# The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities

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*In this Article Professor Brownstein critically evaluates the way that federal courts adjudicate student free speech claims arising out of school-sponsored activities. In doing so, he demonstrates the inconsistency in the case law and the incoherence of current doctrine.*

*Professor Brownstein directly challenges conventional orthodoxy in this area of the law. He rejects the often-stated truism that student free speech rights at school are less rigorously protected than the rights of speakers outside the school environment and argues instead that under current authority, students at public school often have greater free speech rights than adults in other areas of public life. Further, he calls into question the way that most federal courts interpret and apply* Hazelwood v. Kuhlmeier, *the controlling Supreme Court decision in this area, by arguing that school-sponsored activities should not be characterized as a nonpublic forum in which viewpoint-discriminatory regulations are prohibited. Professor Brownstein also contends that a key factor in the* Hazelwood *analysis — whether the expressive activity at issue bears the*

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*imprimatur of the school — should be largely irrelevant to the free speech analysis in these cases.*

*As an alternative to the current morass of inconsistent decisions and incoherent analysis in this area, Brownstein argues that school-sponsored activities should be characterized as a "nonforum" — a new free speech category developed in the Article. The nonforum category covers government property or activities that should not be subject to judicial review under the Free Speech Clause. As a working definition of the category, nonforums involve intrinsically and pervasively expressive government property and activities where the burden of complying with free speech requirements would unreasonably interfere with the activity's purpose or the property's current use. They also involve government functions which, for separation of powers and federalism reasons, should not be subject to intrusive judicial review under the Free Speech Clause.*

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## INTRODUCTION

This Article has a specific purpose. It critically evaluates the way that federal courts adjudicate free speech claims brought by public

school students that challenge restrictions on student expression during school-sponsored activities.[1] After identifying and explaining the difficult issues that courts have confronted over the last twenty years in dealing with these free speech cases, the Article proposes an alternative solution to these problems — a solution that is markedly different than the approaches considered in the current case law.

The problems with existing doctrine and case analysis in this area are conceptual and practical. Current case law is grounded on two rules, each set out in seminal Supreme Court decisions. In *Tinker v. Des Moines Independent Community School District*, the Court held that a student's private speech in school can only be restricted by school authorities if it materially disrupts the educational program or impinges on the rights of other students.[2] In *Hazelwood School District v. Kuhlmeier*, the Court held that student speech in school-sponsored activities may be restricted if doing so is reasonably related to legitimate pedagogical concerns.[3] But these decisions do not track free speech doctrine as it is applied in other circumstances, and as that doctrine has developed over time. These rules have no real counterpart anywhere else in the case law, and the Court has never explained why distinct rules regarding freedom of speech are appropriate in the public school setting.

[1] The Article also addresses speech by non-students that is directed at students during school-sponsored activities. Cases involving advertising in school periodicals, such as a yearbook, or tiles placed on school grounds carrying messages from parents and community members, would fall into this category.

Student speech during school-sponsored activities refers to speech that is part of the school program. Thus, if students whisper to each other while sitting in the audience during a school assembly, I do not consider that speech in a school-sponsored activity. If a student is selected to speak during the assembly, either as a primary speaker or someone who is called on to ask a question or express a comment, then that student's expression is speech in a school-sponsored activity for the purposes of this Article. Thus, in *Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780, 793-94 (E.D. Mich. 2003), plaintiffs argued that that the speech of a student invited to speak at an assembly on "what diversity means to me" should be analogized to the black armbands worn by students in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504 (1969), and protected as a personal message. In rejecting this argument, the court explained, correctly, that "plaintiffs ignore the distinct context of [the student's] school assembly speech." *Hansen*, 293 F. Supp. 2d at 794. The assembly speech did not constitute "personal expression that just happen[ed] to occur on the school premises. Instead, [these] speaking events . . . were specifically and particularly planned . . . — they did not just happen to occur in the school, but rather occurred at school-sponsored forums." *Id.*

[2] *Tinker*, 393 U.S. at 513.

[3] 484 U.S. 260, 273 (1988).

Confronted with holdings that lack justification or doctrinal continuity, courts do not know what these rules mean or how they are to be applied. They do not know how *Tinker* and *Hazelwood* fit into the free speech framework that applies everywhere else outside of the public school environment. Outside of public schools, courts employ forum analysis as a basis for reviewing speech regulations. When and how do free speech categories such as limited public forums and nonpublic forums apply in public schools? Courts do not know how to answer these questions. Outside of public schools, government-subsidized or sponsored expressive activities are often considered to be government speech or to involve editorial discretion for First Amendment purposes. When, if ever, should school-sponsored expressive activities be classified the same way? Again, courts do not know how to relate the meaning of the Free Speech Clause outside the public schools to its operation within the school environment.

Indeed, courts are not even sure how to evaluate the level of protection that student speech receives. Conventionally, they maintain that student speech in public schools receives less protection than the Free Speech Clause provides elsewhere in comparable circumstances. But this is an erroneous impression that only aggravates the level of confusion in this area of law.

The resulting disarray in the case law is all too obvious and all too costly. The mixture of muddled reasoning and inconsistent decisions invites needless litigation. School boards, principals, and teachers receive inadequate guidance as they struggle to comply with constitutional requirements. While there is more than enough uncertainty to go around throughout all of the student speech case law, the adjudication of cases involving student speech in school-sponsored activities is particularly chaotic. Part I of this Article will lay out in detail the scope and nature of the doctrinal confusion in the case law adjudicating disputes about the direction and control of speech by students and to students in school-sponsored activities.

Part II of this Article offers a conceptually defensible and pragmatically functional solution to the problems described in Part I. Because so much of the confusion in this area results from the discontinuity between free speech doctrine as it applies to the public schools and the doctrinal framework employed across the spectrum of all other free speech disputes, however, the proposed solution extends far beyond the problem of student speech in school-sponsored activities. It suggests there is a new doctrinal category of settings and

circumstances[4] — I call the category a "Nonforum" — that should be recognized in free speech jurisprudence. Unlike the various kinds of forums that the Court has identified, in which speech regulations are evaluated under standards of review of varying degrees of rigor, in a nonforum government decisions about speech should not be subject to any form of judicial review under the Free Speech Clause of the First Amendment.

The nonforum category can be located on the free speech doctrinal continuum between the nonpublic forum and government speech.[5] Under existing doctrine, at one pole of the continuum, speech regulations governing public property or government-sponsored or government-subsidized activities receive the most rigorous review in a traditional public forum or a designated public forum.[6] At the other pole, the government's control of its own speech, what is classified as government speech, is immune from Free Speech Clause review. Between these poles, there is a default category that includes all other speech occurring on public property or receiving some form of public support — the nonpublic forum. In a nonpublic forum, viewpoint-discriminatory speech regulations receive strict scrutiny while content-neutral and content-discriminatory regulations are evaluated under a lenient reasonableness standard of review.

The nonforum exists between and borders the nonpublic forum and government speech. It displaces the nonpublic forum with regard to certain settings and circumstances in which government should have even greater discretionary authority to regulate speech and speakers than the nonpublic forum classification provides, but which cannot legitimately or accurately be described as government speech.[7] I will argue in this Article that school-sponsored activities constitute a

[4] I use the term "settings and circumstances" here rather than "location" because the idea of place does not fully describe the substance of this category any more than location completely captures the substance of nonpublic forums.

[5] The described continuum does not cover all speech situations. No linear continuum could, given the complexity of free speech doctrine. The described continuum is focused on speech restrictions that apply to public property or government-sponsored or subsidized activities. Therefore, it does not cover conventional regulations of private speech in private settings. Nor does it cover regulations limiting the speech of public employees.

[6] I use the term designated public forum in this Article to include both a fully open designated public forum and a designated limited public forum that provides only restricted access.

[7] Both a nonpublic forum and a nonforum can be distinguished from government speech itself. In the latter context, the government is not subject to free speech review when it determines the content of its own messages and expresses its own point of view. *See infra* notes 43-46, 97-103 and accompanying text.

nonforum for free speech purposes. But school-sponsored activities are only one example of what this category covers. There are many other settings and circumstances that should be similarly classified.

Thus, this Article solves a particular free speech problem about student speech in the public schools through an analysis that has significant ramifications for free speech doctrine outside of the public school setting. I think the issue of student speech in school-sponsored activities is a good vehicle for introducing the nonforum category, justifying its existence, and demonstrating its value. It should be clear at the outset, however, that the scope and utility of the nonforum category does not begin or end at the schoolhouse door.

Anyone familiar with free speech jurisprudence may be thinking at this point that about the last thing free speech doctrine needs is the addition of yet another category or classification. It is more than complicated enough. I am more than sympathetic to this position. The only justification for adding an additional category to the existing analytic framework is that there are important free speech problems that current doctrine cannot resolve. As I hope to demonstrate in the first Part of this Article, First Amendment cases involving the free speech rights of students in public school-sponsored activities represent just such a problem area. The problems presented in these cases cannot be solved by existing doctrine because existing doctrine itself lies at the heart of the problem.

## I. CONSTITUTIONAL CHAOS IN STUDENT SPEECH CASES INVOLVING SCHOOL-SPONSORED ACTIVITIES

This Part of the Article presents a thorough critique of the way that courts currently adjudicate free speech cases arising out of school-sponsored activities. It identifies four serious problems with free speech doctrine in this area. First, the existing framework fails dismally in filtering out disputes that do not warrant review by a federal court. An astonishing array of disputes that do not raise legitimate free speech issues are being litigated in federal courts and taken seriously by federal judges. Second, courts do not understand, and consistently mischaracterize, the relationship between the distinctive free speech framework that applies in student speech cases and the general principles of First Amendment doctrine that apply everywhere else. In particular, courts operate under the assumption that students' rights are diminished in the school environment when in fact the exact opposite is true. Students have stronger free speech rights in public school than adults do in comparable situations in public life.

Third, courts struggle to determine when *Hazelwood*'s legitimate pedagogical concern standard should be applied in reviewing student free speech claims. To begin with, it is unclear when and whether the control of speech in school programs constitutes government speech or the exercise of editorial discretion over speech, both of which are immune from Free Speech Clause review, and when that control should be reviewed as school-sponsored speech under *Hazelwood*. Moreover, the criteria *Hazelwood* suggested for determining when the legitimate pedagogical concern standard should be employed is inherently ambiguous and indeterminate. There are no coherent or consistent answers to questions about whether restricted speech was school-sponsored, whether it occurred in a curricular activity, and whether it could reasonably be perceived to bear the imprimatur of the school. In addition, courts are hopelessly confused about the relationship between public and nonpublic forum doctrine and the *Hazelwood* standard.

Fourth and finally, even when courts conclude that *Hazelwood* applies to a student free speech case, they disagree as to what constitutes a legitimate pedagogical concern. There is a significant split in the circuits as to whether viewpoint-discriminatory speech regulations in school-sponsored activities should be subject to much more rigorous review than content-discriminatory or content-neutral restrictions on student speech. All of these problems are examined in detail below.

### *A. The Problem with Current Doctrine*

There is something seriously wrong with the way federal courts adjudicate free speech claims arising out of school-sponsored activities. The problem goes far beyond faulty reasoning and erroneous conclusions in particular cases. What is at issue here is nothing less than a complete failure of constitutional doctrine in this area of law.

#### 1. Adjudicating Cases That Do Not Merit Constitutional Review

Consider the kinds of disputes that are being brought to federal courts under existing doctrine. Surely, one critical function of constitutional doctrine is its ability to filter out disputes that do not belong in federal court because they should not be resolved as a matter of constitutional law. Free speech doctrine involving student speech in school-sponsored activities fails this test miserably. To fully appreciate the scope of this failure, one need only look at a sample of cases litigated in federal court in recent years. It is an astonishing collection of lawsuits.

Literally every kind of school decision is grist for the free speech mill. For example, high school marching band members sued school authorities for prohibiting them from playing a song extolling the use of illicit drugs.[8] A fourth-grade student sued his school because he was not allowed to wear his Green Bay Packers jacket in a class photo that was being sent to the Minnesota Vikings football team, and because his picture was not displayed on the classroom bulletin board after he colored a football player in the Packers' colors (green and yellow) rather than the Vikings' colors (purple and gold) as he was instructed to do.[9] High school students went to court to challenge their school's decision to change the school's mascot from "Johnny Reb" to some less divisive symbol.[10]

The administration of student elections is ripe for challenge on free speech grounds. A high school disqualified a student from serving as student body president following his unauthorized distribution of condoms attached to stickers bearing his campaign slogan, "the Safe Choice," during the student government election.[11] He claimed that school authorities violated his First Amendment rights. Another student candidate filed suit to protest his school's decision to disqualify him from running for student office after he ridiculed (during a student election assembly) the way the assistant principal stuttered while using the intercom.[12] Another student candidate, whose first name was "Mary," filed suit to challenge the school's removal of her campaign poster depicting the painting "Madonna and Child" with the caption "He chose Mary . . . You should too."[13]

The list goes on. Children in kindergarten, first, and second grade claim that their First Amendment rights (or the rights of their parents) are abridged when pictures they drew are not hung in the hall or displayed appropriately,[14] or because they cannot present a song or

[8] McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 919 (E.D. Mo. 1999).

[9] Sonkowsky v. Bd. of Educ. for Indep. Sch. Dist. No. 721, No. CIV. 00-2700 ADM/AJB, 2002 WL 535078, at *1 (D. Minn. Apr. 8, 2002).

[10] Crosby *ex rel.* Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1988).

[11] Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1131 (8th Cir. 1999).

[12] Poling v. Murphy, 872 F.2d 757, 759-61 (6th Cir. 1989).

[13] Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643, 645 (N.D. Miss. 2003).

