*, *N.Y. Times*, Mar. 15, 2003, at A1.

⁴ Mary Jacoby, *War on Terror Spurs Secrecy, Experts Say*, *St. Petersburg Times*, Mar. 28, 2003, at 10A.


was asked to remove it or leave the classroom. Any one of these incidents alone would be cause for alarm, but together they signal an erosion of free speech rights that reminds us that even those rights that are taken for granted must be defended if they are to be preserved. As James Madison wrote of the rights of conscience, including the freedom of speech:

We shall be told that in this enlightened age, the rights of conscience are perfectly secure: There is no necessity of guarding them; for no man has the remotest thoughts of invading them. If this be the case, I beg leave to reply that now is the very time to secure them.—Wise and prudent men always take care to guard against danger beforehand, and to make themselves safe whilst it is yet in their power to do it without inconvenience or risk.

We are arguably in a time of danger now, so it may be asking a bit much to seek a broadening of free speech rights. This Note will do so anyway by arguing for the preservation and extension of free speech rights, particularly those of students. The free speech rights of students are worth preserving and extending both because some students will one day become the leaders of our country, charged with preserving the Bill of Rights, and because all of them are citizens whose sense of the strength of the Bill of Rights develops in the hallways and classrooms of their schools.

In 1988, the Supreme Court decided the landmark student censorship case of *Kuhlmeier v. Hazelwood School District*, holding that a public school has the right to censor a student publication bearing the imprimatur of the school as long as that censorship is reasonably related to a pedagogical concern. Reactions from both speech advocates and school administrators were swift. “This decision cuts the First Amendment legs off the student press,” said one journalist. A school administrator defended the decision on the grounds that “[i]t reaffirms our position that the board of education has authority to establish curricula.” Some states,


*supra* note 5.


8 The question of at what age students should be afforded full free speech rights is best reserved for another paper; issues of levels of maturity and understanding are in play for all ages, not to mention the need to balance state interests, impressionability, and parental involvement. This Note will focus for the most part on the free speech rights of high school students, although one of the cases I discuss involves an elementary school student.


fearing that the decision would chill the speech of student journalists, passed legislation to extend explicit protections to student newspapers.\textsuperscript{12} 

Fifteen years later, \textit{Hazelwood} has been extended beyond the realm of student newspapers to include the speech of students, teachers, and guests in classes and assemblies. As a result, a question that only Justice William Brennan observed explicitly at the time of the decision has resurfaced: in protecting the prerogative of school boards to control curricula, did the Supreme Court do away with a key First Amendment protection—the requirement of viewpoint neutrality? The concept of viewpoint neutrality requires that any speech restrictions be made without reference to the viewpoint expressed in the speech. The circuit courts have split on the question of whether the \textit{Hazelwood} holding meant to require viewpoint neutrality, and the Supreme Court has recently denied certiorari in \textit{Fleming v. Jefferson County School District R-1},\textsuperscript{13} a case which would have addressed the question. As a result, the Court has left open not only the issue of the free speech rights of students (and parents) within schools, but also the very definition of viewpoint neutrality itself.

This Note will examine the current circuit court split regarding the \textit{Hazelwood} decision and argue that, while evidence indicates that the 1988 Court might have intended to abandon the viewpoint neutrality requirement for school speech, the Court should reinstate the requirement explicitly at the next available opportunity. Further, this Note will argue that viewpoint discrimination doctrine in the school setting might be clarified by making a distinction between viewpoint discrimination regarding religious speech in a school setting, potentially implicating the Establishment Clause, and viewpoint discrimination directed at non-religious speech, which should be strictly forbidden.

Part I will examine the holding of \textit{Hazelwood} and the reaction to it, including reference to the Supreme Court papers of Justice Thurgood Marshall, interviews with the attorneys for the students, and a brief discussion of the legislative response to the case. Part II will offer a detailed discussion of the cases that comprise the circuit split on viewpoint neutrality in \textit{Hazelwood}. Part III will discuss the question left open by \textit{Hazelwood} and the related issue of the Supreme Court’s unwillingness to clarify the distinction between content-based and viewpoint-based censorship (if indeed there is a true distinction). This Part will also explore theories of public education and local control in seeking a possible solution to the viewpoint discrimination problem and will examine two local speech cases which involve both free speech and religion clause issues. Part IV will examine the particularly intriguing \textit{Fleming} case and its complicated relationship to conservative arguments supporting viewpoint discrimination for the sake of local control. Part V will conclude the pa-

\textsuperscript{12} See infra Part I.C for further discussion of state legislation in this area.

\textsuperscript{13} 298 F.3d 918 (10th Cir. 2002), cert. denied, 537 U.S. 1110 (2003).
per with an argument in favor of the institution of the viewpoint neutrality requirement in school speech cases, with some restrictions retained in order to handle the complex question of religious speech.

I. **Hazelwood: History, Holding, and Context**

   **A. The Background of Hazelwood**

   The *Hazelwood* case arose from a decision by the principal of Missouri’s Hazelwood East High School to censor two articles scheduled to appear in the May 13, 1983 edition of the school’s student newspaper, *Spectrum*.\(^{14}\) The principal, Robert Eugene Reynolds, was concerned that one of the articles, which addressed teen pregnancy, was inappropriate for some of the school’s younger students and might reveal the identity of pregnant students, despite the use of aliases in the article.\(^{15}\) Reynolds believed that the second article, which examined the effects of divorce on students at Hazelwood East, was inappropriate because it did not give a father named in the piece an opportunity to respond to his daughter’s comments or to approve their publication in the article.\(^{16}\) He directed the newspaper’s advisor, Howard Emerson, to remove the articles. Emerson, because of time constraints, decided to solve the problem by reducing the size of the newspaper from six to four pages, thereby removing several articles with which Reynolds had no problem.\(^{17}\)

   The student editors of *Spectrum*, with attorney Leslie D. Edwards, filed suit in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages.\(^{18}\) The District Court denied the injunction, holding that no First Amendment violation had occurred.\(^{19}\) The District Court held that school administrators may restrict student speech in activities that are “an integral part of the school’s educational function” so long as their decision has “a substantial and reasonable basis.”\(^{20}\)

   The Eighth Circuit reversed, holding that *Spectrum* was a public forum because the newspaper was “intended to be and operated as a conduit for student viewpoint.”\(^{21}\) The court relied on *Tinker v. Des Moines Independent Community School District*\(^{22}\) for the proposition that school officials could not censor student speech unless the censorship was “nec-

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\(^{14}\) *Hazelwood*, 484 U.S. at 262.
\(^{15}\) *Id.* at 263.
\(^{16}\) *Id.*
\(^{17}\) *Id.* at 264.
\(^{19}\) *Id.* at 1467.
\(^{20}\) *Id.* at 1463 (quoting Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)).
\(^{21}\) Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372 (8th Cir. 1986).
\(^{22}\) 393 U.S. 503 (1969).
essay to avoid material and substantial interference with school work or discipline . . . or the rights of others” and asserted that Reynolds could not have foreseen that the articles he censored would have materially disrupted the school environment.23

The Supreme Court reversed 5-3, 24 with Justice Byron White writing for the majority. The Court held that Spectrum was not a public forum. Therefore, school officials do not violate the First Amendment when they limit student speech in school-sponsored activities, as long as those restrictions are “reasonably related to legitimate pedagogical concerns.”25 Although Spectrum published a Statement of Policy in its September 14, 1982 issue stating that “Spectrum, as a student-press publication, accepts all rights implied by the First Amendment,”26 the majority found that the statement, “understood in the context of the paper’s role in the school’s curriculum, suggests at most that the administration will not interfere with the students’ exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum.”27

The opinion relied in part on the Court’s earlier holding in Bethel School District No. 403 v. Fraser,28 in which the Court had permitted censorship of a student’s vulgar, but not illegally obscene, speech at a school assembly because the school was entitled to “disassociate itself” in a way that would show those outside the school that the vulgarity was “wholly inconsistent with the ‘fundamental values’ of public school education.”29

The theme of fundamental values in public education runs throughout the Hazelwood opinion. Justice White wrote that “the question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”30 He continued by arguing that educators should be able to exert authority over what their students learn and ensure that individual views are not attributed to the school.31 More specifically, Justice White observed that a school may disassociate itself from speech “that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”32 Such a statement would seem to imply that the Court was implicitly approving

23 Hazelwood, 795 F.2d at 1374, 1375 (quoting Tinker, 393 U.S. at 511).
24 Justice Powell had retired, and his seat was not yet filled.
26 Id. at 269.
27 Id.
29 Id. at 685–86.
30 Hazelwood, 484 U.S. at 270–71.
31 Id. at 271.
32 Id.
viewpoint discrimination (the analysis of whether speech is biased or prejudiced would necessarily involve viewpoint discrimination), but the Court does not explicitly state such a holding. Its holding that *Spectrum* was not a public forum leaves open the question of whether a nonpublic forum in a school setting, unlike a nonpublic forum unrelated to a school, would be subject to viewpoint discrimination.\(^{33}\)

The Court concluded that Principal Reynolds had acted reasonably in deleting the articles on pregnancy and divorce from the paper.\(^{34}\) The Justices believed that Reynolds could reasonably have been concerned about preserving the pregnant students’ anonymity and likewise about the injustice of publishing quotes about a father without giving that father the opportunity to respond.\(^{35}\)

Justice Brennan, joined by Justices Harry Blackmun and Marshall, dissented. Just as the majority had focused on values in their opinion, so did Justice Brennan emphasize values in his. He particularly highlighted civic values, including free speech, in the context of preparing students “for life in our increasingly complex society and for the duties of citizenship in our democratic Republic.”\(^{36}\) The dissent distinguished between student speech that directly interferes with a school’s pursuit of its pedagogical mission (for example, a student standing on a soapbox to deliver a political speech during calculus class) and speech, such as that of *Spectrum*, that interferes with pedagogical purposes “merely by expressing a message that conflicts with the school’s, without directly interfering with the school’s expression of its message.”\(^{37}\)

In addition to the case of *Spectrum*, the dissent suggested three other hypothetical situations of indirect interference: a student responding to a political science teacher’s question with the comment “socialism is good,” students sitting passively in class wearing a symbol of protest against the government, as happened in *Tinker*, and a school gossip who sits around outside of class sharing details of others’ personal lives.\(^{38}\) Justice Brennan wrote that “[i]f mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, con-

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\(^{33}\) The standard for control over speech in a nonpublic forum is articulated in * Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985) (holding that the government may impose content-based restrictions which are “reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view”).

\(^{34}\) *Hazelwood*, 484 U.S. at 274.

\(^{35}\) Id. at 274–75.

\(^{36}\) Id. at 278 (Brennan, J., dissenting).

\(^{37}\) Id. at 279 (Brennan, J., dissenting).

\(^{38}\) Id. at 279–80 (Brennan, J., dissenting).
Divining our public schools into ‘enclaves of totalitarianism,’ that ‘strangle the free mind at its source.’”

Citing his own concurrence in Fraser, Justice Brennan reiterated that “[t]he mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint or an unsavory subject, does not justify official suppression of student speech in the high school.” The dissent further observed that the Court had not previously made the distinction between independent student speech and school-sponsored speech that it does in the Hazelwood holding, and that the three main arguments used by the majority to allow the censorship can each be answered. Addressing the first of these arguments, that a school must be able to control its curriculum, the dissent observed that the Tinker holding would still permit school newspapers to be edited for poor grammar, writing or research because “to reward such expression would ‘materially disrupt’ the newspaper’s curricular purpose,” but “[t]he same cannot be said of official censorship designed to shield the audience or dissociate the sponsor from the expression.”

Regarding the majority’s second argument, that a school has a pedagogical interest in shielding its audience, the dissent observed, “Tinker teaches us that the state educator’s undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as ‘thought police.’” The dissent then addressed the question whether powers of viewpoint discrimination attach to official sponsorship of a school newspaper:

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. The State’s prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State’s prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

Finally, the dissent argued that a school may disassociate itself from student expression through more limited, though equally efficacious, ap-
proaches than censorship. “[The district] could, for example, require the student activity to publish a disclaimer” or otherwise issue a response to student speech announcing the school’s official position. In a line famous to student journalists, Justice Brennan concluded, “[t]he young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.”