[14] *See, e.g.*, Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617 (2d Cir. 2005) (adjudicating claim that kindergarten student's First Amendment rights were violated when part of picture he drew was deliberately folded under so it could not be seen when displayed at school assembly); C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198 (3d Cir. 2000) (en banc) (reviewing claim that kindergarten student's Thanksgiving picture

story in a "show-and-tell" type program,[15] or because they cannot attach long proselytizing messages to trivial gifts exchanged during seasonal holiday parties.[16]

In one memorable case, albeit at the college level,[17] a plaintiff sued a university because it sanctioned him and refused to add his thesis to the university library's archives when it learned that the plaintiff had substituted a "Disacknowledgement" page for the "Acknowledgement" page previously submitted with his manuscript to his Thesis Committee for approval. The "Disacknowledgement" page stated, "I would like to offer special Fuck You's to the following degenerates for being an ever present hindrance during my graduate career." That "degenerate" group included the Dean, staff, and library manager of the plaintiff's graduate school.[18]

Another case involved a northern Michigan community college newspaper. Student fees financed the paper and the student editors and reporters received academic credit or scholarships for their work. The Dean of the college prohibited the paper from printing an

was not displayed on school wall along with other students' pictures).

[15] *See, e.g.*, Denooyer v. Merinelli, No. 92-2080, 12 F.3d 211, 1993 WL 477030, at *1-*2 (6th Cir. Nov. 18, 1993) (unpublished per curium opinion) (evaluating second grade student's claim that her free speech rights were violated when school prohibited her from showing videotape of her singing song at church service in show-and-tell type program); Busch v. Marple Newtown Sch. Dist., No. 05-CV-2094, 2007 WL 1589507, at *1 (E.D. Pa. May 31, 2007) (rejecting mother's claim that she has free speech right to read Bible verses from Psalm 118 at show-and-tell type activity in her daughter's kindergarten class).

[16] Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 273, 281 (3d Cir. 2003) (upholding school's decision not to allow kindergarten student to distribute candy canes with message describing "the Wonder of Jesus and his Great Love that came down at Christmas and remains the ultimate and dominant force in the universe today" at class holiday party). *See generally* Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570, 579 (6th Cir. 2008) (upholding school's decision prohibiting fifth-grade student from selling candy canes with cards for "[t]he admitted purpose . . . [of] promot[ing] Jesus to other students" in social studies program).

[17] Courts are split as to whether the same standards of review should be applied to restrictions on student speech in school-sponsored activities in public universities as are applied to speech regulations in public elementary and secondary schools. *See, e.g.*, Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc) (holding that *Hazelwood* applies to censorship of college newspapers notwithstanding dissent's contention that other circuits limit *Hazelwood* to high schools and elementary schools). I take no position on this issue in this Article. In cases where courts do apply the same constitutional standards to colleges as they do to high schools, however, I see no reason not to use those cases as examples of how these standards of review operate and the results of their application.

[18] Brown v. Li, 299 F.3d 1092, 1099 (9th Cir. 2002), *amended and superseded by* Brown v. Li, 308 F.3d 939 (9th Cir. 2002).

advertisement on its front page for a Canadian nude dancing club across the border that proudly promoted the total nudity of its dancers and the drinking age of nineteen in Canada, both of which are inconsistent with Michigan law.[19] The editor of the paper sued the Dean in federal court for violating his First Amendment rights.

Some of these cases were rejected at the district court level.[20] Others resulted in long, elaborate majority opinions by court of appeals panels, often accompanied by impassioned dissents.[21] Some were only resolved after en banc review.[22]

It is not only the substance of these claims, but also the process of their adjudication, that seems distorted. In one case involving a challenge to a school board's decision to remove a book from school libraries, the trial court granted summary judgment based on depositions of eight of the twelve school board members. The court of appeals remanded for trial so that all twelve of the board members could testify and be cross-examined in order to determine "the true decisive motivation behind the School Board's decision."[23] It would be hard to imagine a more cumbersome and costly approach to adjudicating this kind of an issue.

### 2. Doctrinal Incoherence

The cases described above do not arrive in federal court by happenstance. They are invited in by First Amendment analysis in judicial opinions that is incoherent to the point of incomprehensibility. Similarly, federal judges take these claims seriously because a maze of twisting doctrinal directions and inconsistent precedent makes it difficult to develop a persuasive and uniform basis for rejecting them. Doctrinal confusion serves as a poor gatekeeper for courts in the best of times. When our society is as

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[19] Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410, 1411-12 (E.D. Mich. 1990).

[20] *See, e.g.*, Sonkowsky v. Bd. of Educ. for Indep. Sch. Dist. No. 721, No. CIV. 00-2700, 2002 WL 535078 (D. Minn. Apr. 8, 2002); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918 (E.D. Mo. 1999). *But see Lueth*, 732 F. Supp. at 1416 (granting summary judgment in favor of student editor, allowing publication of full-page advertisement for nude dancing and underage drinking in Canada).

[21] *See, e.g.*, Brown v. Li, 308 F.3d 939, 939 (9th Cir. 2002) (no majority as to reasoning; majority opinion, concurrence, and dissent all adopt different analysis); Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1136 (8th Cir. 1999) (Wolle, J., dissenting).

[22] *See, e.g.*, C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198 (3d Cir. 2000).

[23] Campbell v. St. Tammany Parrish Sch. Bd., 64 F.3d 184, 190 (5th Cir. 1995).

ideologically and politically polarized as it is today, one can hardly be surprised that litigants take advantage of a doctrinal morass so convoluted that federal judges can't figure it out and seek redress from the federal courts as the School District Board of Appeal of last resort.

Doctrinal incoherence is never a good thing, of course. But in this area of constitutional law, it is especially unforgiveable. The fact that courts are wasting their time on disputes that do not require constitutional adjudication is really only a part of the problem. The more serious cost is the burden imposed by constitutional confusion on teachers and administrators.

Education is all about speech in its various facets. Schools are intrinsically expressive institutions. Their core functions involve choices about speech, judgments evaluating speech, limitations restricting speech, and mandates requiring speech. For school administrators and teachers who have to work with and regulate speech on a daily, indeed an hourly basis, being subject to unintelligible and inconsistent constitutional guidelines controlling their conduct is a draining and demoralizing burden.[24]

Responsibility for this state of affairs is widespread. Part of the problem is political and reflects the ideological predispositions of federal judges; part of the problem results from the continued commitment to the holdings of older cases without regard to doctrinal development that has undermined the reasoning of those decisions; and part of the problem reflects the increasing complexity of free speech doctrine in general and the Supreme Court's failure to decide sufficient cases to give meaning to the indeterminate standards the Court employs.[25] There is more than enough blame to go around, so assigning culpability for the current state of affairs isn't much of a challenge. The hard job is identifying and justifying solutions to the doctrinal mess we are in. To do that, we first have to understand the scope and nature of what is wrong with current doctrine in much greater detail.

[24] It is also an expensive burden when school districts are forced to litigate constitutional claims of dubious merit that are taken seriously by courts.

[25] The Supreme Court has not decided a student speech case arising out of school-sponsored activities since *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

### *B. The Isolated and Ambiguous Location of Public School Cases in Free Speech Doctrine*

#### 1. Mischaracterizing the Preferential Free Speech Protection Provided to Public School Students

Free speech case law adjudicating First Amendment claims in public schools does not follow free speech doctrine as it is applied in other contexts. Even worse, judges do not seem to appreciate the way that it differs from free speech case law outside the public school environment. While the focus of this Article is on student speech rights in school-sponsored activities, to fully appreciate this aspect of the problem it is useful to think about student speech rights both outside of and within school-sponsored activities.

When federal courts adjudicate the First Amendment claims of public school students against speech restrictions imposed by school authorities, they base their analysis on a common assumption. The free speech rights of students at school, they explain, are less extensive and less rigorously protected than the speech rights of other speakers outside the school environment.[26] Free speech rights do not end at the school house door, but they are diminished when students walk through it. This is an odd assumption, to say the least, notwithstanding its prevalence in judicial opinions. It is odd because it is clearly wrong. In many circumstances students at public school have greater free speech rights than adults in other areas of public life. In discussing current free speech doctrine, the question is not whether student free speech rights should end at the school house door. It is whether such rights should increase in their scope and the rigor with which they are protected in the public school setting.

[26] *See, e.g.*, *Hazelwood*, 484 U.S. at 266-67; Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 (9th Cir. 2006), *vacated*, Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007) (mem.); Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 276-78 (3d Cir. 2003); Sypniewski v. Warren Hill Reg'l Bd. of Educ., 307 F.3d 243, 259 (3d Cir. 2003) (explaining that "*Tinker* acknowledges what common sense tells us: a much broader 'plainly legitimate' area of speech can be regulated at school than outside school"); *Henerey*, 200 F.3d at 1132; Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (noting that "limitations on speech that would be unconstitutional outside the school house are not necessarily unconstitutional within it"); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 922 (E.D. Mo. 1999).

*a. The* Tinker *Anomaly — Student Speech Outside of School-Sponsored Activities*

Assume that a school official restricts the free speech rights of students on school property when they are not engaged in school-sponsored activities. He regulates student speech in the hallways, in the schoolyard during recess, or at lunch period, for example. Restrictions on student speech in these circumstances are evaluated under the standard set out forty years ago in *Tinker*.[27] Student speech may only be restricted if it materially disrupts the school's educational mission or if it impinges on the rights of other students.[28] There is considerable uncertainty as to how courts should apply this standard in specific cases,[29] and some disagreement among courts as to whether it applies to different kinds of student speech and to different kinds of speech regulations.[30] But many courts continue to apply *Tinker* as the

[27] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[28] *Id.*

[29] *See, e.g.*, Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006) (describing case involving student wearing T-shirt "depicting President George W. Bush in an uncharitable light" as one that requires court "to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents"); *Harper*, 445 F.3d at 1185 (holding over spirited dissent that school may prohibit student from wearing T-shirt communicating anti-gay message under *Tinker* on grounds that it "impinges upon the rights of other students"), *vacated*, 127 S. Ct. 1484 (2007) (mem.); Lavine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (noting that in trying to apply *Tinker* standard, "[f]orecasting disruption is unmistakably difficult to do"); Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992) (remanding to determine whether student buttons arguably referring to replacement teachers during strike as "scabs" might be reasonably perceived to be disruptive and, therefore, subject to restriction under *Tinker*).

[30] The scope of *Tinker* is unclear. *See Guiles*, 461 F.3d at 326 (noting uncertainty as to whether *Tinker* "applies to all student speech . . . or whether it applies only to political speech or to political viewpoint-based discrimination"); Bar-Navon v. Sch. Bd., No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007) (suggesting that "[c]ourts at all levels have demonstrated confusion as to the scope of *Tinker*'s holding").

Courts disagree as to whether *Tinker* applies to content-neutral speech regulations. *Compare* Raker v. Frederick County Pub. Sch., 470 F. Supp. 2d 634, 640 (W.D. Va. 2007) (applying *Tinker* standard to school rule restricting distribution of leaflets), *with* Nelson v. Moline Sch. Dist., No. 40, 725 F. Supp. 965, 973 (C.D. Ill. 1989) (declining to apply *Tinker*'s material disruption standard to content-neutral speech regulations).

Courts also question whether *Tinker* should apply to protect the speech of elementary school students. *See, e.g.*, S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3d Cir. 2003) (concluding that "a school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting"); Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538-39 (7th Cir. 1996) (suggesting that "it is unlikely that *Tinker* and its progeny apply to

general standard to be used in evaluating restrictions on student speech.[31] Further, when *Tinker* is applied, it is often treated as a rigorous standard of review.[32]

Now let's compare this framework to the free speech protection provided to adults in a non-school environment, but in otherwise similar circumstances. First, courts would classify the property under conventional forum analysis. But exactly what kind of a forum is public property like a public school? A school isn't a traditional public forum. It's not a street or a park. Nor is a school a designated or limited public forum. The hallways, school yards, and lunch rooms of public schools have not been deliberately opened up by school authorities for unfettered discussion and debate any more than the foyers and hallways of most government buildings have been opened up for unfettered discussion and debate. Therefore, a school and property like a school that has not been deliberately opened up for public expressive activities should probably be classified as a nonpublic forum.

The free speech rights of speakers in a nonpublic forum are quite clear under current doctrine. As long as the regulations do not discriminate on the basis of viewpoint, they are subject to a very lenient and deferential standard of review. Viewpoint-neutral speech restrictions limiting expressive activities in a nonpublic forum need only be reasonable to be upheld against a First Amendment challenge.[33]

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public elementary (or preschool) students").

[31] *See, e.g.*, Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 767 (9th Cir. 2006) (reaffirming that "the First Amendment protects all student speech that is neither school-sponsored, a true threat, nor vulgar, lewd, obscene or plainly offensive" under *Tinker*'s material disruption standard); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (recognizing that student speech falling outside of special categories Court has identified "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others"); DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 640 (D.N.J. 2007) (acknowledging that "the majority of cases . . . [that] analyze First Amendment rights in the public school context[] do so under the *Tinker* analysis").

[32] *See, e.g.*, Sypniewski v. Warren Hill Reg'l Bd. of Educ., 307 F.3d 243, 254-58 (3d Cir. 2003) (holding that school could not apply its harassment policy to student's T-shirt when there was no evidence message on T-shirt would cause disruption); Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 542-44 (6th Cir. 2001) (concluding that display of Confederate flag could not be prohibited without school showing that display would cause disruption); Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (recognizing that school could not prohibit distribution of underground student newspaper without evidence that its circulation resulted in disruption).

[33] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983); Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991).

That is a far cry from the *Tinker* standard. The standard of review for speech regulations in a nonpublic forum constitutes a much less demanding standard of review than *Tinker* in many cases.[34] In a long line of cases, courts reviewing speech regulations in nonpublic forums have upheld content-discriminatory and content-neutral restrictions on speech[35] that could not be upheld under *Tinker* because the speech is neither materially disruptive nor impinges on students' rights.[36] It seems

[34] The only regulatory context in which the standard of review applied to speech restrictions in a nonpuplic forum is of equal or greater rigor than the standard required by *Tinker* is viewpoint-discriminatory regulations of speech, which receive strict scrutiny in a nonpublic forum. If a court concludes that *Tinker* only applies to viewpoint-discriminatory speech regulations, see, for example, *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), the level of review required by *Tinker* and the nonpublic forum doctrine would be essentially the same.

[35] The Supreme Court's opinion in *Cornelius* provides some of the Court's clearest statements describing the lenient standard of review applied in a nonpublic forum. In the Court's words, "[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity as long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral"; "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation"; "[n]or is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling"; and "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 806, 808-09, 811.

Given this deferential standard of review, the courts have upheld numerous content-discriminatory and content-neutral regulations of speech in nonpublic forums. *See, e.g.*, United States v. Kokinda, 497 U.S. 720 (1990) (upholding as reasonable ban on soliciting on interior sidewalk in front of post office); *Cornelius*, 473 U.S. 788 (upholding as reasonable exclusion of legal defense and advocacy groups from federal workplace charitable drive); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding as reasonable complete ban on posting of signs on utility poles); *Perry*, 460 U.S. 37 (upholding as reasonable content-discriminatory decision denying access to school mail system to union seeking to displace existing bargaining representative); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (upholding as reasonable regulation limiting sale or distribution of literature to fixed booths); Make the Road by Walking, Inc. v. Turner, 378 F.3d 133 (2d Cir. 2004) (upholding as reasonable exclusion from welfare office waiting rooms of all persons, including welfare advocacy groups, who were not present to transact official business with government).

In *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992), four Supreme Court Justices voted to uphold a complete ban on the distribution of literature in a large metropolitan airport terminal, but the Court struck down the regulation as unreasonable. This was one of the only cases in which the Court has struck down a content-discriminatory or content-neutral regulation of speech in a nonpublic forum. A ban on soliciting at the airport was upheld in the companion case, *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

[36] For example, *Tinker*'s material disruption standard has been applied to content-

clear that students engaged in many expressive activities in public schools would often receive greater free speech protection under *Tinker* than adults engaged in comparable expressive activities in nonpublic forums.

It is true, of course, that student speech in school hallways is not as protected as speech in streets or parks or in private settings. But that is entirely beside the point. Public schools are neither traditional public forums nor private settings for speech. They are public property used by the government to serve specific functions. As such, one should compare the rules for reviewing speech regulations in schools to the rules that apply to speech regulations governing public property used for other public purposes. When the government uses public property for its own functions, and does not intentionally open that property up to private expressive activities, the default doctrinal rule is that a nonpublic forum standard of review applies. In comparison to that standard, particularly with regard to content-

discriminatory speech regulations that would be reviewed under a reasonableness standard in a nonpublic forum. *See, e.g.*, Guiles *ex rel.* Guiles v. Martineau, 461 F.3d 320 (2d Cir. 2006) (applying *Tinker* to enjoin application of school's content-based regulation prohibiting students from wearing clothing that displayed alcohol or drugs, even if message communicated was anti-drug); Newsome *ex rel.* Newsome v. Albemarle County Sch. Bd., 354 F.3d 249, 252 (4th Cir. 2003) (holding that school code prohibiting "messages on clothing, jewelry and personal belongings that relate to . . . weapons" cannot be upheld under *Tinker* when there has been no evidence that banned speech causes disruption).

*Tinker* has also been applied to content-neutral speech regulations in schools. In one notable example, *M.A.L. ex rel. M.L. v. Kinsland*, No. 07-10391, 2007 WL 313283, at *8 (E.D. Mich. Jan. 31, 2007), a school prohibited students from distributing literature in the school hallways, but permitted leaflets to be distributed at a table in the cafeteria during lunch hour and posted in the hallways and on bulletin boards. The school argued that *Tinker* does not apply to its content-neutral, time, place and manner regulations. Instead, speech regulations governing school hallways should be evaluated under the lenient standard of review applicable in nonpublic forums. If *Tinker* was applied in this context, the school maintained, students "would have more rights than non-students." The court rejected these arguments and applied *Tinker* to the school's regulations. Because the school failed to provide any evidence that the distribution of leaflets in the hallways would be disruptive, the policy was ruled unconstitutional and enjoined.

Other courts have refused to apply *Tinker* to content-neutral speech regulations for the very reason rejected in *Kinsland*. Thus, in *Bar-Navon v. School Board*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *7 (M.D. Fla. Nov. 5, 2007), the court explained that "the Supreme Court has consistently held that student speech while at school is given less, not more, protection than adult speech . . . . It would therefore be illogical to provide more protection to student expressive conduct than is provided to adult expressive conduct."

discriminatory regulations, the *Tinker* rule provides considerably greater protection for student speech.[37]

*b. The* Hazelwood *Anomaly — Student Speech in School-Sponsored Activities*

In *Hazelwood*,[38] the Supreme Court concluded that school authorities may regulate student speech in expressive activities that are "part of the school curriculum"[39] as long as the exercise of their control is "reasonably related to legitimate pedagogical concerns."[40] The *Hazelwood* case itself deals with a school principal asserting editorial control over a high school newspaper. The school financed the paper. More importantly, the students who published the paper were enrolled in a Journalism class and received academic credit for their work. The reach of the Court's analysis was not limited to school newspapers, however. It extended to "school-sponsored publications, theatrical productions and other expressive activities" that might reasonably be perceived "to bear the imprimatur of the school."[41] Indeed, the *Hazelwood* standard purported to apply to any student expressive activity "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[42]

Leaving aside for the moment the question of what constitutes a "legitimate pedagogical concern," we might ask initially why courts apply First Amendment review of any kind to the regulation of school-sponsored speech that is part of the school's educational mission. Once again, let's compare this framework to the free speech protection provided to adults in a non-school environment, but in otherwise similar circumstances. There are more analogies here than there were

[37] For example, a rule prohibiting the distribution of political leaflets or the posting of political signs in a nonpublic forum would be upheld as long as it was reasonable. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (upholding restrictions on political speeches and distribution of political leaflets on military base under deferential review); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding exclusion of political advertisements from municipal buses); Yeo v. Town of Lexington, 131 F.3d 241, 255 (1st Cir. 1997) (Torruella, C.J., concurring) ("When the state solicits advertising for a nontraditional public forum, it is permitted to filter out pure political speech."). If the same rule were applied to the hallways and grounds of a public high school, it would be struck down unless the school could demonstrate that the distribution of political leaflets was materially disruptive.

[38] 484 U.S. 260 (1988).

[39] *Id.* at 271.

[40] *Id.* at 273.

[41] *Id.* at 271.

[42] *Id.*

in the previous discussion of *Tinker*, but once again the end result seems to be the same. Public school students generally receive more protection for their speech than similarly situated adults would receive outside of the public school setting.

One persuasive analogy suggests that curricular speech in the public schools is government speech and, as such, it is not subject to Free Speech Clause review of any kind.[43] When the government speaks about military matters, for example, courts do not review its expression to see if it is reasonably related to legitimate military concerns. Nor do courts ask whether government messages related to health and safety issues are reasonably related to legitimate health and safety concerns. The conclusion that the expression at issue is government speech summarily ends the court's review. Thus, if curricular speech in public schools is government speech, courts have no business evaluating its content to determine whether it serves legitimate pedagogical concerns.

This argument is most easily applied to speech by teachers expressing the content of courses to their students. Here the government, through the state education department or school board, chooses the information and ideas to be expressed and hires employees to communicate curricular subjects to students. Not all government speech is expressed by government officials or employees, however. The government also may speak by delegating its power to speak to private individuals or by contracting with private actors to communicate the state's message. Thus, for example, when a school chooses a member of the clergy to deliver a school prayer at a high school graduation ceremony and provides instructions to the speaker as to the content of his benediction, the prayer is government speech. Accordingly, the prayer is not protected under the Free Speech Clause of the First Amendment, but rather is prohibited by the Establishment

[43] Numerous cases suggest that curricular speech at a school or university is government speech, which is not subject to judicial review under the Free Speech Clause. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (noting that "[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message"); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863-64 (1982) (recognizing that school boards have broad discretionary authority to establish curriculum of public schools); Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002) ("[U]nder the Supreme Court's precedents, the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere.").

Clause of the First Amendment.[44] Similarly, when government awards grants to medical clinics to provide certain family planning services to patients, but declines to permit the grant recipients to advise their patients about abortion procedures, the clinic's subsidized message constitutes government speech and the state's decisions controlling it are not governed by free speech doctrine.[45]

By analogy, student speech that is part of a curricular activity may also constitute government speech. A student report presented to a history class, for example, may present material the teacher wants communicated to students. The student speaker exercises authority delegated by the teacher who insists that class members listen respectfully and learn from her remarks. Alternatively, when the school finances the publication of a student newspaper or yearbook, it may insist that its funds be used to express only those messages that the school wants communicated to its audience, just as family planning clinic grants may impose conditions on the speech of grant recipients. Both state-subsidized school publications and state-subsidized medical advice can constitute government speech, and accordingly, should be equally free of Free Speech Clause review.

The government speech analogy may seem persuasive, but it is arguably limited in its scope. There are many occasions where student speech in school-sponsored activities cannot reasonably be understood to express the government's message. Most readers of a high school newspaper do not believe that the author of every article and story in the paper speaks for the school. Nor do students selected to engage in classroom debate on a controversial topic in social studies class necessarily express their teacher's message or that of the school authorities. One may argue that student speech in these and many other school-sponsored activities does not really reflect the government's point of view, and, therefore, should not be immunized from free speech review as government speech.

While this argument makes sense in one respect, it may suggest an unreasonably narrow understanding of what constitutes government speech. In *Arkansas Educational Television Commission v. Forbes*, Justice Kennedy explained that state actors engage in their own "speech activity" when they exercise editorial discretion in selecting the expressive material of third parties.[46] Accordingly, their decisions should not be subject to judicial review. These editorial choices

[44] Lee v. Weisman, 505 U.S. 577, 588 (1992).

[45] Rust v. Sullivan, 500 U.S. 173, 192-93 (1991).

[46] 523 U.S. 666, 669 (1998).

"constitute communicative acts" in their own right that are separate from, and independent of, the third parties' messages that are presented.[47] In this sense, a newspaper editor *speaks* when she chooses which columns expressing views contrary to the newspaper's own editorial position should appear on the paper's op-ed page. These op-ed columns do not communicate the newspaper's point of view, but their selection would surely be recognized as an aspect of the paper's speech. Similarly, when a teacher orchestrates a class discussion, there is a real sense in which her choices about who will speak and her comments that guide the discussion constitute an aspect of government speech. Thus, the teacher's choices regarding student speech, and her direction of class discussion, do not constitute the government's regulation of private speech, but rather government-selected speech that is free from judicial review.[48]

In addition to the connection to government speech, there is another, distinct reason why a teacher's exercise of pedagogical discretion in controlling student expression can be analogized to the editorial discretion Justice Kennedy describes in *Forbes* as being exempt from free speech review. The *Forbes* case involved the programming decisions of a state-owned, public-broadcasting television station, but its reasoning extends to all state functions involving the exercise of editorial discretion. As Kennedy explains, it is "the nature of editorial discretion that counsels against" subjecting government actors who perform such functions to judicial review of their decisions. [49] This is so whether their decisions are challenged on the grounds of content or viewpoint discrimination. Thus, Justice Kennedy acknowledges that judicial review of even viewpoint-discriminatory editorial decisions would inevitably involve judges interfering with and usurping the editor's authority.

> Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster [or publisher] by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for

[47] *Id.* at 674.

[48] *See Brown*, 308 F.3d at 950 (explaining how Court's analysis in *Forbes* regarding editorial discretion supports conclusion that educators have power to control and prescribe curricular speech free from judicial review).

[49] *Forbes*, 523 U.S. at 673.

> access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.[50]

Thus, the problem with judicial review of government functions requiring editorial discretion in cases alleging content or viewpoint discrimination is that it requires the courts to "oversee far more of the day-to-day operations"[51] of state actors engaging in such functions than would be appropriate or reasonable. Control over these editorial decisions would be transferred from the government officials, employees, agencies, and policy makers charged with making them to the courts. Once judicial review is permitted — even under the relatively lenient standards applied in a nonpublic forum — there is no way to limit the omnipresent threat of judicial intervention. Private actors will be able to assert constitutional claims whenever they perceive some favoritism toward or against some perspective or idea. When the government function is fundamentally expressive in nature, the application of free speech review to the exercise of that function necessarily implicates pervasive monitoring and oversight by the courts.

This same analysis applies to educational decisions in the classroom or in other curricular-related activities. The function of education is intrinsically expressive. No teacher can perform her job without evaluating and directing student speech. Some speech by certain students is more accurate and useful than other comments by different students. Some speech risks digressions and tangents. Some speech implicates the teacher in political or religious controversies that schools properly try to avoid. Some speech leads to misunderstandings suggesting school approval or support for the message being expressed. Some speech, particularly as to younger students, is normatively inappropriate. Controlling student speech to further educational purposes is simply an ongoing part of the teacher's job. It is something that teachers do all the time. When student speech plays a role in the educational mission, subjecting a teacher's control of such student speech to judicial review raises the exact same issues of judicial overreaching and intrusion that apply when courts review the decisions of state publishers, editors, and broadcasters.

This analysis suggests that teachers exercising educational discretion in controlling their students' speech in school-sponsored activities should have their decisions immunized from Free Speech Clause review. That is not what the Court held in *Hazelwood*, however. The regulation of student speech was only permissible if it was reasonably

[50] *Id.* at 674.