B. The Court’s Intention Regarding Viewpoint Discrimination

The question of what the Court intended to hold regarding viewpoint discrimination is much debated in the circuit courts, and it is difficult to tell from the opinions what the majority actually intended. It seems apparent from the language of the dissent that Justice Brennan feared that the majority had held viewpoint discrimination permissible in the public school setting, and certainly the majority’s unfinished forum analysis would seem to tilt toward their desire to imply approval of viewpoint discrimination. But Justice Brennan observed that even the school district acknowledged that viewpoint discrimination was impermissible: “Petitioners themselves concede that ‘control over access’ to Spectrum is permissible only if ‘the distinctions drawn . . . are viewpoint neutral.”

The questions asked in oral argument indicate that the justices were concerned with the issue of viewpoint discrimination. First, Robert P. Baine, attorney for the school district, responded to a question about whether the Fraser case had been analyzed under the Tinker disruption standard by observing that “there was no indication in Fraser, other than a few laughs, that the speech was disruptive. And I think the Court decided it on really the content and the people involved in the audience.” None of the Justices responded directly to his point. Later in his remarks, Mr. Baine volunteered that “I think that you can teach—not good taste, but I think that you can teach an acceptable standard which does not suppress viewpoints, all right, and then allow the student and everybody else to grow as their time and maturity grows.” In the most explicit reference to viewpoint discrimination in the transcripts, one justice asked, “You said that the teacher could have just total power or censorship. That would

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47 Id. at 289 (Brennan, J., dissenting).
48 Id. at 291 (Brennan, J., dissenting).
49 See infra Part II.
50 Id. at 287 n.3 (Brennan, J., dissenting) (citations omitted).
52 Id. at 388.
53 The transcript of the oral arguments cited in these footnotes does not attribute questions to individual justices. Where possible, I have attributed particular questions to individual justices according to an abridged transcript published in May It Please the Court: The First Amendment 101–18 (Peter Irons ed., 1997).
mean that he could exclude all political articles that favored the Republicans and print only those that favored the Democrats. I do not think that you mean that, do you?” After a few hesitations, Mr. Baine responded, “The answer is, if you can establish clearly on the part of the school a viewpoint of discrimination, that that would abridge fundamental First Amendment rights.”

A few questions later, Justice Antonin Scalia asked:

Let us talk about viewpoint discrimination. The principal could not exclude an article that discussed teenage sexuality and pregnancy of some of his students, and portrayed the whole thing in a favorable light—in effect, sanctioning promiscuity by the students—but permit an article that discussed the same topic, but seemed to frown upon that kind of activity. The principal could not take a position on a subject like that. If he allows sexuality to be talked about, he has to allow both the pros and the cons of adolescent sex to be set forth. Is that right?

After some hesitation, a prompting question asked, “Are you categorical that the principal or whoever has the last word cannot exercise that last word on the basis of some value judgments that discriminate between various positions on particular issues?” Mr. Baine responded, “I am saying that he can.”

Second, Leslie Edwards, the attorney for the student journalists, raised the issue of viewpoint discrimination directly during her presentation to the Justices. She observed that the issue of the control of the school district over the newspaper implicates the issue of viewpoint discrimination. A few statements later, Ms. Edwards noted that the First Amendment is meant to preserve viewpoint neutrality. She stated, “I think that the school board, the principal and superintendent, superiors, can delegate the editorial function to an advisor, and he can exercise that in whichever way he thinks—as long as it is not viewpoint-based. Now, if he says that it is viewpoint-based, then I do not think that would be protected.”

Justice Scalia then asked a question that now seems anticipatory of his question during oral arguments in the 

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54 Transcript of Oral Arguments, supra note 51, at 390.
55 Id. at 391.
56 Id.
57 Id.
58 Id. at 393.
59 Id. at 395 (“The harm that the First Amendment is designed to prevent is that a viewpoint that the government does not like for any reason is excluded. And when you have students allowed to make certain editorial control decisions or allowed to have certain access to their expression in the written columns, then the First Amendment applies, and that is protected.”).
60 Id.
he asked if the “constitutional choice” was either “no school paper, or . . . a school paper that carries articles like smoking pot is fun.”62

After some back and forth on this issue, Ms. Edwards maintained the need for viewpoint neutrality, saying:

[V]iewpoint discrimination is sort of a key to what they did in this case. And it reminds me of something that you asked of Mr. Baine. The 1977 article on pregnancy said, “This is horrible, trauma, leaves scars; do not ever do this—it has nothing to do with, you know, being a good person in school.” The 1987 article says, “I am happy having this baby.” And the effect, whether the principal intended it or not, was to leave out that what he perceived, which you categorized as a moral choice in some sense—to leave out that one viewpoint that that one student had, which said, “You know, this is okay for me today—and to only allow—because for some arbitrary reason, this article on pregnancy was allowed ten years before—to only allow the viewpoint that this is a horrible thing, and do not dare go and do anything like this if you want to be a decent person.63

Later in the argument, Ms. Edwards conceded that the case would have been different if the paper’s advisor, and not the principal, had censored the articles. Clarifying her position, she observed, “I think they [the censors] have to be journalistically involved, so the motivation of the school is good journalism and not a viewpoint.”64

The comments about viewpoint discrimination discussed above reflect the general tenor of the oral arguments and show how central the issue was during the presentation of the case. Judging particularly from Justice Scalia’s comments distilling the issue into a question of whether a school must have a completely open newspaper or no newspaper at all, it would seem possible that at least a few of the justices in the majority of five had no problem with allowing viewpoint discrimination in a school setting. On the other hand, the absence of any specific reference to the viewpoint neutrality requirement of general First Amendment forum analysis might indicate that, in order to build the majority, such an explicit departure from traditional jurisprudence was not feasible.


63 Id. at 396.

64 Id. at 400.
An examination of the papers of Justice Thurgood Marshall, the only Justice on the bench at the time whose papers are available to the public, reveals little evidence of any discussion of the issue during the circulation of the majority opinion or among the dissenters. However, one memo from Justice John Paul Stevens, traditionally a staunch First Amendment supporter and thus a somewhat surprising member of the majority in this case, sought two seemingly minor revisions to Justice White’s initial draft of the majority’s opinion. One of his changes sought to restrain the sweep of language relating to the standard set out in *Hazelwood*. Justice White originally observed:

> It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression appears to have been *wholly arbitrary*—for example, when school officials give no reason whatsoever for refusing to disseminate facially permissible student speech—that the First Amendment is so “directly and sharply implicated,” as to require judicial intervention to protect students’ constitutional rights.65

Justice White’s take on the case, that only censorship without reason implicates the First Amendment, indicates a narrow reading of the First Amendment in the school speech context. Justice Stevens, on the other hand, wrote in his memo,

> I am troubled by the “wholly arbitrary” standard on the last line of page 11. Even if correct, the use of that term in a First Amendment case is somewhat jarring. Could you substitute something like “appears to be wholly unrelated to pedagogical concerns,” or, perhaps, “appears to have no valid educational purpose”?66

Justice White agreed to the suggested changes in a memo three days later. Such a small suggestion may appear irrelevant to the question of viewpoint discrimination, but it does seem to indicate that Justice Stevens was concerned about the scope of the holding. It is not impossible that he might also have been reluctant to include an explicit disavowal of the viewpoint neutrality requirement.

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C. Reaction to the Hazelwood Decision

Given the absence of explicit discussion of viewpoint discrimination in the majority opinion, there was little reaction to the case’s implications for viewpoint neutrality. Even Ms. Edwards, who spent so much of her oral argument answering questions on viewpoint discrimination, could not recall its role in the case in a recent interview. Her colleague, Steve Miller, however, noted that he did not question that the holding allowed viewpoint discrimination. He observed:

The issue of viewpoint discrimination is an unexpected one for me. Having been away from this area of the law for so long, I was actually somewhat astonished to learn that some courts have construed the case as prohibiting, or at least not authorizing, censorship based on the speaker’s views. I always thought that it quite clearly did sanction viewpoint discrimination . . . if . . . not, why bother with all the discussion about cultural values and pedagogical concerns and such-like stuff.

As noted above, the reaction at the time Hazelwood was announced was vociferous, if mixed. Student journalists felt that their rights had been trampled upon, and school administrators felt vindicated. Journalism teachers, however, sided with their students, observing that the decision “ignores the value of a vibrant student press and encourages a repressive school environment.” Several state legislatures took matters into their own hands to extend specific protection to student journalists, adding to the small number of states which had such protections prior to the decision. Arkansas, Colorado, Iowa, Kansas, and Massachusetts all passed legislation establishing varying degrees of protection in the years following Hazelwood.

67 E-mail from Leslie D. Edwards to Susannah Tobin (Jan. 4, 2003) (on file with author).
68 E-mail from Steve Miller to Susannah Tobin (Jan. 21, 2003) (on file with author).
70 The Iowa Student Free Expression Law, Iowa Code § 280.22 (1989), enacted May 11, 1989, explicitly extends freedom of speech to students, “including the right of expression in official school publications.” Id. § 280.22(1). The code limits students’ rights insofar as they cannot express, publish or distribute anything obscene, libelous or slanderous, or any materials encouraging students to commit unlawful acts or cause disruption of the school. Id. § 280.22(2). Iowa disassociates schools from student speech “unless the school employees or officials have interfered with or altered the content of the student speech or expression.” Id. § 280.22(6).

The Colorado Student Free Expression Law, Colo. Rev. Stat. § 22-1-120 (1990), enacted June 7, 1990, is substantially similar but for two provisions. One notes that if a school-sponsored publication is part of a graded or credit class, the advisor is able to limit
A strongly speech-protective example of this legislation is the Massachusetts Student Free Expression Law, enacted just seven months after Hazelwood. It gives broad protection to students under the Tinker standard, stating:

The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish, and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions.

Illustrating Justice Brennan’s point that there are other ways than censorship for schools to disassociate themselves from affiliation with student speech, the act notes that students’ expression in exercise of their rights will not be considered an expression of school policy.

Three states—California, Washington, and Pennsylvania—already had statutes or administrative codes on the books protecting the rights of writing assignments for students working on the publication and to control the learning experience of the students. Id. § 22-1-120(6). The other provision states that “nothing in this section shall be construed to limit the promulgation or enforcement of lawful school regulations designed to control gangs.” Id. § 22-1-120(8). It is worth noting that the Colorado statute uses the Supreme Court formulation of “public forum” in defining a student publication: “If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school.” Id. § 22-1-120(2).

The Kansas Student Publications Act, KAN. STAT. ANN. §§ 72.1504–72.1506 (1992), enacted February 21, 1992, is a bit more restrictive in its language but still prohibits suppression of speech “solely because it involves political or controversial subject matter.” Id. § 72.1506(a). The school district and its employees are disassociated from any problems stemming from student exercise of free expression. Id. § 72.1506(e).

The Arkansas Student Publications Act, ARK. CODE ANN. §§ 6-18-1201–6-18-1204 (1995), enacted April 10, 1995, is similar to the other acts discussed above in prohibiting publications that are obscene, libelous or slanderous, and publications that incite students to commission of unlawful acts. Id. § 6-18-1204. Additionally, the Arkansas statute prohibits publications that constitute an unwarranted invasion of privacy under state law. Id. § 6-18-1204(3).

The scope of this provision was tested by two brothers at South Hadley High School who wore T-shirts reading “See Dick Drink. See Dick Drive. See Dick Die. Don’t be a Dick.” “Coed Naked Band: Do It to the Rhythm,” and “Coed Naked Civil Liberties” to school in order to test the school’s dress code. Both boys were sent home. Jonathan Pyle, Speech in Public Schools: Different Context or Different Rights?, 4 U. PA. J. CONST. L. 586, 586–87 (2002). The Supreme Judicial Court struck down the clause of the school’s dress code that banned messages thought to be “obscene, profane, lewd, or vulgar.” Pyle v. S. Hadley Sch. Comm., 667 N.E.2d 869, 871 (Mass. 1996).
student journalists before the Hazelwood decision. Some counties and local school boards also took steps to strengthen First Amendment protections for student journalists by adopting policies that establish school newspapers as public forums. Baltimore County (Maryland) and Dade County (Florida) are two such districts.