[51] *Id.*

related to legitimate pedagogical concerns. Whatever this phrase means, it suggests some substantive standard of review rather than complete deference to the teacher's discretionary decisions. Moreover, as we shall see shortly, many lower courts have interpreted the *Hazelwood* standard to require the serious review of some restrictions limiting student speech in school-sponsored activities.[52] Here again, student speech in public schools receives more rigorous protection than adult speech subjected to editorial discretion in most other circumstances.

A third analogy demonstrates the special protection that student speech receives in the context of classroom and curricular-related activities. Students are not the only people who speak in classrooms or engage in other expressive activities there, such as placing examples of their work on the classroom walls for everyone to see or read. Teachers, of course, also speak in school-sponsored activities. Moreover, it is clear from a long list of public employee speech cases that teachers do not surrender all of their free speech rights at the schoolhouse door any more than their students do. Public employees, such as teachers, are citizens and as such they retain some constitutional protection for their speech at the workplace and elsewhere.[53]

Recently, however, in *Garcetti v. Ceballos*,[54] the Court has made clear that "when public employees [such as public school teachers] make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[55] Under this holding, which is consistent with many earlier lower court decisions regarding curricular speech,[56] teachers receive no free speech protection for statements they make in class or for expressive materials they distribute to students or post on the classroom walls when these communications are part of their official duties in furtherance of the school's educational mission.[57]

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[52] *See infra* notes 194-98, 201-05 and accompanying text.

[53] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Melzer v. Bd. of Educ., 336 F.3d 185 (2d Cir. 2003); Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

[54] 547 U.S. 410 (2006). The Court did note, in response to Justice Souter's argument in dissent, *id.* at 438-39, that "additional constitutional interests" might require a different analysis in the case of university professors. *Id.* at 425 (majority opinion). While the Court left that issue open, it did not suggest that an alternative rule might apply to public school teachers.

[55] *Id.* at 421.

[56] See, e.g., Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998); Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 17, 18-19 (2005).

[57] *See, e.g.*, Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007) (arguing that "*Garcetti* applies directly" to denial of teacher's free speech

The Court identified several justifications for eliminating the free speech protection of public employees engaged in communicative functions required by their job. Government supervisors must be able to evaluate what their employees say in performing their official duties in order to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[58] When public employee speech is intended to further the goals of the government agency where the employee works, the government employer needs the power to control such speech to make sure that it accomplishes its intended purpose. Moreover, interpreting the Free Speech Clause to protect public employees while speaking pursuant to their official duties would force the courts to adopt "a new, permanent, and intrusive role," providing judicial oversight of the government workplace to enforce this constitutional mandate.[59] That expanded judicial role would conflict with "sound principles of federalism and the separation of powers."[60]

One can make a strong argument that these same concerns and a similar rule should apply when teachers direct student speech in furtherance of the school's educational mission. Teachers, like the supervisors of public employees, need to control student speech in school-sponsored activities to ensure that the speech is accurate, on point, and, most importantly, that it promotes the pedagogical goals of the program in which it is expressed. Likewise, any attempt by courts to protect student speech from classroom or curricular-related regulations and direction would involve the judiciary in intrusive and extended oversight of classroom and school-sponsored activities.

But that is not the rule set out in *Hazelwood*. If a teacher decides to post one of her *own* pictures on the classroom wall to serve some educational purpose, she receives no First Amendment protection in doing so.[61] If she decides to post, or not to post, certain *student* work on the classroom wall, *Hazelwood* authorizes courts to determine whether her decisions serve a legitimate pedagogical concern.[62] Here

claim relating to political statements she expressed during "current-events lesson [that] was part of her assigned tasks in the classroom").

[58] *Garcetti*, 547 U.S. at 422-23.

[59] *Id.* at 423.

[60] *Id.*

[61] *See infra* notes 101-03 and accompanying text; *see, e.g.*, Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838 (W.D. Pa. 1996) (noting that teachers have no First Amendment right to display materials on walls of classroom that are inconsistent with school's curricular objectives).

[62] One might argue that any comparison between teachers' and students' free speech rights is a comparison between apples and oranges. Students are compelled to

again students get more protection than their teachers in the school environment itself.[63]

*c. Asking the Wrong Question*

Because courts misperceive the relative level of protection that students in public schools receive, they ask the wrong question in trying to determine how to apply free speech doctrine in the public school setting. Courts seek ways to justify giving students less protection than the First Amendment typically provides. Instead, of course, they should be asking why, for example, public school students deserve greater protection for their speech in their classrooms than their teachers receive. They should ask why students at recess in the school yard deserve greater free speech protection than adults receive in a public airport or the lobby of a government building. They should try to explain why students working on school-sponsored and subsidized newspapers deserve greater free speech protection than physicians working in family planning clinics that receive government financial support.

Perhaps there are good answers for these and other comparable questions.[64] At this point in the Article, I do not want to prejudge the

attend public school while teachers choose to accept employment in a public school. But, of course, in many states compulsory education laws do not require students to attend school beyond the age of sixteen. Moreover, students may elect to fulfill compulsory school requirements through private school or home schooling. Students will no doubt incur additional financial costs if they avail themselves of these alternatives. But that may also be true for public school teachers. There is no reason to assume that public school teachers can secure employment offering equal pay and benefits if they are forced to leave their jobs in order to assert their freedom of speech.

[63] *See, e.g.*, Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 765-68 (9th Cir. 2006) (explaining that while free speech rights of public employees are limited to matters of public concern, free speech rights of public school students are more broadly protected and cover student speech on personal and private matters, in addition to political speech).

[64] Probably the most commonly offered explanation for providing special free speech protection to public school students is that they are compelled by law to attend public schools. At least one difficulty with this explanation is that it does not provide a uniform foundation for free speech doctrine in different locations and adds considerable complexity to the analysis. In states in which compulsory education laws do not require attendance at school beyond the age of sixteen (a group which includes about half of the states), for example, there would be no basis for extending this special free speech protection to high school juniors and seniors. That conclusion, however, would run counter to the conventional understanding that the free speech rights of minors increase with their age and maturity.

Similarly, the extent of the justification for providing special free speech protection to public school students would vary depending on the increased costs their families would incur if they chose to utilize private alternatives to public education. Public

answer to this constitutional inquiry. My point is simply that courts are not asking these questions. If they do not do so, it is unlikely that they will be able to explain persuasively why the Free Speech Clause should be employed the way that it often is in the public school setting.

### 2. Making Sense of the *Tinker* and *Hazelwood* Standards in Light of Free Speech Doctrine Outside the School Environment

As should be clear from the discussion so far, *Tinker* and *Hazelwood* ask lower courts to apply standards of review to the regulation of student speech in public schools that differ on their face from the conventional standards of review that seem to apply everywhere else. What is less clear is whether and to what extent free speech decisions within the school environment should be influenced by generally applicable free speech doctrine. There are really several problems here. One is more relevant to *Tinker* issues involving the regulation of non-curricular, non-school-sponsored student speech. The others relate more to the *Hazelwood* problem of reviewing the regulation of curricular and school-sponsored expressive activities.

#### *a. Why Is It So Hard to Apply* Tinker *in Student Speech Cases?*

Looking at *Tinker* cases first, courts seem to recognize that the *Tinker* standard is sui generis. It stands alone and in isolation from the more formalized and conventional standards of review that courts apply in most free speech contexts. Indeed, there is no other circumstance in which courts apply a requirement, like the one set out in *Tinker,* that speech can only be regulated if it is materially disruptive or impinges on the rights of others.

The explanation for the Court's adoption of this distinctive standard seems largely historical. The Court decided *Tinker* in a period when free speech doctrine was less rule-governed than it is today and courts employed more open reasoning in adjudicating cases. The nonpublic forum framework, which focuses on the distinction between content and viewpoint discrimination and applies specific standards of review to speech regulations on public property, had not yet taken hold.[65]

school students in states that offer voucher programs for private schools or that are relatively flexible with regard to home schooling requirements would have a less persuasive argument that they are "compelled" to attend public school.

[65] The ascendency of nonpublic forum doctrine began with the Court's decisions in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The complete vindication of the nonpublic forum as the default rule for all public

During this period, one approach the Court considered for reviewing regulations restricting speech on public property (other than traditional public forums) was some kind of functional compatibility test. Private speech could be prohibited on public property when it interfered with the state's use of that property.[66] The *Tinker* analysis is easily subsumed within this approach.

This kind of analysis came under increasing challenge in the 1980s, however, and by the early 1990s it was explicitly rejected by the Supreme Court.[67] Nonpublic forum doctrine emerged victorious as the appropriate framework for reviewing speech regulations on most public property. Despite this shift in doctrine and reasoning, however, *Tinker* remained the authoritative precedent for evaluating school restrictions on private student speech. But the Court has never explained why *Tinker* continues to be applied when the foundation for its holding has long since been rejected. Indeed, for the last forty years, the Court has done nothing to justify or clarify its commitment to the *Tinker* rule. Lower courts have been left to decide private student speech cases virtually without any guidance as to how rigorously *Tinker* should be enforced. The Court did not decide a single case applying the *Tinker* standard from 1969 until *Morse v. Frederick*[68] in 2006. Even then, it only compounded the confusion by adding an unclear exception for student speech advocating or encouraging drug use to the *Tinker* analysis.[69]

Because of this anomalous background, the difficulty with *Tinker* is not so much that courts do not know *when* its holding applies, although that question does arise with some frequency. The primary problem with *Tinker* is that courts do not know *how* to apply it. The Supreme Court is silent and lower courts cannot look to other free speech cases to assist them in deciding whether student speech is materially disruptive or impinges on the rights of other students. In most other free speech contexts, doctrine overlaps and similar factors or standards of review are employed in a variety of different settings. Thus, courts deciding a case involving a question of narrow tailoring, for example, can see how this inquiry is conducted in a large body of

property was accomplished in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

[66] *See, e.g.*, *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 693 (Kennedy, J., concurring); Greer v. Spock, 424 U.S. 828, 842-43 (1976) (Powell, J., concurring); Grayned v. City of Rockford, 408 U.S. 104, 116-20 (1972).

[67] *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 685.

[68] 127 S. Ct. 2618, 2629 (2007).

[69] *Morse*, 127 S. Ct. at 2620-21.

case law because this concept is employed in a range of circumstances as part of several free speech standards.[70] The *Tinker* standard, however, is distinct and has no applicability outside of student speech cases. Courts have little with which to compare their reasoning other than to other courts engaged in similarly narrow struggles.

*b. How Are Courts Supposed to Apply the* Hazelwood *"Legitimate Pedagogical Purpose" Standard?*

Cases involving student speech in school-sponsored activities present far more of a problem for lower federal courts than cases decided under the *Tinker* standard. As noted above, in *Tinker* cases, courts usually recognize the doctrinal independence of the *Tinker* holding. True, they receive little assistance from the case law in other free speech areas in applying the *Tinker* standard. But there is at least one upside to acknowledging that *Tinker* is unique. Courts do not distort their analysis by trying to jam square doctrinal requirements into a round standard of review. They do not misuse free speech doctrine outside of the school environment in an attempt to inform their understanding of *Tinker*'s mandate.

Adjudicating student speech claims arising out of the kind of school-sponsored activities to which *Hazelwood* arguably refers is much more complicated. To begin with, it is not always clear whether *Hazelwood*'s deferential "legitimate pedagogical concern" standard or the more rigorous *Tinker* standard should apply in particular student speech cases. But that is only part of the problem. Here, when courts confront cases involving school-sponsored activities, they cannot easily avoid the relevance and influence of generally applicable free speech doctrine. There are alternative approaches that must be sorted through, considered, and sometimes adopted. In some cases, courts view government control over speech in certain school-sponsored activities as government speech.[71] In other cases, they draw analogies to

[70] *See* Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989) (content-neutral speech regulation may not burden substantially more speech than is necessary to achieve its purpose); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (commercial speech regulation may not be more extensive than necessary to serve state's interest in regulating speech); United States v. O'Brien, 391 U.S. 367, 369-77 (1968) (regulation of symbolic speech may not be greater than is essential to further state's interest).

[71] *See, e.g.*, Hosty v. Carter, 412 F.3d 731, 735-36 (7th Cir. 2005) (discussing whether school may exercise discretion in regulating student newspaper because when government subsidizes and publishes periodical, "the contents are *its* speech"); Brown v. Li, 299 F.3d 1092, 1104 (9th Cir. 2002) (suggesting strong connection

government actors exercising editorial discretion under the Supreme Court's analysis in *Forbes*.[72] Some school-sponsored activities are classified as designated public forums or limited public forums[73] or nonpublic forums,[74] and courts apply the standard of review appropriate to the forum in question. In cases involving the selection of books for classroom use or school libraries, some courts look to *Board of Education, Island Trees Union Free School District No. 26 v. Pico*[75] for guidance and try to determine whether school authorities intended to suppress ideas in making their decisions.[76] In at least one case involving campaign expenditure limits in student elections, a court thought *Buckley v. Valeo*[77] was controlling precedent.[78]

A summary of the range of alternative approaches courts consider, however, does not do justice to the extraordinary level of confusion and doctrinal dissonance that exists on the basic question of whether *Hazelwood* applies to specific school-sponsored activities. Indeed, it is difficult to figure out a way to adequately describe lower court jurisprudence in this area. Each of these alternative approaches

between "the curriculum of a public educational institution [as] . . . one means by which the institution itself expresses its policy" and "institution's interest in mandating its curriculum and in limiting a student's speech to that which is germane to a particular *academic* assignment"), *amended and superseded by* Brown v. Li, 308 F.3d 939 (9th Cir. 2002); Golden v. Rossford Exempted Vill. Sch. Dist., 445 F. Supp. 2d 820, 824 (N.D. Ohio 2006) (describing challenge to school's decision not to allow students' Christian band to perform at school assembly as dispute "about the state having control over who speaks on its behalf"); Duran *ex rel.* Duran v. Nitsche, 780 F. Supp. 1048, 1054 n.8 (E.D. Pa. 1991) (suggesting that it "strains language" to describe student's oral report presented in class to be school sponsored in that "because it was part of an assignment related to an actual class, the report was, in fact, school itself").