At least one state rejected an attempt to strengthen the rights of student journalists. A similar bill to those discussed above was defeated in the Nevada legislature in 1989, and the bill’s sponsors accused those voting against it of characterizing high school students as unreasonable, irresponsible, and unintelligent.

The Student Press Law Center (SPLC), a nonprofit organization committed to supporting student journalists and providing advice on potential censorship issues, reports on its Web site that after the Hazelwood

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74 The California Student Free Expression Law, CAL. EDUC. CODE § 48907 (West 1977), enacted February 22, 1977, prohibits only expression which is obscene, libelous or slanderous or expression which incites students to the commission of unlawful acts. Id. The law provides that student journalism advisers will have the responsibility of maintaining journalistic standards on the school newspaper, within the parameters of the law. Id.

75 Student Press Law Ctr., Spring 1998 Report 11 (1988), cited in Shoop, supra note 69, at 583 n.24; see also Baltimore County Schools Handbook, available at http://www.bcps.org/system/handbooks/student_handbook.pdf (last visited on Nov. 28, 2003) (“Students who have facts and opinions on topics should be allowed to express them in print and conversation. However, student editors and writers must observe the same legal responsibilities as those imposed upon conventional newspapers and news media. Thus, no student shall distribute in any school any student publication which: (a) is obscene according to current legal community standards; (b) is libelous, according to current legal definitions; or (c) creates a material and substantial disruption of the normal school activity or interferes with appropriate discipline in the operation of the school”); Dade County Student Handbook, available at http://www.dadeschools.net/ehandbook/Code/CodeEnglishSec/ch3.pdf (last visited on Nov. 28, 2003) (“Students have the right to possess, post and distribute any forms of literature that are not inherently substantially disruptive to the school program, including, but not limited to, newspapers, magazines, leaflets, and pamphlets. Students have the right to be free from censorship of their publications except within the framework of guidelines previously agreed upon by current students and administrators.”).

decision, there was a “dramatic increase in the amount of censorship.”

Calls for help received at the Center increased by twelve percent from 1988 to 1989. It is possible, of course, that although incidences of censorship no doubt increased in the wake of Hazelwood, reports of censorship also increased because of the heightened awareness surrounding the issue of student journalists’ First Amendment rights. Leslie Edwards, the students’ attorney, takes a more optimistic view of the aftermath of the decision, writing that reaction to Hazelwood forced many states and school districts to extend First Amendment protections to students, making student rights part of the debate in a way they had not been considered before: “[W]e lost the battle but we won the war.”

The reality most likely lies somewhere between the SPLC’s valid concerns and Ms. Edwards’ somewhat rosy outlook on the situation. Fifteen years after the Hazelwood decision, America has moved into two non-metaphoric wars—with Iraq and with Al Qaeda—and into the throes of an aggressive “patriotism” movement that threatens free speech at all levels. With the circuit courts divided over the true meaning of the Hazelwood decision, public education may be expected to inculcate a new set of civic values. Since those values may now include loyalty to country and president to the exclusion of dissenting views that argue for loyalty to the Constitution and self, it is necessary to examine where student free speech stands today.

II. THE CIRCUIT COURT SPLIT

Given the ambiguities discussed above, it is not surprising that the circuit courts have struggled since 1988 in applying the Hazelwood case not only to student newspapers but also to the speech of students, teachers and guest speakers in school settings. Currently, the First, Third, and Tenth Circuits have stated that viewpoint discrimination is permissible, despite the Supreme Court’s First Amendment jurisprudence to the contrary outside the context of schools. At the same time, the Sixth, Ninth, and Eleventh Circuits have indicated that viewpoint discrimination is not permissible. This Part will examine how each of these circuits has applied Hazelwood.
A. Circuits Supporting Viewpoint Discrimination

Three circuits have indicated that viewpoint discrimination is permissible under *Hazelwood*. The First Circuit has affirmed a lower court’s dismissal of the civil rights claim of a teacher who alleged that she had been fired for discussing abortion in class.\(^{81}\) Though there is a separate line of cases related to the rights of teachers speaking within a curricular setting,\(^{82}\) the *Hazelwood* precedent, originally focused on student speech alone, is often applied to teachers and outside speakers. The First Circuit opinion held that under *Tinker* and *Hazelwood*, a school could limit classroom speech to further educational goals\(^{83}\) and noted in dicta that “the Court in [*Hazelwood*] did not require that school regulation of school-sponsored speech be viewpoint neutral.”\(^{84}\)

The Third Circuit expressed a similar belief in *C.H. v. Oliva*.\(^{85}\) There, the court stated that “*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns.”\(^{86}\) In *Oliva*, a young boy at an elementary school had his speech censored twice, once in kindergarten and once in first grade.\(^{87}\) In kindergarten, the student made a Thanksgiving poster observing that he was thankful for Jesus.\(^{88}\) His teacher initially hung the poster along with the other students’ work in the hallway, but members of the Board of Education removed the poster because of its religious theme. The boy’s

\(^{81}\) Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993).

\(^{82}\) See, e.g., Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (holding that school board does not need a reason not to rehire a non-tenured teacher); Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968) (stating that analysis of whether a teacher’s speech is protected by the First Amendment rests on a narrow conception of speech as regarding “a matter of public concern” and a balancing test of the teacher’s right to speak against the state’s interest).

\(^{83}\) Ward, 996 F.2d at 452.

\(^{84}\) Id. at 454 (citations omitted).


\(^{86}\) Id. at 172–73

\(^{87}\) Id. at 168.

\(^{88}\) Id.
teacher later re-hung the poster in a less obvious location.\textsuperscript{89} In first grade, the student participated in a reading presentation in which the students were invited to read their favorite story to the class. The student brought a children’s book of biblical stories to class and asked to read a story based upon the biblical story of Jacob and Esau.\textsuperscript{90} The student was allowed to read the story to his teacher but not to the other students because of its religious content.\textsuperscript{91}

The court observed that the requirement of viewpoint neutrality, while necessary for school restrictions on extracurricular speech, such as that involved in \textit{Rosenberger v. Rector and Visitors of University of Virginia}\textsuperscript{92} and \textit{Lamb’s Chapel v. Center Moriches Union Free School District},\textsuperscript{93} is not applicable to restrictions on the State’s own speech.\textsuperscript{94} Affirming the panel’s decision, the Third Circuit, sitting \textit{en banc}, “decline[d] to address the tendered constitutional issue under these circumstances,”\textsuperscript{95} but Judge Samuel A. Alito’s passionate dissent disregarded the panel’s \textit{Hazelwood} analysis entirely and advocated the use instead of a \textit{Tinker} analysis.\textsuperscript{96} Judge Alito argued that it would be impossible for people to believe that the student’s story or picture bore the imprimatur of the school under the \textit{Hazelwood} test and reasoned that viewpoint discrimination is \textit{per se} unconstitutional even in schools, as long as the speech does not rise to the \textit{Tinker} standard of “necessary to avoid material and substantial interference with schoolwork or discipline.”\textsuperscript{97} He wrote:

If the panel’s understanding of \textit{Hazelwood} is correct, it would lead to disturbing results. Public school students . . . when called upon in class to express their views on important subjects, could be prevented from expressing any views that school officials could reasonably believe would cause “resentment” by other students or their parents. If this represented a correct interpretation of the First Amendment, the school officials in \textit{Tinker} could have permitted students, as part of a class discussion, to express views in favor of, but not against, the war in Vietnam because some students plainly resented the expression

\textsuperscript{89} Id. at 169.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} 515 U.S. 819 (1995) (holding that a university could not deny funding to a student newspaper with a Christian editorial viewpoint when it funded other non-religious publications).
\textsuperscript{93} 508 U.S. 384 (1993) (holding that a school district could not deny religious group access to public school facilities after school hours when they were open for other social, civic, and recreational uses).
\textsuperscript{94} \textit{Oliva}, 195 F.3d at 173.
\textsuperscript{95} C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 203 (3d Cir. 2000) (en banc).
\textsuperscript{96} Id. at 203 (Alito, J., dissenting).
\textsuperscript{97} Id. at 212 (Alito, J., dissenting) (quoting \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 511 (1969)).
of antiwar views . . . . Such a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster.  

Though Judge Alito supported the outcome of Hazelwood with respect to student newspapers, the themes raised about the role of the First Amendment in helping to make strong citizens of a democracy and the possible deleterious outcomes of a viewpoint discriminatory Hazelwood regime are significant for the recognition of the tensions inherent in this question.

The Third Circuit recently decided a similar case. In Walz v. Egg Harbor Township Board of Education, a student was not permitted to distribute pencils at a holiday party that read, “Jesus [heart symbol] the little children.” The District Court judge granted the school’s motion for summary judgment on the grounds that viewpoint discrimination is not implicated when a school has not opened a forum for the exchange of views on a subject. The Third Circuit upheld that ruling. The court wrote, “As a general matter, the elementary school classroom, especially for kindergartners and first graders, is not a place for student advocacy.” Part III will discuss why certain religious speech in schools (particularly that which proselytizes to other students) might be usefully considered to be outside the viewpoint neutrality analysis, or at least to require an additional and simultaneous constitutional inquiry under the Establishment Clause endorsement test.

Muddying the interpretative waters still further, an earlier Third Circuit case, Brody v. Spang, had expressed the opposite of the Oliva court’s opinion on viewpoint discrimination. In an inconclusive discussion of whether a high school graduation could be considered a public or non-public forum, the court noted that even in a school context, “‘reasonable’ grounds for content based restrictions include the desire to avoid controversy and an interest in maintaining the appearance of neutrality, provided that these are not simply pretexts for viewpoint discrimination.”

Finally, in the summer of 2002, the Tenth Circuit in Fleming v. Jefferson County School District overruled a lower court’s decision that the Columbine High School memorial tile project was a limited public

98 Id. (Alito, J., dissenting) (citations omitted).
99 Id. at 213 (Alito, J., dissenting).
100 342 F.3d 271 (3d Cir. 2003).
102 Id.
103 Walz, 342 F.3d 271.
104 Id. at 277.
105 957 F.2d 1108, 1122 (3d Cir. 1992).
106 Id. (citation omitted).
107 298 F.3d 918 (10th Cir. 2002), cert. denied, 537 U.S. 1110 (2003).
forum not subject to viewpoint discrimination. Part IV will return to the Fleming case for a fuller discussion of how the facts and outcome of that case illustrate the problem with relying on a general philosophy of the inculcation of moral values or even local control in applying Hazelwood. The Fleming court, however, does make a persuasive case for a reading of Hazelwood that allows school administrators to practice viewpoint discrimination.