[72] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998); *see, e.g.*, Chiras v. Miller, 432 F.3d 606, 616 (5th Cir. 2005) (struggling to explain how *Hazelwood* and *Forbes* fit together in adjudicating free speech claims in public school setting); Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002).

[73] *See, e.g.*, *Hosty*, 412 F.3d 731; Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (en banc); Kiesinger v. Mex. Acad. & Cent. Sch., 427 F. Supp. 2d 182 (N.D.N.Y. 2006).

[74] *See, e.g.*, Bannon v. Sch. Dist., 387 F.3d 1208, 1213 (11th Cir. 2004); Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 879 (9th Cir. 1991); Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989); Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098, 1106 (D. Ariz. 2004).

[75] 457 U.S. 853 (1982).

[76] *See, e.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998); Campbell v. St. Tammany Parrish Sch. Bd., 64 F.3d 184, 188-89 (5th Cir. 1995); ACLU of Fla. v. Miami-Dade County Sch. Bd., 439 F. Supp. 2d 1242, 1268 n.21 (S.D. Fla. 2006).

[77] 424 U.S. 1 (1976).

[78] Welker v. Cicerone, 174 F. Supp. 2d 1055, 1064 (C.D. Cal. 2001).

standing alone is complicated and difficult to apply. There are no clear criteria to consider and no consistent lines of authority to follow when courts try to distinguish government speech from non-government speech or to determine which kind of forum, if any, should be found to exist in a particular setting. The situation is even worse when it is not clear to courts which of several complex approaches should apply in the first place. Unsurprisingly, courts have floundered, flailing in multiple directions while struggling to sort out how so many overlapping, inconsistent free speech frameworks fit together. The result is nothing short of chaos, and chaos is not that easily described. Still, to appreciate the depth of the problem, it is necessary to enter the morass and try to explain the distorted landscape of the case law.

(1) *Hazelwood* and Student Newspaper and Yearbook Cases

One would think that the easiest decision for a court to make regarding the scope and meaning of *Hazelwood* would be its application to a student newspaper or yearbook. A challenge to the censorship of a student newspaper, after all, was the specific free speech claim asserted in *Hazelwood*, which the Supreme Court forcefully rejected. But there is nothing simple about student newspaper or yearbook cases. Courts and judges disagree repeatedly and intensely on whether the censorship of these publications violates the First Amendment.[79]

Indeed, it is hard to find a federal court decision that actually applies *Hazelwood* to the regulation of a student newspaper.[80] In many cases, courts have rejected the application of the *Hazelwood* standard, often after evaluating numerous factors deemed relevant to their inquiry. In *Dean v. Utica Community Schools,* for example, the court determined that a high school newspaper was a limited public forum and its regulation should not be reviewed under *Hazelwood* after

[79] Some newspaper and yearbook cases received en banc review with far from unanimous results. *See, e.g.*, Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc panel splits 7–4 on university-subsidized student newspaper case); Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (en banc) (10–3 split, with one concurring opinion and one concurring in part and dissenting in part); *Planned Parenthood of S. Nev.*, 941 F.2d at 817 (en banc) (7–4 split, with two separate concurring opinions).

[80] Indeed, in *Hosty*, 412 F.3d at 744, Judge Easterbrook concluded that *Hazelwood* applies to a free speech dispute involving a university's student newspaper, but does not cite a single high school student newspaper case, other than *Hazelwood* itself, where the legitimate pedagogical concern standard has been applied.

examining six factors derived from the *Hazelwood* opinion and three others added by Sixth Circuit precedent.[81] The court first considered:

> (1) whether the students produced the newspaper as part of the high school curriculum;
>
> (2) whether students receive credits and grades for completing the course;
>
> (3) whether a member of the faculty oversaw the production;
>
> (4) whether the school deviated from its policy of producing the paper as part of the educational curriculum;
>
> (5) the degree of control the administration and the faculty exercise; and
>
> (6) applicable written policy statements of the board of education.

The court then considered three additional factors related to whether the school intended to open the newspaper up for expressive activity: "(1) the school's policy with respect to the forum; (2) the school's practice with respect to the forum; and (3) the nature of the property at issue and its compatibility with expressive activity."[82] Although the newspaper was part of the high school curriculum, students received academic credit for their work on it, and a faculty advisor supervised its publication, the court concluded that *Hazelwood* did not apply because school authorities almost never intervened in the publication of the paper, the school's written policies supported the paper's independence, the paper was funded through advertising revenue, and it was distributed to the general public.[83]

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[81] 345 F. Supp. 2d 799, 807 (E.D. Mich. 2004).

[82] *Id.* The *Dean* case does not stand alone with regard to the complexity of its reasoning. In *Luenberg v. Everett School District No. 2*, No. C05-2070RSM, 2007 WL 2069859, at *3-*8 (W.D. Wash. July 13, 2007), the district court applied a six-factor analysis to determine whether a high school newspaper that was part of the school curriculum and produced by students who received grades and academic credit for their work should be considered a limited public forum.

[83] Courts concluding that student newspapers or yearbooks are some kind of public forum that is protected by the First Amendment against censorship by school authorities rarely address the question of the constitutional status of student editors who refuse to print the articles other students submit for publication. If the student publication is a designated or limited public forum, one might reasonably argue that the student editors have been delegated the authority to control access to a publicly sponsored and subsidized forum. Accordingly, the editors' decisions should be subject to constitutional scrutiny. In the rare cases where this issue is addressed, some courts have ruled that

Similarly, in *Draudt v. Wooster City School District*, the court concluded that a high school newspaper published in a Journalism class for academic credit under the supervision of a faculty advisor was a limited public forum.[84] The court distinguished *Hazelwood* because the newspaper included a few articles by nonstudents, was distributed outside the school, and school authorities typically exercised little control over its publication.[85] In *Romano v. Harrington*, the court declined to extend *Hazelwood* to a school-funded, high school newspaper published under the supervision of a faculty advisor because its production was an extracurricular activity for which the student editors and reporters did not receive academic credit.[86] Courts in other cases have reached similar conclusions.[87]

Sometimes juxtaposing two cases together can help to illustrate the full range of inconsistency between decisions in this area. In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, for example, the Ninth Circuit held that *Hazelwood* applied to a decision by school authorities not to accept an advertisement from Planned Parenthood in a high school yearbook.[88] The yearbook was held not to constitute a designated public forum with regard to its advertisements notwithstanding the fact that it included ads from "casinos, bars, churches, political candidates and the United States

student editors are not state actors and their decisions are not subject to constitutional review. *See, e.g.*, Yeo v. Town of Lexington, 131 F.3d 241, 248-49 (1st Cir. 1997) (en banc) (holding that editors of high school newspaper and yearbook were not state actors and, accordingly, their decision not to accept advertisements promoting sexual abstinence did not violate First Amendment); Douglass *ex rel.* Douglass v. Londonderry Sch. Bd., 413 F. Supp. 2d. 1, 5 (D.N.H. 2005) (holding that student yearbook editors who refused to publish pictures of students carrying firearms were not state actors and were not subject to free speech requirements).

[84] 246 F. Supp. 2d 820, 821 (N.D. Ohio 2003).

[85] Notwithstanding its conclusion that the school newspaper constituted a limited public forum, the court denied plaintiffs the injunctive relief they sought because the article at issue, which provoked the censorship of the paper, could reasonably have been understood by school authorities to be defamatory. *Id.* at 832.

[86] 725 F. Supp. 687, 689 (E.D.N.Y. 1989).

[87] *See, e.g.*, Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc) (determining that *Hazelwood* may apply to university-subsidized student newspapers even if they are not part of college curriculum, but college paper is designated public forum because neither university administrators nor faculty supervised its publication); *Luenberg*, 2007 WL 2069859, at *7; Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410, 1415 (E.D. Mich. 1990) (distinguishing *Hazelwood* and holding that community college newspaper is "forum for public expression" notwithstanding fact that paper is financed from student fees and staff receives academic credit or scholarship support for their work).

[88] 941 F.2d 817, 830-31 (9th Cir. 1991).

Army" and that Planned Parenthood's advertisement was the only one deemed unacceptable and rejected.[89] The court upheld the school's decision under deferential review on the grounds that the school's goal of avoiding advertisements that were controversial among community groups was reasonable and, therefore, constitutional.

Contrast this decision with the district court's analysis in *Lueth v. St. Clair County Community College*.[90] This is the Northern Michigan community college student newspaper case referred to previously in which the Dean attempted to prohibit the paper from printing an advertisement for a Canadian nude dancing club on its front page.[91] The court held that the student newspaper was a "forum for public expression" notwithstanding the fact that the paper was financed from student fees and that its staff received academic credit or scholarship support for their work.[92] Because the college did not provide adequate guidelines for regulating the student newspaper, the court concluded that the Dean's decision was not narrowly tailored to further the university's interest in avoiding advertisements that degrade women and promote underage drinking.[93]

(2) Factors and Forums Galore

The inconsistent analysis of student newspaper and yearbook cases is only the visible tip of the iceberg. Courts and judges struggle with and debate the applicability of the *Hazelwood* standard in myriad contexts and employ diverse criteria in doing so. One line of demarcation is whether the *Tinker* standard or the *Hazelwood* standard should apply to specific restrictions on student speech, an analysis which requires careful evaluation of the criteria set out in the *Hazelwood* decision.[94] Another conflict focuses on the applicability of the Court's forum doctrine to school-sponsored activities and whether the activity in which the regulated speech occurs constitutes a designated public forum.[95] Yet another doctrinal boundary dispute

[89] *Id.* at 830 (Norris, J., dissenting).

[90] *Lueth*, 732 F. Supp. at 1416.

[91] *Id.* at 1412; *see supra* note 19 and accompanying text.

[92] *Lueth*, 732 F. Supp. at 1415.

[93] *Id.* at 1415-16.

[94] Peck *ex rel.* Peck v. Baldwinsville Cent. Sch., 426 F.3d 617, 625, 628-29 (2d Cir. 2005); Bannon v. Sch. Dist, 387 F.3d 1208, 1214-15 (11th Cir. 2004); Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995); Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (noting Judge Merritt, dissenting at 765, would have applied *Tinker* rather than *Hazelwood*).

[95] Some opinions detail the range of choices courts believe they confront in

requires courts to distinguish between government speech, which is immune from Free Speech Clause review, and school-sponsored speech, which courts review under the *Hazelwood* standard. [96]

Each of these separate issues — distinguishing government speech from non-government speech, deciding whether the criteria set out in *Hazelwood* apply, and determining whether a public forum or nonpublic forum exists — requires courts to consider numerous factors. The interplay of all three issues, and the various factors on which each is based, is what makes the case law in this area so complex and confusing.

*(a) Government or Curricular Speech in the Public Schools*

The question of what constitutes government speech has perplexed courts and commentators for decades.[97] It is no easier to resolve in the context of public school programs than anywhere else. Some public school decisions address the issue under an ad hoc or intuitive analysis. Others attempt to formalize the inquiry. The Tenth Circuit, for example, applies a four factor test: "(1) whether the central purpose of the project is to promote the views of the government or the private speaker; (2) whether the government exercised editorial control over the content of the speech; (3) whether the government

deciding free speech cases in public schools. In *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284-85 (10th Cir. 2004), for example, the court explained the permutations of analysis along a forum continuum and a kinds-of-speech continuum. First, it suggested "we must determine whether the . . . classroom should be considered a traditional public forum, designated public forum, or nonpublic forum for free speech purposes." *Id.* Then the court turned its attention to "the type of speech at issue in this case." *Id.* at 1285. It suggested that "[t]here are three main types of speech that occur within a school setting." The first is "student speech that happens to occur on the school premises" (covered by *Tinker*); the second is "government speech, such as the principal speaking at a student assembly;" and the third is "school-sponsored speech" (covered by *Hazelwood*). *Id.*; *see also* Morrison *ex rel.* Morrison v. Bd. of Educ., 419 F. Supp. 2d 937, 941 (E.D. Ky. 2006) (describing speech in schools as government speech, school-sponsored speech, and "private, noncurricular" student speech). Other opinions suggest that there are four categories of expression in a public school and add "vulgar expression" to the three categories noted above. *Bannon*, 387 F.3d at 1213.

[96] The court in *Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005), went so far as to characterize the application of the *Hazelwood* standard to the publication of a student newspaper as "an exception to the general rule that schools engage in government speech when they set and implement education policy through the curriculum."

[97] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Rust v. Sullivan, 500 U.S. 173 (1991); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW & GOVERNMENT EXPRESSION IN AMERICA (1983); Gia Lee, *Persuasion, Transparency and Government Speech*, 56 HASTINGS L.J. 983 (2005); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

was the literal speaker; and (4) whether ultimate responsibility for the project rested with the government."[98]

In the public school context, distinguishing government speech decisions (which are not reviewed under the Free Speech Clause) from student speech restrictions in school-sponsored activities (which are reviewed under *Hazelwood*) may seem to be a deceptively straightforward task. The key question would be who is doing the talking. Clearly, when the principal or a teacher communicates curricular material to the student body in a classroom or assembly, her expression could be categorized as government speech.[99] When a student writes a composition on an assigned topic or answers a question in class, however, the student does not seem to be speaking for the government, and the content of the student's expression would not be recognized as government speech that reflects the government's point of view.[100]

In reality, however, basing decisions on the identity of the "speaker" raises more problems than it solves. Suppose a teacher or principal selects a poem or an essay from a book and either assigns it to the class to read, reads it to the class directly, or copies it and posts it on the classroom wall. Many cases suggest that the educator's decision in each of these situations reflects government speech that is immune from Free Speech Clause review.[101] Essentially the same result can be reached from

[98] Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 923 (10th Cir. 2002).

[99] *See infra* note 101; *see, e.g.*, Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491-92 (3d Cir. 1998) (rejecting argument that university's control over what instructors can teach in classrooms must be reasonably related to legitimate educational interests because classroom teaching constitutes government speech as to which Free Speech Clause does not apply); *Morrison*, 419 F. Supp. 2d at 942-43 (holding presentation of video to students as part of diversity training that allegedly includes only positive and no negative statements about homosexuality is government speech that is not subject to Free Speech Clause review).

[100] *See, e.g.*, *Axson-Flynn*, 356 F.3d at 1285; Downs v. L.A. Sch. Dist., 228 F.3d 1003, 1009 (9th Cir. 2000) (distinguishing between standard of review applied to speech by school itself and *Hazelwood* standard applied to restrictions on student speech in school-sponsored activities); C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 214 (3d Cir. 2000) (en banc) (Alito, J., dissenting) (distinguishing between activities that bear imprimatur of school, to which *Hazelwood* applies, and statements students express in class, which do not bear imprimatur of school); *Morrison*, 419 F. Supp. 2d at 942 (distinguishing speech by school itself, which is government speech, from regulation of student speech in school-sponsored activities, to which *Hazelwood* applies).

[101] *See, e.g.*, Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007) (concluding that teachers have no First Amendment right to challenge curricular controls on their classroom expression because "school system does not 'regulate' a teacher's speech as much as it *hires* that speech"); *Chiras*, 432 F.3d at 614 (explaining that "when the [State Board of Education] devises the state curriculum for Texas and selects the textbook with which teachers will teach to the students, it is the

an alternative perspective if the exercise of educational discretion in choosing materials is analogized to the exercise of editorial discretion.[102] As the Court explained in *Forbes,* the decisions of government actors in a "public school prescribing its curriculum" should not be subject to judicial review under the Free Speech Clause.[103]

Even here, however, there is considerable disagreement and uncertainty. Curricular decisions by administrators and teachers are not always construed to be government speech. In one case, a court reviewed a decision to discontinue use of a textbook under *Hazelwood* rather than treating that decision as a matter of government speech.[104] In another case, a court applied the *Hazelwood* legitimate pedagogical concern standard to reject a teacher's claim that his principal violated his free speech rights by preventing him from discussing religion in the classroom and distributing religious supplementary materials to

state speaking, and not the textbook author"); *Downs*, 228 F.3d at 1015-16 (holding that teacher's posting of anti-homosexual material on bulletin board in school hallway was not protected by First Amendment because bulletin board was intended to express school's own message and constituted government speech); Golden v. Rossford Exempted Vill. Sch. Dist., 445 F. Supp. 2d 820, 824 (N.D. Ohio 2006) (upholding school decision not to permit Christian band to give concert at school assembly because state has complete discretion "to lend out its microphone to whomever it wishes to speak on the state's behalf"); Newton v. Slye, 116 F. Supp. 2d 677, 682-83 (W.D. Va. 2000) (strongly suggesting that high school teacher's posting of pamphlets about banned books on his classroom door constitutes curricular speech that is subject to unfettered control of school authorities).

Some courts apply free speech doctrine relating to the rights of public employees to evaluate the control exercised by school authorities over the curricular speech of teachers. Even from this perspective they often conclude that "curricular speech [of teachers] . . . does not constitute protected speech and has no First Amendment protection." Lee v. York County Sch. Div., 418 F. Supp. 2d 816, 824 (E.D. Va. 2006) (holding teacher's free speech rights were not violated when principal required him to remove religious materials from classroom walls); *see* Boring v. Buncombe County Bd. of Educ. 136 F.3d 364, 370-71 (4th Cir. 1998) (en banc) (holding teacher has no free speech right to produce student play as part of school curriculum); Amar & Brownstein, *supra* note 56, at 23-24 (arguing that speech of elementary and high school teachers on job is subject to state control).

[102] *Chiras*, 432 F.3d at 615 (explaining that "because the Board [of Education] must necessarily exercise its editorial discretion in selecting which private entities will convey the message the state selects," its decision in selecting textbooks is not subject to judicial review).

[103] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[104] Virgil v. Sch. Bd., 862 F.2d 1517, 1521-22 (11th Cir. 1989) (analyzing rejection of humanities textbook under *Hazelwood*); *see also* Borger *ex rel.* Borger v. Bisciglia, 888 F. Supp. 97, 100 (E.D. Wis. 1995) (applying *Hazelwood* to review school superintendant's decision not to allow high school history teachers to take their students to see film *Schindler's List* because it was rated "R").

his students.[105] In a particularly long and complicated decision, a school's choice of clergy to speak on a panel at a school assembly on race, religion and sexual orientation held during class time was reviewed under *Hazelwood* and ruled unconstitutional.[106] The court rejected the school's argument that the assembly constituted government speech in part because "not a single school administrator or teacher conveyed any viewpoint or message" at the program.[107] Other courts struggle to work out what framework to apply and end up evaluating decisions regarding curricular speech both as government speech, which is beyond the scope of judicial review, and school-sponsored speech, which must be reasonably related to legitimate pedagogical concerns.[108]

[105] Williams v. Vidmar, 367 F. Supp. 2d 1265, 1273-74 (N.D. Cal. 2005); *see also* Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838, 844-45 (W.D. Pa. 1996) (applying *Hazelwood* to review teacher's challenge to restrictions on her pedagogical technique and her use of symbols and literature in her classroom). Additional citations of cases that have "applied the *Hazelwood* standard to a teacher's instructional speech" are listed in *Chiras*, 432 F.3d at 617 n.29. *See* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 913-14 (10th Cir. 2000); Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 724 (8th Cir. 1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723-24 (2d Cir. 1994); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993); Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1008 (7th Cir. 1990).

[106] Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780, 794-95 (E.D. Mich. 2003). The district court concluded that the school violated the First Amendment by practicing viewpoint discrimination in selecting clergy to speak on the panel. No mention was made of the Supreme Court's language in *Forbes* suggesting that the decisions of "a public institution selecting speakers for a lecture series" should not be subject to Free Speech Clause review. *Forbes*, 523 U.S. at 674.

[107] *Hansen*, 293 F. Supp. 2d at 794.

[108] For example, in *Newton v. Slye*, 116 F. Supp. 2d 677, 684-85 (W.D. Va. 2000), the Court held that a teacher had no First Amendment right to post pamphlets constituting curricular materials on classroom door in defiance of school policy, but also ruled that the school's decision to have the pamphlets removed furthered legitimate pedagogical goals. Similarly in *Golden v. Rossford Exempted Village School District*, 445 F. Supp. 2d 820, 824 (N.D. Ohio 2006), the court upheld a school district's decision to cancel a school assembly in which the sole performers would be a Christian band playing religious music. The court described the case as one involving the state's interest "in having control over who speaks on its behalf" and its discretionary authority "to lend out its microphone to whomever it wishes to speak on the state's behalf," but still seemed to think it was necessary to discuss *Hazelwood* and to determine that the school's decision was reasonably related to a legitimate pedagogical concern. In *O.T. ex rel. Turton v. Frenchtown Elementary School District Board of Education*, 465 F. Supp. 2d 369, 376 (D.N.J. 2006), the court maintained that the *Hazelwood* test "only applies when a student's school-sponsored speech could be viewed as the speech of the school itself [and that] school-sponsored speech occurs when a public school or other government entity aims to convey its own message."

A Fifth Circuit panel tried to explain the distinction between government speech

Another complication is a result of the Supreme Court's decision in *Pico*.[109] A strong argument can be made that selecting materials for a school library is a quintessential exercise of editorial discretion that should not be subject to judicial review. In *Pico*, however, a plurality opinion concluded that a school board's decision to remove certain books from the school library would violate the First Amendment if the board's motive in doing so was to deny students access to ideas with which the board disagreed.[110]

The *Pico* decision is extremely narrow in scope (it does not apply to school library acquisition decisions or to curricular decisions).[111] It is also more than a little ambiguous as to its meaning. The plurality recognizes that school boards may remove books from school libraries that they deem educationally unsuitable, but does not explain how courts are to distinguish this permissible motive from a constitutionally impermissible one.[112]

Courts struggle to determine what *Pico* means and how it should be reconciled with more recent case law. In doing so, they have to

and restrictions on student speech in school-sponsored activities by drawing an analogy between *Forbes* and *Hazelwood*.

> In *Forbes*, the Court outlined the general proposition that a public broadcaster, acting as an arm of the state, normally speaks as the government, and exercises control over its own message unrestricted by forum analysis or the viewpoint-neutrality requirements. Nonetheless, a public broadcaster may become subject to those requirements under certain circumstances, such as when it creates a forum by holding and televising a debate for political candidates. Similarly, the school in *Hazelwood* became subject to those same requirements when it created a student newspaper as a forum for student expression. However, just as a political candidate's debate is an exception to the general rule that state-owned media engages in government speech by selecting and broadcasting programs, so too is the student newspaper an exception to the general rule that schools engage in government speech when they set and implement education policy through the curriculum.

*Chiras*, 432 F.3d at 616 (citations omitted). Unfortunately, the court failed to explain how or why the special treatment provided to a debate among electoral candidates broadcast by a public television station in *Forbes* justifies a distinctive standard of review for the altogether different circumstance of a student newspaper published by a high school Journalism class. The court also failed to explain why the *Hazelwood* standard should be used to review decisions involving the myriad school-sponsored activities other than newspapers to which it has been applied.

[109] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

[110] *Id.* at 872.

[111] *Id.* at 861-62.

[112] *Id.* at 879; *see also* ACLU of Fla. v. Miami-Dade County Sch. Bd., 439 F. Supp. 2d 1242, 1268 n.21 (S.D. Fla. 2006).

confront several hard questions. Has *Hazelwood* superseded *Pico* so that the *Hazelwood* legitimate pedagogical concern standard of review should now be applied in school library cases? If not, and *Pico* still commands respect with regard to the removal of books from a school library, should it also guide lower court decisions when materials are removed from reading lists and curricular assignments? Or should courts ignore both *Pico* and *Hazelwood* and characterize all school decisions related to books in the library or books assigned in class as discretionary choices that are free from judicial review? Thus, if a school board removes a previously assigned book from the curriculum, courts must decide whether to evaluate the board members' motives to determine if the removal was based on disagreement with the author's ideas, determine if the board's decision is reasonably related to legitimate pedagogical concerns, or defer completely to the board's decision.

Most cases involving the removal of books from school libraries are reviewed under *Pico*, but not without some expression of uncertainty.[113] Curricular decisions involving assigned reading material are more likely to be deemed government speech.[114] Nevertheless, at least one court applied *Hazelwood* to evaluate a school board's decision to discontinue use of a Humanities textbook because it contained the play *Lysistrata* by Aristophanes and *The Miller's Tale* by Chaucer, both of which were criticized for their sexuality and vulgarity.[115] In another case, *Pico* clearly influenced a court's refusal to apply *Hazelwood* to the censorship of a school newspaper out of a misplaced concern about the relevance of *Hazelwood* to extracurricular activities.[116] It would be reasonable to expect that more recent Supreme Court decisions reviewing access restrictions in libraries, such as *United States v. American Library Ass'n,*[117] in which the Court upheld federal spending conditions requiring libraries to block access to sexually explicit web sites, will only further complicate these cases.

Disputes concerning the selection of outside materials for libraries or classroom use are only part of the problem. The hard issues related to government speech and editorial discretion in curricular decisions arise

[113] Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995) (distinguishing *Hazelwood* as limited to curricular decisions); *ACLU of Fla.*, 439 F. Supp. 2d at 1265; Case v. Unified Sch. Dist. No. 233, Johnson County, Kan., 895 F. Supp. 1463, 1469 (D. Kan. 1995) (distinguishing *Hazelwood* as limited to curricular decisions).

[114] *See supra* notes 101-03 and accompanying text.

[115] Virgil v. Sch. Bd., 862 F.2d 1517, 1522-23 (11th Cir. 1989).

[116] Romano v. Harrington, 725 F. Supp. 687, 690 (E.D.N.Y. 1989).

[117] 539 U.S. 194 (2003).

when the material selected to be assigned to the class, read to the class, or posted on the classroom wall is written or drawn by students. If a teacher's selection of a poem written by an outside author to be posted on the classroom wall is government speech or the exercise of editorial discretion, should our characterization of the teacher's action change if a student wrote the selected poem as part of a class assignment? Does a teacher's decision stop being curricular in nature and government speech when it is applied to student-authored materials?

If we shift the perspective of the question, the same issue arises. Would the author of a book of poetry whose work was not selected by a teacher to be posted on the classroom wall be able to claim that his free speech rights were violated by the teacher's content- or viewpoint-based decision to reject his work? If not,[118] does the analysis change if it is a student whose work is not acknowledged and posted on the wall by a teacher for content- or viewpoint-discriminatory reasons?

This basic dispute can be extended from either side of the debate. Perhaps the decision not to post a student's work in isolation does not implicate free speech rights. But if every student's work is posted except for that of a single student, and that student's work is singled out for discriminatory treatment because of the viewpoint it expresses, then the Free Speech Clause should require that the decision be subject to rigorous review. The argument here would be that the teacher has created some kind of designated forum by posting all the other students' work, or, by analogy to *Pico*, that the teacher's decision reflects the impermissible motive of attempting to suppress the student's ideas.

Alternatively, one could argue that a teacher's curricular decisions about student speech should extend far beyond the selection of materials to be assigned to students or posted on the classroom walls. In the course of orchestrating a class discussion, all of the teacher's decisions regarding who is permitted to speak and the content of their discourse are curricular in nature and constitute either government speech or the exercise of editorial, educational discretion.[119] Accordingly, all such decisions should be free from speech clause review.

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[118] Chiras v. Miller, 432 F.3d 606, 616 (5th Cir. 2005) (rejecting First Amendment claim by author whose textbook was not selected by Board of Education for allegedly viewpoint-discriminatory reasons because "although the state may utilize private textbook authors, it does so to facilitate transmission of its own approved message, not a message of the author's choosing").