B. Circuits Supporting Viewpoint Neutrality

On the other side of the analysis, several cases indicate support for the idea that Hazelwood did not open the door for viewpoint discrimination in schools. In Kincaid v. Gibson,108 a divided panel of the Sixth Circuit stated, inaccurately, that the Hazelwood Court approved only non-viewpoint-based restrictions.109 On rehearing, the court found that a Kentucky State University yearbook was a limited public forum, and thus not subject to Hazelwood analysis.110 In dicta, the court noted that “[a]lthough the government may act to preserve a nonpublic forum for its intended purposes, its regulation of speech . . . must not attempt to suppress expression based on the speaker’s viewpoint.”111 Of course, this case can be distinguished from Hazelwood and the subsequent circuit cases because it took place at a university and not at a high school, but the court’s opposition to viewpoint discrimination is clear.112

The Ninth Circuit in DiLoreto v. Downey Unified School District Board of Education113 held that an advertisement listing the Ten Commandments was legitimately prevented from being posted on the non-public forum of a school’s ballpark fence on the grounds that its presence would be disruptive under the Hazelwood analysis. Nevertheless, the court noted that viewpoint discrimination remained impermissible: “Al-

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108 191 F.3d 719 (6th Cir. 1999), rev’d en banc on other grounds, 236 F.3d 342 (6th Cir. 2001).
109 Id. at 727. The court cited a line from Hazelwood regarding nonpublic forums, observing that “school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community,” Kuhlmeier v. Hazelwood Sch. Dist., 484 U.S. 260, 267 (1988). Unfortunately, the Kincaid court inserted after “reasonable” the phrase “non-viewpoint-based,” which is not present in the text of the Hazelwood opinion.
110 236 F.3d at 354.
111 Id. at 355.
112 The Seventh Circuit declined to extend the Hazelwood holding to college newspapers in Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003). College journalists had feared that the extension of Hazelwood would chill expression on college campuses in the same way it has on high school campuses. See Student Press Law Ctr., On Edge: Campuses Reflect on the Governors State Newspaper Censorship Case, Debate Impact Court Ruling Could Have if Hazelwood is Applied to Colleges, in Student Press Law Center Winter 2002–2003 REPORT 4 (2002–2003). On June 25, 2003, however, the Seventh Circuit vacated the order and scheduled the case for rehearing en banc so the issue remains open. Id.
113 196 F.3d 958 (9th Cir. 1999).
though the District’s decision not to post the ad was reasonable in light of the purpose served by the forum, it may still violate the First Amendment if it discriminates on the basis of viewpoint, rather than content.114 As will be discussed in greater detail later in this Note, discrimination against religious messages can be seen as viewpoint, not content discrimination. However, the DiLoreto court held the decision to have been content based. Admitting that “the distinction is not a precise one,”115 the court wrote, “[P]ermissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic.”116 The question of whether to post a sign depicting a religious message could also implicate Establishment Clause issues, as the school district noted in defending its decision. Because the court held that the school’s decision was legitimate on the grounds that the posting of the sign would have been disruptive, it did not reach the Establishment Clause issues.117

Likewise, in Planned Parenthood v. Clark County School District,118 the Ninth Circuit found that a school’s decision not to publish a Planned Parenthood advertisement in school publications was reasonable for a nonpublic forum because instead of discriminating by viewpoint, it banned all ads relating to the subject of birth control.119 There is some internal disagreement in the Ninth Circuit regarding this issue, however. In Downs v. Los Angeles Unified School District,120 the Ninth Circuit held that a billboard for Gay and Lesbian Awareness Month posted by a teacher was speech attributable to the school district, to which viewpoint neutrality analysis was inapplicable. The court wrote: “Despite the absence of express ‘viewpoint neutrality’ discussion anywhere in Hazelwood, the Planned Parenthood court incorporated ‘viewpoint neutrality’ analysis into nonpublic forum, school-sponsored speech cases in our Circuit.”121 The court nevertheless observed that if it was not considering the bulletin board to be the speech of the school and the school district instead of school-sponsored speech in a nonpublic forum, “we would nec-

114 Id. at 969.
115 Id. (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995)).
116 Id. (quoting id. at 969 (citations omitted)).
117 941 F.2d 817 (9th Cir. 1991).
118 Id. at 829–30.
120 Id. at 1010. In a case not quite on point because it does not involve students directly, but nonetheless somewhat illustrative, the Fifth Circuit found that regardless of whether a school-organized parent meeting on the math curriculum was a limited public forum or a nonpublic forum, viewpoint discrimination was unacceptable. Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 349–50 (5th Cir. 2001). The opinion cited Hobbs v. Hawkins, 968 F.2d 471, 481 (5th Cir. 1992), for the assertion that “viewpoint discrimination violates the First Amendment regardless of the forum’s classification.” Chiu, 260 F.3d at 349–50.
essarily be compelled by Planned Parenthood to review [the school district]’s actions through a viewpoint neutrality microscope.”

Finally, the Eleventh Circuit has held that the Hazelwood standard is no different from the Cornelius standard for nonpublic forums and thus does not permit viewpoint discrimination. In Searcey v. Harris, a school district attempted to ban a group called the Atlanta Peace Alliance (APA) from tabling at a school career fair, where military recruiters were permitted entrance, by crafting regulations expressly tailored to exclude the peace group. The court held that the regulations were unconstitutional under Hazelwood because of their viewpoint discrimination:

We fail to see how this standard differs from the Cornelius standard for nonpublic forums; instead it is merely an application of that standard to a curricular program. Since the purpose of a curricular program is by definition “pedagogical,” the Cornelius standard requires that the regulations be reasonable in light of the pedagogical purposes of the particular activity. Hazelwood therefore does not alter the test for reasonableness in a nonpublic forum such as a school but rather provides the context in which the reasonableness of regulations should be considered.

The Searcey court alone among appellate courts attempted to reconcile the language of the Hazelwood opinion with the inference that viewpoint neutrality is still required in an analysis of school-sponsored speech. The court observed in a footnote that, “[a]lthough the Supreme Court did not discuss viewpoint neutrality in Hazelwood, there is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s views.” Although this reading of Hazelwood is persuasive, it does not address the argument by the Fleming court that the kind of control needed by a school in disassociating itself from inappropriate speech is most logically seen as viewpoint-based. It is difficult to argue that the text of the Hazelwood opinion, with its characterization of “biased or prejudiced” speech as worthy of school censorship, did not implicitly address the permissibility of viewpoint discrimination. On the other hand, the Searcey court makes

122 Downs, 228 F.3d at 1011.
123 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (holding that governmental restrictions in a nonpublic forum may “be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral”).
124 888 F.2d 1314 (11th Cir. 1989).
125 Id. at 1319.
126 Id. at 1319 n.7.
a strong point that the Hazelwood Court did not explicitly abandon the viewpoint neutrality requirement, and that such a move would surely have required a more affirmative statement than the mere absence of any reference to the issue.

III. Why Viewpoint Neutrality? The Distinction Between Content and Viewpoint

The circuit split discussed above emphasizes the ambiguities raised by the Hazelwood decision. Though one might understand the Hazelwood Court to have abandoned the viewpoint neutrality requirement, the holding does not explicitly alter public forum jurisprudence. This Part will discuss the philosophical and pragmatic arguments for and against preserving a viewpoint neutrality standard in assessing censorship of school-sponsored speech. It will also examine a potential underlying difficulty in applying the viewpoint test in the first place: the lack of a clear distinction between content- and viewpoint-based discrimination, particularly as it relates to religious speech. Viewpoint neutrality is not inordinately difficult for schools to maintain, despite the Supreme Court’s own apparent confusion. However, an exception should be made for religious speech, which should be considered not only through viewpoint neutrality analysis, but also within an Establishment Clause framework. This Part will examine two case studies. The first highlights the ease of identifying viewpoint discrimination in a school setting; the second demonstrates why religious speech should not be included in the viewpoint neutrality analysis without an additional Establishment Clause inquiry.

One conservative commentator writing on the circuit split under Hazelwood has argued both that the Hazelwood Court intended to abandon the viewpoint neutrality requirement and that such abandonment is defensible philosophically and pragmatically.128 Janna Annest argues that the Hazelwood Court must have intended to abandon the viewpoint neutrality requirement because of the opinion’s failure to complete the forum analysis by examining the principal’s decision for viewpoint neutrality as well as reasonableness.129 Further, the Court seemed prepared to allow the school to censor viewpoint-based student speech that might appear to advocate the use of alcohol or drugs or “conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”130 Justice Brennan’s repeated references to the issue of viewpoint discrimination in his dissent bolster Annest’s argument. Annest further observes that the Eleventh Cir-

129 Id. at 1228.
court is excessive in its concern that the Supreme Court would not have eliminated viewpoint neutrality without doing so explicitly:

Permitting public schools to make viewpoint-based decisions carves out a single, discrete exception to the public forum doctrine in recognition of the hybrid role of the public school as an instrument of the state, and a custodian of children in loco parentis. It would hardly represent a major overhaul of First Amendment law . . . . Although the Hazelwood Court’s omission of the viewpoint-neutrality requirement remains mysterious, it was unlikely to have been mere oversight.\(^{131}\)

Annest also argues that in addition to the philosophical and historical support for administrative and local control over student speech, there is the functional difficulty of distinguishing between content and viewpoint-based restrictions—a line that the Court, much less local school districts, has found hard to draw. This difficulty makes an abandonment of the viewpoint neutrality requirement necessary for consistent application of the school-sponsored speech doctrine.\(^{132}\)

It is useful to address the role that philosophical and historical theories of local school board control and in loco parentis doctrine have played and might later play in Supreme Court precedent. Despite Annest’s claim, the difficulty of the doctrine is not a sufficient reason to allow school administrators essentially free rein when it comes to censorship.

A. Arguments in Favor of Viewpoint Neutrality: Underlying Purposes of Free Speech in Public Schools

The education of the nation’s children is essential to the development and survival of democracy in the country, as well as a deeply personal issue for parents.\(^{133}\) As such, debates over curriculum, discipline, behavior and attendance have long been hotly contested and often require intervention by courts, despite Justice White’s contention in Hazelwood that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal

\(^{131}\) Annest, supra note 128, at 1252 (citations omitted).

\(^{132}\) Id. at 1254–55.

\(^{133}\) There are commentators who have written that public education does not possess the influence on young people that many people assume it to have. See, e.g., Tyll van Geel, The Search for Constitutional Limits on Governmental Authority to Inculcate Youth, 62 Tex. L. Rev. 197, 262–71 (1983) (exploring studies which indicate that school does not greatly shape the political views of young people), cited in Robert Trager & Joseph A. Russomanno, Free Speech for Public School Students: A “Basic Educational Mission,” 17 Hamline L. Rev. 275, 291 n.121 (1993).
judges.” The state has multiple obligations and interests, including producing active and moral participants in its democracy through the inculcation of civic values while simultaneously maintaining order in the schools and protecting students from harm. Likewise, parents have the prerogative to raise their children as they see fit, a right that takes many forms, whether through parents’ own expression on school and political issues, the preparation of their children to express themselves, or the protection of their children from harmful views or views with which the parents disagree.

The idea of local control of schools—whereby parental interests are intertwined with state decision-making—may begin to ameliorate the tension among these competing interests. However, adding the rights of students as independent individuals into the mix makes it difficult to strike an appropriate balance. Thus, the Supreme Court has not chosen a consistent prioritization of state, parental, and student interests. In *Pierce v. Society of Sisters*, the Court allowed children to be educated in a non-public school but affirmed the state’s right to ensure that “teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and . . . nothing [shall] be taught which is manifestly inimical to the public welfare.” Eighteen years later, however, the state’s interest in promoting patriotism by having students recite the Pledge of Allegiance before each school day met its match when the Supreme Court supported parents’ desire to have their children refrain from reciting oaths, in keeping with the families’ religious beliefs.

The holding in *Tinker* extended the sphere of interests to include students, allowing them to protest the Vietnam War by wearing black armbands to class. This holding may be better linked with *Barnette*, on the grounds that the students might have been espousing parental viewpoints instead of, or in addition to, their own. By the time of *Fraser*,

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134 484 U.S. at 273.

135 See Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581 (1993) (suggesting that courts should not dismiss concerns of fundamentalist Christian parents that public school education introduces their children to ideas that are incompatible with and offensive to their religion), cited in Trager & Russomanno, supra note 133, at 292 n.121. Thanks to Harvard Law School Professor Martha Minow for articulating the expansive nature of competing concerns for the state and for parents.

136 268 U.S. 510 (1925).

137 Id. at 534.


when the Court upheld the suspension of a student for making a vulgar speech at a student assembly, the apparently broad freedoms of *Tinker* had been reined in. In *Tinker*, it was possible that students were reflecting parental views, but the vulgar speech in *Fraser* was a purely student act needing punishment. Chief Justice Warren Burger, writing for the Court, summarized the Court’s appreciation for the school’s *in loco parentis* role. Referring to the Court’s holdings in *Ginsberg v. New York*143 and *Board of Education v. Pico*,144 he wrote, “These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”145 The opinion also stated, “[P]ublic education] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”146

When the Court has faced cases in which state and parental interests are in tension, it has often sought the middle ground in the form of local control. Parents can participate in local control over their school districts by working on parent-teacher associations, volunteering in schools, and making their voices heard. But local control does not always take into consideration the rights of students as individuals, rights which must be the concern of a state if it intends to raise active participants in a democracy.147 The Court has noted that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”148 and observed in *Pico* that “[o]ur Constitution does not

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143 390 U.S. 629 (1968) (upholding a New York statute banning sale of sexually oriented material to minors).

144 457 U.S. 853, 872 (1982) (plurality opinion) (ruling that schools could not remove books in the library with the intent “to deny . . . access to ideas with which [they] disagreed,” but they could remove books that were “pervasively vulgar”).