[119] *See, e.g.*, Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995) (arguing that "where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper"); Duran *ex rel.* Duran v. Nitsche, 780 F. Supp. 1048, 1054 n.8 (E.D. Pa. 1991) (describing student report presented to class as part of school itself).

Courts have no firm basis for answering these questions under current doctrine.[120] Some judges seem to recognize that decisions about student speech in class constitute government speech or involve the exercise of editorial discretion, but apparently feel constrained from following the logic of this line of reasoning because of the precedent of *Hazelwood*.[121] In other cases, as will be described more fully in the next section, judges express doubts that student speech in class or on class assignments is school-sponsored speech, much less government speech.[122] Most often, courts apply *Hazelwood* without any clear explanation as to how and why these pedagogical decisions should be distinguished from government speech or the exercise of editorial, educational discretion that is not subject to judicial review.[123] Some opinions consider alternative approaches, but reflect a

[120] *See* R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 198-99 (2007) (criticizing attempt "to distinguish between . . . speech that the school merely somehow approves or sponsors, and official speech on behalf of the school itself by its agents" as "inevitably vague, if it is tenable at all"). The Supreme Court's opinions only add to the confusion. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 834 (1995), for example, the Court cites *Hazelwood* for the proposition that "[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." But if the school-sponsored speech to which *Hazelwood* applies is considered to be a school's "own speech," as the above referenced quote suggests, why is it subject to judicial review under the Free Speech Clause at all?

[121] In *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 173 (3d Cir. 1999), *aff'd in part and vacated in part en banc*, 226 F.3d 198 (3d Cir. 2000), for example, the court distinguished language in cases like *Rosenberger* and *Lamb's Chapel v. Central Moriches School District*, 508 U.S. 384 (1993), which discussed "a school's restrictions on extracurricular speech," from the case before it which involved the school's control over student speech that was "elicited as part of a teacher-supervised, school-sponsored activity" because the *Rosenberger* and *Lamb's Chapel* analysis "is simply not applicable to restrictions on the State's own speech." Yet the court went on to apply *Hazelwood* to the school's control over student speech that it had just characterized as "restrictions on the state's own speech." *See also* Golden v. Rossford Exempted Vill. Sch. Dist., 445 F. Supp. 2d 820, 824-25 (N.D. Ohio 2006); *Duran*, 780 F. Supp. at 1054 n.8.

[122] *See infra* notes 130-34 and accompanying text.

[123] *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) (holding requirement that student recite lines from plays in university theatre class falls within school curriculum and is governed by *Hazelwood*); Crosby *ex rel.* Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988) (reviewing decision to change school symbol from Johnny Reb under *Hazelwood*); Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003) (holding after limited discussion that panel at school assembly discussing homosexuality and religion should be reviewed under *Hazelwood* and not as government speech); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918 (E.D. Mo. 1999) (evaluating decision by school superintendant not to allow school marching band to play song related to drug culture under *Hazelwood* without

muddled lack of clarity about the relationship between these overlapping frameworks.[124]

*(b) The* Hazelwood *Factors*

In directly addressing the applicability of *Hazelwood* to the regulation of student speech, courts primarily consider three factors derived from the *Hazelwood* opinion itself: (1) whether the activity in which the speech occurs is school-sponsored, (2) whether it is part of the curriculum or serves curricular goals, and (3) whether it bears the imprimatur of the school.[125] The discussion of these factors inevitably generates confusion for several reasons. First, the factors overlap and cannot easily be distinguished from each other. Second, to the extent that the factors are considered independent from each other, it is not clear how much weight should be assigned to any factor or whether particular factors are necessary or sufficient to invoke the *Hazelwood* standard.[126] Third, all three factors raise serious questions of interpretation.

considering whether curricular decisions constitute government speech).

[124] *See supra* note 121.

[125] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988); *see infra* notes 127-74 and accompanying text.

[126] To some courts, the existence of any one factor may be necessary or sufficient to justify the application of the *Hazelwood* standard, and the lack of one factor may be a sufficient basis for refusing to do so. *See, e.g.*, Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 629 (2d Cir. 2005) (basing its decision to apply *Hazelwood* on its conclusion that student speech occurred in a curricular activity); Bannon v. Sch. Dist., 387 F.3d 1208, 1214 (11th Cir. 2004) (agreeing that "Hazelwood only controls school-sponsored expression that occurs in the context of a curricular activity"); Behmyer-Smith *ex rel.* Behmyer v. Coral Acad. of Sci., 427 F. Supp. 2d 969, 973 (D. Nev. 2006) (declining to apply *Hazelwood* because student speech at issue was not school sponsored because it was not "part of the educational curriculum and a regular classroom activity"). Other courts consider (or require) two or three of these factors in deciding whether *Hazelwood* applies. *See, e.g.*, Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570, 578 (6th Cir. 2008) (concluding that *Hazelwood* applies because student speech was school sponsored and might reasonably be perceived as bearing imprimatur of school); Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1133 (8th Cir. 1999) (reviewing regulation of student council election under *Hazelwood* because it was school-sponsored, curricular activity that public might reasonably perceive as bearing imprimatur of school); Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098, 1107 (D. Ariz. 2004) (determining that *Hazelwood* applies to non-curricular, school-sponsored activity that bears imprimatur of school).

(i) School Sponsorship

The issue of school sponsorship can be considered the most basic of the *Hazelwood* factors because it follows from the Court's key distinction between speech that a school tolerates and speech that the school affirmatively promotes. Courts discuss a variety of facts in determining whether an activity is school sponsored for *Hazelwood* purposes.[127] Generally speaking, student speech in class discussions and student expression in homework, research papers or class projects are considered particularly easy cases.[128] Courts reason that "if a school newspaper . . . can be considered school-sponsored speech, then surely student speech that takes place inside the classroom, as part of a class assignment, can also be considered school-sponsored speech."[129]

[127] In some of the decisions previously mentioned, for example, the fact that a student newspaper accepts articles from nonstudents and is distributed to the general community undermined the applicability of *Hazelwood*. *See, e.g.*, Draudt v. Wooster City Sch. Dist. Bd. of Educ., 246 F. Supp. 2d 820, 828 (N.D. Ohio 2003) (suggesting fact that college newspaper publishes letters to editor and columns from outsiders and distributes many of its issues to local townspeople makes it less likely that newspaper could be considered curricular activity to which *Hazelwood* applies). In other contexts, however, courts maintained that "the involvement of community members in the . . . [school] project [did not make] it any less of a school-sponsored event." Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 931 (10th Cir. 2002).

[128] Courts have determined that *Hazelwood* applies to a wide range of classroom-related activities and student assignments. *See, e.g.*, *Peck*, 426 F.3d at 628 (applying *Hazelwood* to "poster . . . prepared by [student] pursuant to a class assignment, and one that was given under highly specific parameters"); Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002) (explaining that "*Hazelwood* controls the inquiry into whether a university's requirements for an evaluation of a student's curricular speech infringe that student's First Amendment rights" with regard to evaluation of student's master's thesis); C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 174-75 (3d Cir. 1999) (applying *Hazelwood* to decisions of elementary school teachers not to allow first-grade student to read bible story to his class and not to post kindergarten student's picture of Jesus in school hallway), *vacated and remanded*, 226 F.3d 198 (2000) (en banc); Settle v. Dickson County Sch. Bd., 53 F.3d 152, 156 (6th Cir. 1995) (upholding teacher's refusal to accept life of Jesus Christ as topic for student research paper); Denooyer v. Merinelli, No. 92-2080, 12 F.3d 211, 1993 WL 477030, at *3 (6th Cir. Nov. 18, 1993) (unpublished per curium opinion) (upholding teacher's refusal to allow second-grade student to show tape of her singing proselytizing religious song in church during class show-and-tell type activity); *McCann*, 50 F. Supp. 2d at 923 (concluding that school Marching Band's performances constitute school-sponsored speech because participation in Band is required for students enrolled in Symphonic Band class for which they receive academic credit).

[129] Axson-Flynn v. Johnson, 356 F.3d 1277, 1286 (10th Cir. 2004); *see also Settle*, 53 F.3d at 155 (explaining that "[w]here learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum").

This conclusion is not always so summarily accepted, however. For some judges, the question is not whether the student speech occurred in a school-sponsored activity, but rather whether the student speech itself was in some sense endorsed or promoted by the school. The activity in which the student's speech occurred itself may have clearly been school sponsored, but this does not necessarily mean that each student's speech and work product was also school sponsored for *Hazelwood* purposes.[130] In *Settle v. Dickson County School Board*, for example, a case in which a teacher refused to allow a student to write her ninth-grade research paper on "The Life of Jesus Christ," one judge suggested that student speech in the classroom or in school assignments "would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression *allowed* under the school curriculum but *not* sponsored or endorsed by the school."[131]

In *C.H. ex rel. Z.H. v. Oliva*, Judge (now Justice) Alito also challenged the applicability of *Hazelwood* to student expression in the classroom and in school assignments.[132] A kindergarten teacher had asked her students to make a poster describing what they were thankful for as a Thanksgiving assignment. One child drew a picture saying he was thankful for Jesus. The plaintiff argued the child's free speech rights were violated when his picture was removed from the school hallway where the pictures drawn by other students were displayed.

Dissenting from the majority's opinion en banc, Judge Alito argued that the school violated the free speech rights of the student because it had engaged in viewpoint discrimination against religious expression. He maintained that *Hazelwood* was inapplicable to cases involving student speech in class or in assignments when students "are called upon by their teachers to express their own thoughts or views."[133] The alternative approach offered by *Hazelwood*, Alito maintained, would allow teachers to limit class discussions on controversial topics even in

[130] The question of whether student speech in classroom discussions or in assignments is school-sponsored overlaps and parallels the question of whether speech in these curricular activities bear the imprimatur of the school. Just as courts may question whether student speech in the classroom is school sponsored, they must determine whether student speech in the classroom bears the imprimatur of the school. *See infra* notes 163-65 and accompanying text.

[131] *Settle*, 53 F.3d at 156 (Batchelder, J., concurring). Batchelder concluded, however, that students have no constitutional right to challenge the contours of a class assignment and insist on the right to receive credit for doing something other than what was assigned as long as the teacher's decisions are not based on impermissible criteria such as the student's race, gender, religion, class, or political beliefs.

[132] *Oliva*, 226 F.3d at 209-14 (en banc) (Alito, J., dissenting).

[133] *Id.* at 213.

high school to only one point of view. To Judge Alito, *Hazelwood* was clearly an outlier opinion inconsistent with forum doctrine and the Court's repeated rejection of viewpoint discrimination.[134]

Yet other courts read *Hazelwood* to permit the kinds of restrictions on religious speech in the classroom and one-sided limits on student speech in class and on assignments that Judge Alito condemned. In *Busch v. Marple Newtown School District*, the teacher of a kindergarten class organized an "All About Me" unit in which students would create a poster and share information about themselves during a class presentation.[135] Parents were also invited to participate by reading a story or bringing a game to class. When the school refused to allow a student's mother to read *Bible* verses from Psalm 118 in class, she filed a lawsuit claiming that the school's decision violated her free speech rights. The district court rejected her claim, notwithstanding the fact that the school had invited the parent and child's personal views and participation in the "All About Me" program, because the school's concerns about not being "perceived as endorsing speech that promoted a religious viewpoint" furthered legitimate pedagogical concerns.[136]

In *Head v. Board of Trustees of California State University* — a more egregious case, albeit at the university level — the plaintiff, a student taking a class in Secondary Education, argued that his teacher violated his First Amendment rights by prohibiting him from discussing criticisms of multicultural education in class or projects, deprecating his comments in class, refusing to allow him to write about discrimination against Caucasians on an assignment, and compelling him to espouse in

[134] *Id.* at 213-14. Courts have reached a similar result by interpreting *Hazelwood* to prohibit viewpoint discrimination, as opposed to distinguishing it as then-Judge Alito attempted to do in the *Oliva* case. In *Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780, 794-95 (E.D. Mich. 2003), for example, the court applied *Hazelwood* in holding that a school violated the First Amendment when it refused to allow a student to express her criticism of homosexuality during a school assembly where she had been selected to speak about "what diversity means to me." Restrictions on speech in school-sponsored activities, the court explained, must still be viewpoint neutral. *See infra* notes 202-05 and accompanying text.

[135] Busch v. Marple Newtown Sch. Dist., No. 05-CV-2094, 2007 WL 1589507, at *1 (E.D. Pa. May 31, 2007); *see also* Denooyer v. Merinelli, No. 92-2080, 12 F.3d 211, 1993 WL 477030, at *1, *3 (6th Cir. Nov. 18, 1993) (unpublished per curium opinion) (applying *Hazelwood* to presentations to their class by second-grade students "about items that were interesting or important to them").

[136] *Busch*, 2007 WL 1589507, at *10. The school did allow the child to display a poster with a religious message on it during his "All About Me" presentation and in this sense was less restrictive than the school in the *Oliva* case. Yet Judge Alito's analysis would have clearly required the invalidation of the school's viewpoint-discriminatory decision preventing the mother from reading from the Bible as well.

his assignments views on feminism and diversity with which he strongly disagreed.[137] The court applied *Hazelwood* and rejected the student's claims under cursory review. The university furthered a legitimate pedagogical purpose, the court explained, by designing and implementing its curriculum "to foster educators who can function effectively and sensitively in the multicultural, multilingual . . . environment of today's secondary schools."[138]

(ii) Curricular Activities

The issue of school sponsorship is sometimes merged with the second *Hazelwood* factor — whether the activity was part of the school curriculum or served curricular goals. Although there is some practical overlap between these two factors, in an important sense they are analytically distinct. The school-sponsorship factor focuses on whether the speech at issue is tolerated or promoted. Determining whether activities fall outside of the core curriculum and may be characterized as non-curricular in nature raises a different kind of question. Extracurricular activities are often subsidized and promoted by the school. The constitutionally relevant question is whether there is some reason to be less deferential to school authorities when they regulate school-sponsored activities that are not part of the academic curriculum.