146 *Fraser*, 478 U.S. at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

147 Additionally, individual parental rights might be lost in the emphasis on local control; see discussion of *Fleming infra* Part IV. Some commentators argue that the same philosophical reasons supporting the First Amendment as applied to adults—protection of dissenting views, self-realization, preservation of human dignity, and the liberty principle, among others—apply equally well to students in a high school setting. See generally Trager & Russomanno, *supra* note 133.

permit the official suppression of ideas.” Justice Abe Fortas wrote in _Tinker_ that:

> In our system, state-operated schools may not be enclaves of totalitarianism . . . . Students in school as well as out of school are “persons” under our Constitution . . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

The catch, of course, is the existence of “constitutionally valid reasons to regulate speech” and the evolving scope of those reasons over the years, depending on the circumstances of the country, the composition of the Court and the behavior of school districts. Some of the most persuasive rhetoric involving student rights came from the Warren Court, whereas the Rehnquist Court has taken a narrower view of student rights and a more skeptical approach toward students themselves.

**B. Addressing Arguments Against Viewpoint Neutrality**

The central challenge to the preservation of free speech, particularly the speech of pre-college students, is that controversial or offensive speech can cause serious problems and that, therefore, preempting these problems by silencing questionable speech is a valid pedagogical strategy. This repressive philosophy has been discredited to a large extent in non-student-related speech cases, in which the Supreme Court’s jurisprudence has evolved from an early and recurring desire to silence seditious political speech to a more accepting view that the answer to problematic speech is more speech, not less. The Court seems reluctant to ex-

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149 457 U.S. at 871 (plurality opinion).
150 _Tinker_, 393 U.S. at 511.
151 A prime example is Bd. of Educ. v. Earls, 536 U.S. 822 (2002), where the Court upheld a school district’s policy of drug testing of students participating in extracurricular activities. _Id._ at 838.
152 See, e.g., Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction for conspiracy to overthrow the government by teaching the philosophies of Marx, Lenin, and Engels); Schenck v. United States, 249 U.S. 47 (1919) (upholding conviction for wartime anti-draft leafleting); Debs v. United States, 249 U.S. 211 (1919) (upholding conviction for wartime anti-draft speech).
153 See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . .”); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there by time . . . to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”); and Abrams v. United
tend this approach to student speech because of the belief that students are impressionable and thus unable to distinguish “good” speech from “bad” speech. What they hear must be filtered until they reach a point of maturity that will allow them to make decisions for themselves.

The alternative view is that, just like the “real” world, school environments can provide a marketplace of ideas where “bad” speech might be countered by “good” speech, either from other students or from the administration itself. For example, in Hazelwood, a less speech-restrictive response to the controversial news articles might have been for the principal to send a letter to students and parents sharing his own view about the issues of teen pregnancy and divorce. This approach would have included the entire community in a dialogue about two topics that, like it or not, were probably already on the minds of high school students.

Additionally, the “safety valve” argument for freedom of speech154 applies significantly in school settings. If student journalists, guest speakers and other non-school officials raise troubling issues, whether regarding the traditional parental concerns of “sex, drugs and rock and roll” or the frightening specter of violence in the schools, the advantage gained by knowing that the students are thinking and talking about these issues outweighs the discomfort or administrative burden involved in directly confronting the issues.

A school can respond to the voicing of troublesome issues by facilitating further discussion. Further knowledge of particular student difficulties will allow officials to respond to concerns before potentially problematic matters move beyond speech to violence or self-inflicted harm. For students, attending a school where teachers and officials are willing to engage in potentially controversial discussion and listen to unpopular views will foster a learning environment where they will acquire the ability to analyze problems rationally, voice their opinions articulately and calmly, and utilize appropriate resources to take action or resolve concerns.155 High school students are sensitive to signs of secrecy and discomfort on the part of their teachers and advisors, and speech-suppressive reactions by administrators only serve to encourage concern and tension instead of open and useful dialogue.

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154 See, e.g., Rodney A. Smolla, Free Speech in an Open Society 13 (1992) (“If societies are not to explode from festering tensions, there must be valves through which the citizens may blow off steam.”).

155 Lee Bollinger’s theory of the First Amendment as primarily necessary for tolerance applies particularly well to the school environment and the inculcation of useful civic values: “free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.” Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 9–10 (1986).
Such discussion-facilitating responsiveness on the part of administrators and teachers might require a fair amount of time that many school districts do not have to spare. In the long run, however, the knowledge and value gained will be less time-consuming than the public controversy and student punishment that often follow from censorship actions. In the Hazelwood context, the time it would have taken for Mr. Reynolds to write a letter to the parents about the school’s views on teen pregnancy and divorce, or even to speak to the student editors about appropriate journalistic ethics, would have been negligible relative to the time consumed by the litigation and public outcry that resulted after the newspaper pages were excised.\footnote{156}

Finally, in addition to the specific arguments in support of fuller speech protection for students, there is the simple question of logical consistency. As one commentator has written:

In the “cradle of our democracy,” students learn the fundamentals of that democracy. If the freedom of expression is so fundamental, then concluding that our nation’s schools should teach our students to respect that freedom is a simple matter of completing the syllogism. However, teaching students to respect the freedom of expression while simultaneously prohibiting them from exercising it verges on a “do as I say, not as I do” hypocrisy.\footnote{157}

C. Separating Content from Viewpoint

The politically conservative approach to limiting speech in schools can be accompanied by a pragmatic argument that it is simply too difficult for school officials to distinguish between content-based and viewpoint-based discrimination and thus that they should not be required to do so.\footnote{158}

The Supreme Court has not made the distinction between content- and viewpoint-based regulations clear. In fact, the Court has never explicitly defined viewpoint discrimination. A viewpoint-based regulation is always unconstitutional, but because of that strict rule, the Court has occasionally contorted itself in order to read potentially viewpoint-based restrictions as content-based in order to preserve the formal ban on viewpoint discrimination.

\footnote{156 I should note that many of the arguments in favor of more speech and dialogue cannot be applied to the circumstance of religious speech in schools (discussed infra Part III.D), for the simple reason that, were teachers to become involved in discussions of religious belief, very grave Establishment Clause concerns would arise.}

\footnote{157 Andrew D.M. Miller, Balancing School Authority and Student Expression, 54 Baylor L. Rev. 623, 625 (2002) (citations omitted).}

\footnote{158 See Annest, supra note 128, at 1254–55.}
In *Arkansas Educational Television Commission v. Forbes,* the Court held that a publicly owned television station was a nonpublic forum and that a decision to exclude a minority party candidate from a political debate was a reasonable, viewpoint-neutral restriction. The Court wrote, “There is no substance to Forbes’ suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion.” Such a reading of the restriction as viewpoint neutral is inaccurate because it privileges the viewpoints of the majority of the voters, supporting the major party candidates, as against the viewpoints of the minority of the voters, supporting Forbes. The application of a “neutral” standard of support masks the fundamentally related standard of relative popularity of political viewpoints.

Likewise, in *National Endowment for the Arts v. Finley,* the Court read a seemingly viewpoint-based restriction as viewpoint neutral in order to preserve the statute outlining the NEA’s grant guidelines. That statute, amended in 1990, includes a provision that the NEA should “take[] into consideration general standards of decency and respect for the diverse beliefs and values of the American public” in awarding funds. The Court found that the statute did “not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face.” Despite this finding, evaluation of what constitutes “decency and respect” for American values requires an intrinsically viewpoint-based decision.

The Justices themselves acknowledged the complexity of distinguishing between content- and viewpoint-based restrictions. In his *Hill v. Colorado* concurrence, Justice David Souter observed, “The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” He noted that subject and viewpoint begin to merge when a regulation burdens behavior on one side of a controversy.

**D. Viewpoint Discrimination and Religious Speech: The Need for Simultaneous Constitutional Inquiries**

Recently, nowhere has this debate over viewpoint neutrality been more heated than in the definition of religious speech. Advocates of re-

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160 *Id.* at 683.
163 *Id.* at 583.
165 *Id.* at 737 (Souter, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
166 *Id.* (Souter, J., concurring).
religious speech have argued (and the Supreme Court has hinted at its agreement with this view) that the exclusion of all religious speech in favor of secular speech prioritizes a non-religious viewpoint over a religious one. The Court supported this argument in *Rosenberger v. Rector and Visitors of the University of Virginia*,\(^\text{167}\) when it held unconstitutional a university’s decision to deny funding to a student newspaper with a Christian viewpoint. The Court observed that the distinction between content and viewpoint was “not a precise one” but categorized religious “perspective[s]” as viewpoints.\(^\text{168}\) Many school speech cases involve student religious speech of some sort. This Part will shortly discuss both how religious activists have contributed significantly to the litigation over the meaning of *Hazelwood* and how religious speech should be considered separately from traditional viewpoint analysis because of concerns of endorsement by the school under the Establishment Clause.

Because of the Court’s lack of precision about what constitutes viewpoint discrimination, Annest argues that school officials should not be required to attempt to distinguish between the content and viewpoint regulations when regulating speech. As a result, she argues that the *Hazelwood* test should not include a viewpoint neutrality requirement.\(^\text{169}\) She writes:

> [E]liminating the distinction between content and viewpoint in this limited context offers a clearer standard for schools and courts: schools may reasonably regulate speech in school-sponsored forums based on legitimate pedagogical concerns, without worrying that an apparently permissible, content-based rule actually implicates a viewpoint and thus violates the First Amendment.\(^\text{170}\)

Though such an approach would certainly make life easier for school administrators, it misses the point both philosophically and practically. Philosophically, in keeping with the objective of the public schools to educate the nation’s students in preparation for democratic participation, it should be a priority of school administrators to preserve as much speech as possible without sacrificing order and safety in the school. Practically, the confusion that Annest implies would run rampant were administrators to try to distinguish between content- and viewpoint-based restrictions is unlikely to arise in a school setting.

Ambiguous questions about neutrality, such as those arising in the *Forbes* case,\(^\text{171}\) would be far fewer than the traditional controversies that

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\(^\text{168}\) *Id.* at 831.
\(^\text{170}\) *Id.* at 1255.
arise over student speech—for example, whether a student could advocate for the legalization of marijuana or debate the availability of condoms in school restrooms. In a post–September 11 world, a controversy might include a student wishing to write an editorial criticizing or supporting the Bush administration’s rationale(s) for the war with Iraq. In short, most controversies that implicate viewpoint are clear because they concern controversies that tempt administrators to censor speech.

Precisely because a public school is a center for the inculcation of values, speech that school officials wish to censor is most likely to present a viewpoint contrary to the viewpoint presented by the school. With awareness of the temptation of censorship, school administrators should be able to maintain a viewpoint-neutral approach to speech restrictions without too much difficulty. Clarification of the doctrine by the Supreme Court would be very helpful both in and out of the school setting, but the elimination of a viewpoint neutrality requirement under the Hazelwood test is too extreme a response to the confusion.

Two recent Massachusetts cases illustrate the main points of this Part: viewpoint discrimination is often easy to recognize in a school setting, and religious speech should not be considered solely through the viewpoint neutrality analysis.

First, in the spring of 2002, Nancy Murray, a staff member at the ACLU of Massachusetts, was invited to speak at two Holliston High School assemblies as part of Harmony Week, a student-run event at the school. The student who invited her asked her to speak on ethnic profiling and civil liberties after September 11, and also on the Israeli-Palestinian conflict. Concerned about the combination of potentially controversial topics, Murray asked the student if the school was prepared for her to speak on these issues. The student responded that the topics were appropriate for the theme of the day, “Religious Bias.” Murray later learned that the topic had been cleared with the faculty advisor for Harmony Week, and that Murray was indeed listed in the program as speaking on the designated topics. Murray spoke to the first assembly, of ninth- and tenth-graders, for about half an hour on Islam, and then for about ten minutes on the history of the Israeli-Palestinian conflict, illustrated by nine maps showing the gradual reduction in the amount of land allocated to Palestinians.

172 The question of what values are appropriate for inculcation is outside of the scope of this Note. For one discussion, see Susan H. Bitensky, A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools, 70 Notre Dame L. Rev. 769 (1995).


174 Telephone Interview with Nancy Murray, Director, Bill of Rights Education Project, ACLU of Massachusetts (July 2002).
At the conclusion of the assembly, when Murray asked for questions, one teacher asked why the Palestinians could not just leave the disputed territories and move somewhere else. Murray responded that Palestinians considered the land their home and questioned how residents of Holliston would feel if Canadians came to their town and asked them to move away. When the presentation ended, a few students came up to speak with Murray as the eleventh- and twelfth-graders began to file in for the second assembly, and a few other students went to speak with the teachers present at the assembly. At that point, a group of teachers and administrators approached Murray and asked her to leave the school, saying that the assembly had been cancelled. When Murray asked what had happened, the administrators responded that her presentation had been so “one-sided” that it could not continue. After she had left, the school’s social studies coordinator announced that a speaker would be brought in to rebut Murray’s presentation.

Though no lawsuit was ever filed, the silencing of Murray’s speech is exactly the kind of censorship that is troublesome to those who support a viewpoint neutrality element to the Hazelwood test. Despite the Supreme Court’s articulation in Tinker of a school’s prerogative to avoid disruptive controversy if it so chooses, the Holliston High School administration can hardly claim a desire to avoid controversy as a reason for canceling Murray’s speech. She had been expressly invited, and the school had approved the invitation, to speak on two topics that few would call anything other than controversial: ethnic profiling and the Israeli-Palestinian conflict. Moreover, the entire “Harmony Week” at the high school seems to have been devoted to the open discussion of controversial issues, ranging from the “Religious Bias Day,” to which Murray was invited, to a “Heterosexism Day” and a “Classism Day.”

Judging from the reaction of the students—some approached Murray with questions, some approached their teachers, and others merely left to go to their next class—the speech did not cause disruption of the sort that would implicate a Tinker-like analysis. The fact that some students may have complained to their teachers about the subject matter does not go to disruption under Tinker because there was no indication that the assembly could not continue because of student unrest. Indeed, the exchange of views that took place after the assembly shows precisely how controversy can be handled through discussion. When school officials announced that a speaker would be brought in to rebut Murray’s perspective, the school admitted its acceptance of the topic at hand while rejecting a viewpoint it did not want to tolerate.

This incident exemplifies the instinct of school officials to avoid controversy by silencing “unacceptable” perspectives (there was no un-

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175 Id.
176 Abelson & Vaishnav, supra note 173, at B2.
certainty about whether this was a content- or viewpoint-based decision) and why speech restrictions do not often serve useful purposes. The school had a golden “teachable moment” in which to cultivate a discussion about the Israeli-Palestinian conflict by seeking student and teacher responses to Murray’s presentation. The school could also have invited another speaker on the alternative viewpoint without silencing Murray. Instead, the administration caused pain to some and confusion to all by shutting off the discussion before it could become more controversial. In a positive development to the case, school officials revised the curriculum to incorporate more opportunities to understand conflict after a new principal took over at Holliston High. 177 Mary Canty, the new principal, said, “We live in a world of conflict, and when it comes to politics and sources of conflict around the world, it’s important for all of [the students] to deal with these issues, looking at causes and solutions.” 178 The Superintendent of Schools, Nancy Young, has also suggested that the high school could have an “Understanding Conflict Week,” where students would learn about a dispute from various perspectives. 179 This thoughtful reaction to controversy, though it came too late for the disruption of Harmony Week, is exactly what some would say should be expected from public school educators.

In the religious speech context, a recent incident in Westfield, Massachusetts brings to the foreground many of the issues raised by the viewpoint neutrality discussion and the role of religious speech in public forum analysis. A group of Westfield High School students, members of a Bible club not sponsored by the school, passed out candy canes in the school hallways and lunchroom with biblical verses and a prayer for salvation attached, 180 along with messages explaining the symbolism of the red and white of the candy canes as the blood and body of Jesus Christ. 181

178 Id.
179 Id.
180 Michele Kurtz, Students Sue over Messages on Candy, BOSTON GLOBE, Jan. 14, 2003, at B3.
181 The exterior of the card said, “Merry Christmas.” The text of the message read:

LIFE Bible Club
Every first and third Monday of every month
2:00–3:00
Love and
Insight
For
Eternity

“And this is my prayer: that your love may abound more and more in knowledge and depth of insight, so that you may be able to discern what is best and may be pure and blameless until the day of Christ, filled with the fruit of righteousness that comes through Jesus Christ—to the glory and praise of God.”—Philippians 1:9–11
After being asked to stop on the grounds that school policy prohibits the distribution of non-school-related literature, the students persisted and were then told that they would have to serve one day of in-school suspension for their behavior.\footnote{182} The students filed a federal lawsuit claiming that their First Amendment rights had been violated. They were supported by the odd couple of the ACLU and the Liberty Counsel, a religious freedom organization affiliated with the Reverend Jerry Falwell.\footnote{183}

This case was not a \textit{Hazelwood} case in the traditional sense\footnote{184} because the students were not part of a school-sponsored group,\footnote{185} and the

According to legend there was a candy maker who wanted to make a candy that was a witness to Christ. The result was the candy cane. First of all, he used a hard candy because Christ is the Rock of Ages. This hard candy was shaped so that it would resemble a ‘\textit{J}’ for Jesus or a shepherd’s staff. He made it white to represent the purity of Christ. Finally, a red stripe was added to represent the blood of Christ that was shed for the sins of the world and three thinner red stripes for the stripes he received on our behalf when the Roman soldiers whipped him. The flavor of the candy is peppermint, which is similar to hyssop. Hyssop is in the mint family and was used in the Old Testament for purification and sacrifice. Jesus is the pure Lamb of God, who came to be a sacrifice for the sins of the world. Too often the true meaning of Christmas is lost in commercialism and the stress of the holiday season. One thing that we can be thankful for is the salvation that God has given us through Jesus Christ, instead of worrying about what presents we are going to get. The gift of salvation is the greatest gift anyone could ever give us. It is better than getting a new car, and it is better than a gift certificate to the mall. And it’s free!

Remember: It is not a prayer that saves you. It is trusting Jesus Christ that saves you. Prayer is simply how you tell God what you are doing. If you want to receive this awesome gift just be real with God and ask Him for it! Dear God, I know I am a sinner, and I know I should be punished. I believe that Christ died for me and took the punishment for my sins, and then rose from the dead three days after he died. I trust Jesus Christ alone as my savior. Thank you for your forgiveness and everlasting life that I know I now have. In Jesus’ name, Amen. Now your whole life is new!


\footnote{182} Id.; Kurtz, supra note 180.
\footnote{183} John McElhenny, \textit{Federal Rule Aids Student Lawsuit: Bible Clubs Fights Ban on Messages}, \textit{Boston Globe}, Mar. 2, 2003, at B9. By the time of this writing, U.S. District Court Judge Frank Freedman granted a preliminary injunction to the plaintiffs, ruling that the school’s policy banning distribution of printed material on school grounds likely was unconstitutional. Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 127, 129–30 (D. Mass. 2003). The school district attempted to argue that the Bible Club was a school-sponsored organization subject to a \textit{Hazelwood} analysis. If the club were school-sponsored, the school would run right into serious Establishment Clause issues, but the court found that the club was not school-sponsored and consequently that the censorship likely was impermissible. \textit{Id.} at 117–20.
\footnote{184} As noted above, however, even when it is not relied upon, \textit{Hazelwood} always lurks in the background of school speech cases; in this case, the judge observed, “The Supreme Court’s holding in \textit{Hazelwood} appears to have no more than a general bearing on this case.” \textit{Westfield High Sch. L.I.F.E. Club}, 249 F. Supp. 2d at 120.
\footnote{185} See \textit{id.} at 117 (“[T]he school’s contention that the LIFE Club is a school-sponsored organization whose literature distribution bears the ‘imprimatur of the school’ is unpersuasive.”).
lawsuit focused on the *Tinker* standard of whether the students’ distribution of the candy canes caused a disruption to the school.\footnote{See id. at 111–13.} However, the issue of viewpoint discrimination is broadly implicated because the students believed that their messages would not have been censored had they not been related to religion. Despite the Supreme Court’s holding in *Rosenberger* that religious perspectives are viewpoints,\footnote{Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831–32 (1995).} within the school context, religious speech of this kind (a group advocating conversion to Christianity, as opposed to an individual expressing a religious sentiment when called upon in class or in a discussion with peers) should be subject not just to a free speech analysis, but also to an additional constitutional inquiry under the Establishment Clause, in order to avoid potential issues of state endorsement.

Admittedly, the Establishment Clause may not prohibit the expression of religious speech by public school students in the same way it prohibits the endorsement of religious speech by school officials.\footnote{See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 206–07, 223 (1963) (holding that a public school policy of having students, under the supervision of a teacher, read from the Bible over the intercom every morning before school violated the Establishment Clause).} However, the provision of school space during school hours to students proselytizing to other students about Christianity can be argued to be a kind of school endorsement amounting to an unacceptable endorsement by the government. The Supreme Court’s Establishment Clause jurisprudence is complex and still incompletely defined, but at least one commentator has argued that the Establishment Clause creates a “no religion zone” around the government.\footnote{See, e.g., Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885 (2001).}

Some commentators and jurists have supported the treatment of private religious speech under the free speech clause alone,\footnote{Justice Scalia has observed that “in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).} and others have argued that an Establishment Clause analysis must be invoked even for private religious speech in a government context in order to avoid “the capture of the government by the dominant religious group in a community.”\footnote{Gey, supra note 189, at 1892.} The clash between Establishment Clause concerns and free speech rights is particularly at issue in the public schools, where religious activists have increasingly focused their attention in recent years. As the discussion of *C.H. v. Oliva* in Part II.A showed, religious speech advocates have been extremely active in the debate over the meaning of *Hazelwood* with respect to viewpoint discrimination, on the grounds that if viewpoint discrimination is not permitted, more religious speech by
students will be permissible in school settings. A similar effort by religious speech advocates has resulted in the related holdings in *Good News Club v. Milford Central School*\(^{192}\) and *Rosenberger*,\(^{193}\) both of which preserve religious speech rights in extracurricular contexts.

In *Good News*, the issue was whether a private religious club could rent after-school space in a public elementary school that was also used by other, non-religious clubs. The Court found that to deny the religious club access to the rental space was a violation of the free speech rights of the members because it was discrimination against religious viewpoints.\(^{194}\) This argument ignores potential Establishment Clause concerns involved in renting school space to a religious group: young children might be subconsciously coerced by the image of seeing their friends go off to religious club meetings in the very school they all attend together, and the young children might associate the presence of the religious club with endorsement by the school.\(^{195}\)

The groundwork for the free speech argument had been laid in *Rosenberger*, in which the University of Virginia was required to lift its funding restriction against a religious newspaper because the school was funding non-religious newspapers.\(^{196}\) On the high school level, another candy cane case in Nevada was recently settled after the Pacific Justice Institute, another religious freedom organization, intervened with a free speech claim on behalf of the students.\(^{197}\)

In addition to the push to establish religious speech on equal footing with all other speech in extracurricular school settings by emphasizing the free speech clause instead of the religion clauses, the rhetoric of the plaintiffs in these cases reveals a specific focus on introducing more Christian speech into the public schools. After the resolution of the Nevada candy cane case, the president of the Pacific Justice Institute, Brad Dacus, observed, “Christian speech is by far the most suppressed, but the school’s reversal serves as victory for all students and their right to en-

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192 533 U.S. 98 (2001) (holding that the school engaged in impermissible viewpoint discrimination by denying the club access to the limited public forum of after school use of its facilities).

193 515 U.S. 819 (holding that the university could not deny funding to a student newspaper with a Christian editorial viewpoint).

194 *Good News Club*, 533 U.S. at 120 (“When Milford denied the Good News Club access to the school’s limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment.”).


196 See 515 U.S. at 831 (“[V]iewpoint discrimination is the proper way to interpret the University’s objections to [the religious paper].”)

gage in free speech.” Several years earlier, the decision in Board of Education of Westside Community Schools v. Mergens affirmed the constitutionality of the Equal Access Act, which the school district violated by denying equal access to student religious clubs to meet on school property during the non-instructional part of the school day. Reacting to the decision, the lawyer for the students in that case allegedly said, “Our purpose must be to spread the gospel on the new mission field that the Lord has opened—public high schools.”

Given the recent spate of cases regarding extracurricular religious speech, the need to provide school officials with some guidance for handling student religious speech during school hours has never been greater. Of the many tests (Lemon, coercion, endorsement) in the Supreme Court’s arsenal of approaches to Establishment Clause cases, the one most obviously applicable, in both its functional approach and its recognition of the possible exclusionary effect of some religious practices on government property, to a situation regarding student religious speech in schools is Justice Sandra Day O’Connor’s endorsement test. It was first articulated in her concurrence in Lynch v. Donnelly, adopted by the

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200 Id. at 247.
201 Id. at 253.
202 Rob Boston, American Public Schools: Mission Field USA?, 45 CHURCH & STATE 8 (1992) (quoting Jay Alan Sekulow, general counsel of Christian Advocates Serving Evangelism, who defended the Act before the Supreme Court). Some commentators are less skeptical of religious speech activists than the author:

Some may regard the civil liberties rhetoric of the new religious activists as self-interested, and to an extent, they would be right. The Christian legal groups described here are undeniably invoking civil liberties principles in order to achieve certain political ends beneficial to themselves. Yet, this is the way principles are usually—even inevitably—invoked in the political arena. Those who think they are being treated unjustly seek to persuade others of this fact by appeals to broader principles. This was as true of the civil rights protestors of the 1960’s as it is of the evangelical litigators of today. One ought not dismiss the arguments of the evangelical civil libertarians simply because of their self-interest.

203 The famous tripartite test was first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). To survive an Establishment Clause challenge, a statute must meet the following criteria: “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” Id. at 612–13 (citations omitted).
majority in Allegheny County v. ACLU, and further explicated by Justice O’Connor in Capitol Square Review and Advisory Board v. Pinette.

Under the endorsement test, Justice O’Connor would ask “whether government’s actual purpose is to endorse or disapprove of religion” and “whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.” Her reasoning for such an evaluation of Establishment Clause cases is that “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”

This approach is particularly apposite in the school setting, where allowing religious student groups to proselytize in the hallways and the lunchroom might be taken by other students, and indeed, by an objective observer, to be an endorsement by the school of the dominant religion or religions in the community.

Unfortunately, Justice O’Connor’s application of the endorsement test inquires only into whether an “objective observer” would believe that the state was endorsing religion. Apart from the vexed issue of just who is or what constitutes an objective observer, commentators have pointed out that such an approach defeats the purpose of the endorsement test. It ignores the fact that perceptions of endorsement will necessarily be felt more strongly by non-adherents, precisely those who are meant to be protected by the endorsement test, but who may not be sufficiently considered in the objective observer test. The objective observer test is especially problematic in schools, where students might be particularly susceptible to feelings of alienation and marginalization when faced with

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208 Lynch, 465 U.S. at 690 (O’Connor, J., concurring).
209 Id. at 688 (O’Connor, J., concurring).
211 See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 207 (1992) (“Majority practices are myopically seen by their own practitioners as uncontroversial; asking predominantly Christian courts to judge the exclusionary message of creches may be a little like asking an all-male jury to judge a woman’s reasonable resistance in a rape case.”); see also Anjali Sakaria, Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations, 37 Harv. C.R.-C.L. L. Rev. 483, 493 (2002):

If the concern under the Establishment Clause is to protect individuals from feeling politically alienated, as Justice O’Connor rightly points out, then the appropriate test should look at government action through the lens of an individual who might be potentially alienated—that is, an individual who does not subscribe to the religious message in question. By not focusing on the viewpoint of a non-adoherent, the objective observer standard is at odds with the fundamental purpose of the endorsement test.

Id. (citations omitted).
a group of Christian students proselytizing in the place where all students eat their meals or store their books.

Despite the Court’s apparent reluctance to find government endorsement in cases of private religious speech, there is potential for a more expansive view of the test that would find some student religious speech in schools to be in violation of the Establishment Clause. As Justice Stevens has written, “It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief [a symbol] expresses.”

Second, and equally significant for a general exclusion of religious speech from the viewpoint discussion, or at least for the requirement of an additional constitutional analysis alongside the viewpoint analysis, the school is practicing viewpoint discrimination against other religious groups and implicitly preferring one religion to the others by virtue of allowing Christian religious speech to take place. This same argument can be made for non-religious speech, like political speech, but the consequences of such accidental preferential treatment are not as grave as they are for religious speech. This is precisely why religious speech is given a separate category in the First Amendment Free Exercise and Establishment Clauses.

Religious speech is unique in the special attention it receives, for good and ill, in the religion clauses of the First Amendment. Attempts by activists to equate such speech with all other forms of expression not only implicate Establishment Clause issues in the context of the school environment, but they also diminish the unique considerations historically accorded religious speech under the Free Exercise Clause. School administrators should therefore be allowed at least some latitude to restrict religious speech that could be construed as school-endorsed without fear of running afoul of the suggested viewpoint neutrality requirement for all other speech.

This framework of administrative latitude in evaluating religious speech cases would allow for individual instances of speech, such as the student in C.H. ex rel. Z.H. v. Oliva who wanted to read a Bible story or show his appreciation for Jesus through his artwork, but would not allow a group of students (or even one student) to proselytize to other students on school grounds during school hours because of the greater risk of endorsement and coercion problems inherent in such activity.

212 This reluctance is most notable in Capitol Square, where a large cross on a government green was found not to be endorsement. See 515 U.S. at 769–70.

213 Id. at 799 (Stevens, J., dissenting).

214 Due to limited space, for example, the running of a pro-legalization of marijuana editorial might prevent an anti-legalization article from running in the same issue of the newspaper.

215 195 F.3d 167 (3d Cir. 1999), aff’d on other grounds, 226 F.3d 198 (3d Cir. 2000) (en banc).

216 Although a school may be able to avoid endorsement problems in non-religious
There is room for a wide range of speech activities on the spectrum between the individual student’s comment in class and the candy cane distribution, a range requiring more than one strand of constitutional inquiry in order to protect school children from attempts to establish religious speech in the public schools and, equally important, to protect religious speech from being treated in the same way as all other speech.

Though the language of speech-related policies will differ from school to school under the local control model, all schools would benefit from an articulation of the distinction between required viewpoint neutrality and equally required limitations on religious speech. While viewpoint-based censorship should be impermissible outside of a religious speech context, administrators and teachers must be able to curtail group-sponsored religious speech that can be misunderstood as school endorsement. An appropriate way to handle this curtailment would be to conduct a discussion with the students and parents involved in the religious speech and explain how that speech could be misunderstood as coming from the school. Administrators should never limit any kind of speech without an explanation.

IV. **Fleming v. Jefferson County: Did the Supreme Court Miss an Opportunity?**

The Supreme Court recently denied certiorari in a case involving all of the elements of *Hazelwood* discussed in this Note: viewpoint neutrality, religious speech, and the conflicts among state powers, parental interests and student rights. By denying certiorari in *Fleming v. Jefferson County School District R-1*, the 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. On the other hand, the case also includes complicating elements regarding religious speech and school sponsorship which may have made it an imperfect candidate for the resolution of the circuit split.

The *Fleming* case arose in the wake of the shootings of twenty-three people, thirteen of whom were killed, at Columbine High School in Littleton, Colorado, by two students, Eric Harris and Dylan Klebold. The school officials at Columbine High changed the appearance of the building in an effort to make the school building a welcoming, non-traumatic environment for students returning after the shootings. In addition to structural renovations, a librarian and an art teacher devised a speech situations by having students clearly state their independence from school approval, the potential for confusion regarding endorsement of religious speech is of sufficient concern that a mere disclaimer might not be enough.

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218 *Id.* at 920.
project in which students could create abstract tiles that would be mounted in the hallways throughout the school.\textsuperscript{219} The press release for the project promoted two purposes: “Students will have another opportunity to come into the school and become more comfortable with the surroundings. By participating in creating the tile art, they will also be a part of reconstruction of their school.”\textsuperscript{220}

The coordinators of the project created guidelines for the tiles, directing that “there could be no references to the attack [or] to the date of the attack . . . no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive” included on the tiles.\textsuperscript{221} Tiles that did not follow the guidelines would not be hung in the school.\textsuperscript{222} During the tile-painting sessions held at the school, school officials told painters about the guidelines, but did not provide written copies of them, and posted examples of acceptable tiles, but did not specify symbols that would be considered prohibited religious expression.\textsuperscript{223} The painters, including the parents of one of the deceased students, Kelly Fleming, told school officials that they disagreed with the guidelines and wanted to paint tiles with “messages such as ‘Jesus Christ is Lord,’ ‘4/20/99 Jesus Wept,’ ‘There is no peace says the Lord for the wicked,’ names of victims killed in the shooting, and crosses.”\textsuperscript{224}

The school officials at the tile painting session told some who complained that they could paint whatever they wanted but that tiles that did not conform to the guidelines would be given back to the artists and not mounted in the school.\textsuperscript{225} School administrators screened the tiles before they went to be fired, but some tiles inconsistent with the guidelines escaped review.\textsuperscript{226} Volunteers posting the tiles on the walls were told to put aside any tiles that did not meet the guidelines.\textsuperscript{227}

Despite these safeguards, some tiles that did not comport with the guidelines were posted.\textsuperscript{228} Ultimately, between eighty and ninety tiles, including tiles with crosses, gang graffiti, an anarchy symbol, a star of David, angels, the Columbine ribbon, a skull dripping with blood, the date of the shooting, and a mural with red colors that some found disturbing, were removed after being posted.\textsuperscript{229} The plaintiffs, parents of victims of the shooting, were given the opportunity to paint new tiles without religious symbols, the date of the shooting, or anything obscene and

\begin{itemize}
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Id. at 920–21.
  \item \textsuperscript{221} Id. at 921.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} Id.
  \item \textsuperscript{225} Id.
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} Id.
  \item \textsuperscript{228} Id.
  \item \textsuperscript{229} Id. at 921–22.
\end{itemize}
offensive, but declined because they said that they had painted what they wanted to express already or had been prevented from painting the tiles they wanted to paint.\textsuperscript{230}

The plaintiffs brought suit under 42 U.S.C. §§ 1983 and 1988 for violation of their free speech rights and the Establishment Clause.\textsuperscript{231} The District Court granted judgment for the plaintiffs on the free speech claim.\textsuperscript{232} Judge Wiley Y. Daniel held that the school had created a limited public forum for speech that was not school sponsored and thus that \textit{Hazelwood} did not apply,\textsuperscript{233} that some of the restrictions on the tiles were unreasonable given the purpose of the project,\textsuperscript{234} and that the restrictions on religious speech constituted viewpoint discrimination.\textsuperscript{235} He cited the Supreme Court for the proposition that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”\textsuperscript{236} Extending his analysis in dicta to a hypothetical situation in which a nonpublic forum was involved, Judge Daniel observed in a footnote to his \textit{Hazelwood} discussion:

Even if I did find that the speech was school-sponsored speech subject to the \textit{Hazelwood} analysis, the Circuits are split as to whether \textit{Hazelwood} allows a school to engage in viewpoint discrimination. It does not appear that the Tenth Circuit has decided this issue. It may well be that the Tenth Circuit would hold that viewpoint discrimination would not be warranted even if this speech were school-sponsored.\textsuperscript{237}

Because of the ruling that the tile project constituted a limited public forum, in which the Supreme Court has forbidden viewpoint discrimination,\textsuperscript{238} the Judge did not need to rule on the \textit{Hazelwood} question. His footnote, however, might have prompted the Circuit Court to address the issue directly.

After the District Court enjoined the tile project, the school district appealed, and the Tenth Circuit reversed the decision, holding that the tile project was a nonpublic forum\textsuperscript{239} subject to \textit{Hazelwood} analysis be-

\textsuperscript{230}Id. at 922.
\textsuperscript{232}Id. at 1117, 1122.
\textsuperscript{233}Id. at 1108–10.
\textsuperscript{234}Id. at 1112–13.
\textsuperscript{235}Id. at 1113–17.
\textsuperscript{236}Id. at 1106 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995)).
\textsuperscript{237}Id. at 1110 n.4 (citation omitted).
\textsuperscript{239}Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 929–30 (10th Cir. 2002).
cause the speech was school-sponsored. Under *Hazelwood*, the Court found, school officials are permitted to make decisions based on viewpoint:

*Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech. If *Hazelwood* required viewpoint neutrality, then it would essentially provide the same analysis as under a traditional nonpublic forum case . . . . In light of the Court’s emphasis on the “special characteristics of the school environment,” and the deference to be accorded to school administrators about pedagogical interests, it would make no sense to assume that *Hazelwood* did nothing more than simply repeat the traditional nonpublic forum analysis in school cases.

The Court noted that the *Hazelwood* decision emphasized “the uniqueness of the public school setting and the deference with which it viewed decisions made by educators.” Analyzing the text of the *Hazelwood* opinion, the Court further noted:

[The Court’s specific reasons supporting greater control over school-sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with which messages a school chooses to associate itself, often will turn on viewpoint-based judgments. . . . No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint.]

Of the decisions supporting the use of viewpoint discrimination in school speech cases, the *Fleming* court most closely follows the text of the *Hazelwood* decision in emphasizing the priorities of shared values and moral inculcation inherent in most people’s conception of public education. In terms of philosophical consistency, however, such an emphasis on shared values, implicitly including the theme of local control, ignores the fact that the *Fleming* case is a speech case involving all members of the community and the suppression of their speech by the school district. The case illustrates that censorship does not always fall into the box of “them, not us” or “students, not real people.” In this case, the parents of

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240 Id. at 924.
241 Id. at 926 (citations omitted).
242 Id. at 928.
243 Id. (citations omitted).
students, in addition to some students themselves, were censored. The facts should remind us that free speech should not only be extended to those who deserve it because their speech is valuable or to those who are old enough to appreciate it, but rather to all citizens.

In reading *Hazelwood* to allow viewpoint discrimination by school administrators, the Tenth Circuit additionally undermined efforts to expand speech protection when it remarked:

>If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as “God is Hate,” once it allows tiles that say, “God is Love.” When posed with such a choice, schools may very well elect not to sponsor speech at all, thereby limiting speech instead of increasing it.244

Such an argument gives pause to those who wish to see viewpoint neutrality reinstated in the *Hazelwood* test, but it is also unlikely that school districts will find ways to limit speech as sweepingly outside of fact patterns similar to this one. As discussed below, the tile project is a special form of speech because of the goal of preserving the tiles permanently as fixtures of the school. In other cases, involving, for example, student newspapers, different administrators and communities will respond in different ways depending on the time and circumstances, balancing the protection of free speech against the school’s interest in preserving order and preventing disruption.245

It appears that the *Fleming* case can be distinguished from many of the speech cases discussed earlier in two ways. First, the Tenth Circuit could have avoided a reading of *Hazelwood* which allowed for viewpoint discrimination by holding that the guidelines established by the school were already viewpoint neutral. Though Judge Daniel in the District Court argued otherwise regarding the limitations on religious speech,246 the school’s concern about posting tiles with religious imagery throughout the hallways seems to push this case out of basic viewpoint analysis and into the special category for the examination of religious speech in a school setting suggested above in Part III.D.

Under the Establishment Clause, schools have a heightened obligation regarding religious speech not to be seen as endorsing religion. Since the Tenth Circuit suggests that the school had created a nonpublic forum subject to the *Hazelwood* analysis, it seems clear that the tiles bear the

244 Id. at 934 (citation omitted).

245 Perhaps for political reasons, administrators are unlikely to institute sweeping speech restrictions for the purpose of avoiding case-by-case evaluations, because the outcry of the community and the students would be too great a public relations problem.

imprimatur of the school in a way that implicates Establishment Clause concerns of endorsement. Under a viewpoint-neutral *Hazelwood* test that allows for an additional constitutional inquiry under the Establishment Clause for evaluation of religious speech, the guidelines could have been considered to be viewpoint-neutral in that they marked off a category of content that was unacceptable for the tiles (that is, the Columbine tragedy) and instead promoted models of tiles that were more in service of the stated goal of the project: the creation of a more welcoming and healing space for the students. The fact that the school did not create clear guidelines or stick to them when challenged is unfortunate, but it does not change the fact that the Tenth Circuit could have read the guidelines to be viewpoint neutral instead of applying a viewpoint discrimination element of the *Hazelwood* test.

Alternatively, a more aggressive reinterpretation of the *Fleming* case would suggest that the tile project should have been considered government speech from the beginning because of the permanent nature of the tile display in the school. Unlike a newspaper article, a speech, or even a temporary display of artwork, the tiles were intended to become part of the fabric of the school building, and as such, were not easily distanced from the school’s own beliefs. As suggested above in Part III.B, in other cases of free speech with controversial viewpoints, a school is able to answer speech with speech of its own, whether in a meeting or a newsletter, but in this case, the school’s own premises became the speech in a way that could not be responded to equivalently. A reading of the tile project as government speech would have precluded the need for a viewpoint-based *Hazelwood* analysis because the government can advocate the viewpoints it chooses when it speaks for itself.247

The plaintiffs in the *Fleming* case appealed to the Supreme Court, which denied certiorari on January 13, 2003, leaving the circuit court split over *Hazelwood* and viewpoint neutrality unresolved. The Becket Fund for Religious Liberty filed an amicus brief urging certiorari and a ruling that *Hazelwood* does not permit viewpoint discrimination.248 The brief argued specifically for the point that discrimination against religious speech was a particularly insidious form of viewpoint discrimination, citing the Seventh Circuit for the proposition that “even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker’s viewpoint[,] . . . [e]specially not on

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247 See, e.g., Rust v. Sullivan, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”) (citation omitted).

account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection."  

As the Becket Fund’s brief illustrates, in addition to the question of whether viewpoint neutrality is included in the Hazelwood analysis, the Fleming case potentially raises at least one other complicated issue: does the banning of religious speech in a school setting during school hours constitute impermissible viewpoint discrimination? Proponents of religious speech, as discussed earlier, have increasingly raised this issue with test cases such as the series of candy cane cases. Considering these issues and the possibility that the Court could have interpreted the artwork as government speech, the fact pattern of Fleming may not have been an ideal context in which to settle the viewpoint neutrality debate. 

The issues raised by Fleming, however, whether confined to the context of Hazelwood or, more likely, considered in the broader context of the role of religious speech in government-related activity, will not soon fade away. A controversy is brewing in Loudoun County, Virginia, over a brick walkway built in front of Potomac Falls High School. In a fundraising effort, the school’s parents group sold bricks for the walkway to parents, who could then inscribe a brick with their children’s names and, for a few more dollars, add a symbol from a school-created list of twenty-three symbols (including a soccer ball, a cheerleader, and a cross). After the bricks were put into the walkway, a parent complained about the cross symbols, and six bricks were removed from the walkways. The Rutherford Institute, a civil liberties group, is suing the school district on behalf of five families whose bricks were removed. Federal Judge James C. Cacheris denied the school district’s motion to dismiss the lawsuit and noted in a footnote to his ruling that the issue of viewpoint discrimination in school cases is still an unresolved question. Another court will soon grapple with the combined issues of viewpoint discrimination and Establishment Clause endorsement concerns.

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249 Id. at 7 (quoting Hedges v. Wauconda, 9 F.3d 1295, 1298 (7th Cir. 1993)) (alterations in original).
250 This question is distinguished from the holding already handed down by the Court in Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), allowing a religious group access to school grounds after school hours for extracurricular activities when the school was otherwise permitting secular groups to use the space.
252 Id.
253 Id.
255 Id.
V. CONCLUSION: TOWARD VIEWPOINT NEUTRALITY

When the Supreme Court first handed down Hazelwood, supporters of free speech rights were dismayed because the holding restricted the rights of students and others to express themselves in school-sponsored fora. The holding of Tinker nineteen years earlier had appeared sufficient to allow administrators the necessary control over student speech that was disruptive to the school environment, and the extensions of administrator control found in Fraser and Hazelwood seemed to be unnecessary limitations on student rights. As Hazelwood began to be applied, its ramifications regarding viewpoint discrimination became increasingly clear, rendering a troublesome decision even more harmful. The denial of certiorari in Fleming indicates that it will likely be some time before the Supreme Court hears a case which seeks to clarify the circuit split regarding Hazelwood and viewpoint discrimination. Judging from the evidence of the questions asked at oral argument and the language of both the majority and dissenting opinions, it seems possible that the Hazelwood Court intended to abandon the requirement of viewpoint neutrality that it held so sacred in its other free speech jurisprudence. It is also possible, however, that the absence of an explicit rejection of viewpoint neutrality in the context of school-sponsored speech indicates a reluctance on the part of some members of the majority to articulate such a serious departure from precedent.

When and if the Court does take up a case addressing this question, the justices should explicitly prohibit viewpoint discrimination in schools. Further, the Court should try to make a statement about the distinction between content and viewpoint discrimination in order to give courts and, for that matter, local school officials guidance as they go forward. The complexity of the situation is not a reason to encourage ambiguity. One useful distinction that could be made is between viewpoint discrimination regarding religious speech in a school setting that potentially implicates the Establishment Clause and therefore an additional line of constitutional inquiry, and viewpoint discrimination of non-religious speech, which should be strictly forbidden. While the holdings in Rosenberger and Lamb’s Chapel indicate that religious speech can be considered a viewpoint for purposes of viewpoint neutrality analysis, those cases did not involve in-school speech activities, like the candy cane distribution in Westfield, that might be seen as proselytizing approved by a government entity.

The explicit requirement of viewpoint neutrality in schools might raise concerns about the ability of schools to promote legitimate pedagogical objectives, but those concerns can be addressed even in an environment of viewpoint neutrality. One priority of school officials is the creation of a safe and productive learning environment for students. The Tinker disruption standard, still in place, would allow officials to limit
speech that threatens the security of students. Equally important priorities include the inculcation of civic values and transmission of curricular subject matter. To the extent that controversial speech interferes with those objectives, teachers and administrators should take the opportunity to engage students in dialogue and consider each controversy a “teachable moment.” There is no doubt that public school teachers are overworked and underpaid, and such a prescription for more dialogue and less speech suppression may seem unrealistic given their already heavy burdens. But speech suppression directly contradicts the public school system’s mission to produce well-educated citizens able to participate in democracy. Any adjustments made in favor of more dialogue and speech protection will be worth the effort and will ultimately result in a more productive school environment.

Last spring, a student newspaper editor at a North Carolina high school was forced to censor an article on high school drinking rather than face the other option her principal gave her: no publication of the paper at all.256 The principal required the editor to eliminate references to specific students who had been suspended for drinking during a school trip on the grounds that the publication of the anecdotes would embarrass those students.257 The principal, Bill Anderson, explained his decision, saying, “One of the responsibilities of a high school principal is to edit the content of a school-sponsored newspaper to insure that all writings are appropriate for students at different developmental levels.”258 But the student editor, Sara Boatright, noted that Anderson had not previously censored references to inappropriate student activity, having allowed the paper to run references to students in a fight and to arson suspects.259

At the time of this writing, the principal at Lynn English High School in Massachusetts prevented an English teacher (who had received permission from the department chair) from screening the Academy Award–winning film Bowling for Columbine on the grounds that it allegedly contained anti-war messages.260 The ACLU of Massachusetts issued a press release suggesting that such action might violate the First Amendment, as a viewpoint-based decision, because it did not involve a “legitimate pedagogical concern” under Hazelwood.261

The kind of choice Sara Boatright faced—self-censorship or no publication at all—and the censorship of a noted film by school officials

257 Id.
258 Id.
259 Id.
in Lynn are exactly what student journalists and others who have experienced or witnessed censorship will remember about the kind of civic values taught to them in public school. The inculcation of moral and democratic values which the public education system was created to promote demands a more rigorous protection of First Amendment rights for student journalists, students, and community members in general than that which the Court gave us in *Hazelwood* and that which too many circuit courts have given us in the subsequent fifteen years. The world undoubtedly has changed after September 11, but what should not have changed is our recognition of the wisdom of the Founding Fathers when they expressly protected the freedom of speech. Despite the temptation to silence dissent in a time of tension and violence, the Court has a chance to clarify and extend the freedoms of students and others in school settings. It should not hesitate to take that opportunity to inculcate the values of democracy in the country’s young citizens.