If the alleged school-sponsored activity is not in any formal sense a part of the school's educational mission, and only tangentially implicates instructional goals, one might argue that there is less of a reason for courts to defer to school authorities' regulation of speech out of respect for their discretionary authority in making educational judgments.[139] When school administrators and teachers are not engaged in their educational roles, they are no different than other state actors regulating speech and their exercise of regulatory power over student speech should be reviewed accordingly. Sponsorship

[137] No. C 05-05328 WHA, 2006 WL 2355209, at *1-*3 (N.D. Cal. 2006) (unpublished opinion).

[138] *Id.* at *7.

[139] *See, e.g.*, Brown v. Li, 299 F.3d 1092, 1103 (9th Cir. 2002) (reading Supreme Court precedent to distinguish between "core curricular speech . . . which is an integral part of the classroom-teaching function of an educational institution" and "students' extracurricular speech"), *amended and superseded by* Brown v. Li, 308 F.3d 939 (9th Cir. 2002); Welker v. Cicerone, 174 F. Supp. 2d 1055, 1065 n.6 (C.D. Cal. 2001) (explaining that deference due school authorities is limited to curricular activities and other "areas of expertise"); Romano v. Harrington, 725 F. Supp. 687, 690 (E.D.N.Y. 1989) (arguing that "inroads on the First Amendment in the name of education are less warranted outside the confines of the classroom and its assignments").

alone, without the added impetus of educational autonomy and expertise, should command less deference from the courts.

For this argument to have practical merit, courts must be able to distinguish between curricular and non-curricular activities. That is no simple task. The *Hazelwood* opinion itself is only marginally useful because it is susceptible to inconsistent interpretations. Justice White's language describing the scope of the *Hazelwood* holding is quite broad. School-sponsored activities, he explained, "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[140] The facts of *Hazelwood*, however, are much narrower. The censored school newspaper was produced by students in an academic course, a Journalism class, at the high school. The publication of the paper was actively supervised by the faculty advisor and submitted to the school principal for pre-publication review. The paper relied on school funds for most of its operating expenses.[141] In determining the applicability of *Hazelwood*, courts have focused on either the language of the opinion or the facts of the case to reach markedly different conclusions.[142]

The case law demonstrates that conclusions about whether a school activity is curricular in nature are difficult to predict. The lack of significant faculty supervision over student expressive activities convinced some courts that *Hazelwood* should not apply to a school activity, even though the program at issue was clearly part of the school curriculum and students received academic credit for their participation in that program. Several of the student newspaper cases previously referenced illustrate this approach.[143] Somewhat similarly, in *Behymer-Smith ex rel. Behymer v. Coral Academy of Science*, a court applied *Tinker* rather than *Hazelwood* in reviewing a school's decision to prohibit a student from reciting a poem containing the words "damn" and "hell" at "a school-authorized, off-campus student competition" that was partially supervised by school officials. The court concluded that the competition could not be "classified as

[140] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[141] *Id.* at 262.

[142] *See, e.g.*, Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410, 1414 (E.D. Mich. 1990) (focusing on facts of *Hazelwood* rather than expansive language in majority opinion); *Romano*, 725 F. Supp. at 688-89 (same).

[143] *See, e.g.*, Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799 (E.D. Mich. 2004); Draudt v. Wooster City Sch. Dist. Bd. of Educ., 246 F. Supp. 2d 820 (N.D. Ohio 2003); *Romano*, 725 F. Supp. 687; *supra* notes 79-93 and accompanying text.

school-sponsored speech because . . . [it was not] part of the educational curriculum and a regular classroom activity."[144] But in other cases, courts reach very different conclusions. In *Bannon v. School District*,[145] for example, the court held that students painting murals on plywood during a period of construction at the school did constitute curricular activity even though the "students were not required to participate, they received no grade or credit for participation, the murals were painted on a Saturday outside of school hours, and students paid a small fee to participate [in the activity]."[146]

When an activity is concededly non-curricular in nature, courts may still justify the application of the *Hazelwood* standard to these extracurricular activities with various arguments. A common analysis expansively interprets the Court's language in *Hazelwood* regarding programs "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences"[147] to include any activity that furthers a legitimate pedagogical concern. The scope of these concerns has been found to extend far beyond academic matters. They include programs that are intended to instill "discipline, courtesy, and respect for authority,"[148] that teach civility and leadership skills and "expos[e] . . . students to

[144] Behymer-Smith *ex rel.* Behymer v. Coral Acad. of Sci., 427 F. Supp. 2d 969, 973 (D. Nev. 2003).

[145] 387 F.3d 1208, 1214 (11th Cir. 2004).

[146] The court was persuaded that the mural painting project was curricular in nature because it was supervised to some extent by faculty and because it imparted knowledge and skills to student participants. "It allowed student participants to express themselves artistically, allowed student audiences to appreciate their fellow students' artwork, and promoted school spirit." *Id.* at 1215.

Other cases also seem to define curricular activities broadly. In *Walz ex rel. Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003), for example, parents sued the school district on free speech grounds because their child was prohibited from distributing pencils and candy canes at a pre-kindergarten and kindergarten holiday party at school. Rejecting plaintiffs' arguments that the parties were primarily social events, the court held that *Hazelwood* applied because of faculty involvement in the parties and because they helped the children learn important social skills. (The school district pointedly did not regulate the distribution of plaintiff's gifts with accompanying religious messages outside of class, presumably reflecting its understanding of the distinction between *Hazelwood* and *Tinker*.)

[147] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[148] Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989).

the democratic process,"[149] or that help students to participate in "community healing" after a violent attack occurred at their school.[150]

One line of arguably non-curricular cases involves challenges to school regulations governing the election of student officers. In *Henerey ex rel. Henerey v. City of St. Charles, School District,* high school authorities disqualified a student candidate for junior class president after he distributed condoms along with his campaign stickers to student voters.[151] In deciding whether the expressive activity was "school-sponsored speech or independent student speech," the court emphasized that student elections were operated and supervised by the school administration and served the pedagogical purposes "of allowing candidates to learn leadership skills and exposing the general student body to the democratic process."[152] Accordingly, the court applied *Hazelwood* and rejected the student's claim under deferential review.[153] Other decisions are consistent with this line of reasoning.[154]

In another kind of student election case, *Alabama Student Party v. Student Government Ass'n of the University of Alabama,* plaintiffs challenged regulations limiting the distribution of campaign literature in student government elections at the University of Alabama.[155] Here, the court also invoked *Hazelwood* to uphold the regulations under lenient scrutiny. The court accepted defendant's argument that *Hazelwood* applied because depositions affirmed that "the University views its student government association, including the election

[149] Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1133 (8th Cir. 1999).

[150] Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 923 (10th Cir. 2002).

[151] *Henerey*, 200 F.3d at 1131.

[152] *Id.* at 1133.

[153] A dissenting judge challenged the majority's decision on the grounds that safe sex is not "such a controversial topic that school officials may squelch its discussion in a school-sponsored school election contest." *Id.* at 1137 (Wolle, J., dissenting).

[154] *See, e.g.*, Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (holding that disqualification of student candidate because of rude remarks expressed during election assembly unquestionably involved "school-sponsored activities within the meaning of *Hazelwood*" because school organized election and sought to instill values of "discipline, courtesy, and respect for authority" in supervising it); Bull *ex rel.* Bull v. Dardanelle Pub. Sch. Dist. No. 15, 745 F. Supp. 1455 (E.D. Ark. 1990) (applying *Hazelwood* to uphold disqualification of candidate for student council president because his election would be inconsistent with educational goals underlying school's establishment of student government).

[155] 867 F.2d 1344, 1345 (11th Cir. 1989).

campaigns, as a learning laboratory, similar to the student newspaper or yearbook."[156]

As always, there are dissenting opinions and inconsistent results. A dissenting judge in the *Alabama Student Party* case argued that the election regulations at issue should be subjected to strict scrutiny because they restricted speech on parts of the University's property that constituted a traditional public forum.[157] In another case, *Welker v. Cicerone*,[158] a court turned to *Buckley v. Valeo*[159] for guidance and struck down the campaign expenditure limits on student government elections at the University of California at Irvine under strict scrutiny review. The court refused to apply *Hazelwood* on the grounds that student elections did not relate to the University's curriculum, implicate professorial or administrative expertise, or receive University subsidies.[160]

(iii) The Imprimatur of the School

A final justification for applying the legitimate pedagogical concern standard to extracurricular activities focuses on the third *Hazelwood* factor — whether the school-sponsored activity might reasonably be perceived as bearing the imprimatur of the school.[161] Once again there

[156] *Id.* at 1347; *see also* Flint v. Dennison, 361 F. Supp. 2d 1215, 1218-20 (D. Mont. 2005) (applying *Hazelwood* to uphold $100 campaign expenditure limits in student government election because "[p]articipation in student government falls within the University's educational mission by instructing students on many aspects of the governmental process").

Other student election cases are more summary in their analysis. *See, e.g.*, Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643, 648 (N.D. Miss. 2003) (holding that school elections "are school-sponsored activities governed by *[Hazelwood v.] Kuhlmeier*").

[157] *Ala. Student Party*, 867 F.2d at 1351-52 (Tjoflat, J., dissenting). There was also a dissenting opinion in *Poling*, 872 F.2d at 765-66. Judge Merritt argued that the student candidate's campaign speech expressed during a high school assembly should be considered political speech as to which *Tinker*, rather than *Hazelwood*, should apply.

[158] 174 F. Supp. 2d 1055, 1064-67 (C.D. Cal. 2001).

[159] 424 U.S. 1 (1976).

[160] *But see Flint*, 361 F. Supp. 2d at 1218-19 (rejecting reasoning of *Welker* and applying *Hazelwood*'s reasonableness standard to campaign expenditure limits in university student association election).

[161] In many cases, both the school sponsorship issue and the imprimatur factor are employed together to justify the application of *Hazelwood* to non-curricular activities. Thus, in *Henerey*, discussed above, the court argued that the student distribution of condoms along with his campaign stickers "carried with it the implied imprimatur of the school" because most students would assume that student campaign activities had been approved by the school authorities who supervised the election. Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1135 (8th Cir. 1999); *see, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (noting that "few

is considerable overlap here with the question of whether an activity is school sponsored in the first place. Just as courts may question whether student speech in the classroom or on an assignment is school sponsored, for example, they may ask whether student speech in the classroom or an assignment bears the imprimatur of the school. While the issue of school sponsorship seems to be more of a formal inquiry, however, the question of whether an imprimatur of school approval exists is grounded on the reasonable perceptions of students, parents and members of the community.

Viewed independently, the imprimatur factor has the potential to create an open-ended inquiry susceptible to profound differences in interpretation and application. In theory, determining whether speech bears the imprimatur of the school could raise many of the same problems that arise in Establishment Clause cases in which private displays on public property are challenged as endorsing religion.[162] Moreover, even if some imprimatur of approval were found to exist, there may be considerable debate as to how much weight courts should assign to this criterion. It is far from self-evident that empowering school authorities to censor the expression is the appropriate constitutional response to the likelihood that private expressive activity may be perceived to bear the imprimatur of the school. Yet this is the likely result if courts apply deferential review in these circumstances.

For the most part, controversy regarding this factor has been more limited than one might expect, although there is certainly some inconsistency and disagreement in the case law. On the whole, most courts find that classroom activities bear the imprimatur of the school, almost as a logical consequence of their conclusions that these

activities bear a school's 'imprimatur' . . . more" than school-sponsored activities that occur in classroom for instructional purposes); Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 828-29 (9th Cir. 1991) (explaining that because school yearbook is school sponsored "it is not at all unlikely that members of the public, parents of school children in particular, might reasonably perceive [it] to 'bear the imprimatur of the school'").

[162] Determining whether speech bears the imprimatur of the school raises many of the same problems that arise in Establishment Clause cases in which private displays on public property are challenged as endorsing religion. *See* Busch v. Marple Newtown Sch. Dist., No. 05-CV-2094, 2007 WL 1589507, at *10 (E.D. Pa. 2007) (looking to Establishment Clause cases for guidance as to whether speech bears imprimatur of school). Indeed, some student speech cases directly implicate the endorsement test as well as raising the issue of whether student speech bears the imprimatur of the school. This occurs when the school defends itself against a free speech challenge involving a religious message by arguing that the religious expression in a school-sponsored activity would constitute an endorsement of religion violating the Establishment Clause.

activities satisfy the other *Hazelwood* criteria — school sponsorship and curricular programming — as well.[163] Because student speech in class is typically observed primarily by other students, however, the perception of classmates often becomes the focus of the court's inquiry. Not surprisingly, the age of the students may be a relevant factor here. Courts typically conclude that young children in elementary school are particularly likely to believe that any expressive activity in their classes or during an assembly is approved by teachers and administrators.[164] Taking the age of students into account, however, while certainly reasonable, adds yet another indeterminate variable to the determination of whether *Hazelwood* applies.[165]

The imprimatur issue is of greater importance when courts review the control of student speech, and speech directed to students, in non-curricular activities. By focusing on an activity bearing the imprimatur of the school, courts can justify applying *Hazelwood* to decisions that fall well outside of the formal curriculum. Thus, for example, the

[163] *See, e.g.*, Peck *ex rel.* Peck v. Baldwinsville Cent. Sch., 426 F.3d 617, 623, 629 (2d Cir. 2005) (concluding that display of student posters at environmental assembly was curricular activity that necessarily bears imprimatur of school); *Axson-Flynn*, 356 F.3d at 1289 (10th Cir. 2004) ("Few activities bear a school's 'imprimatur' and 'involve pedagogical interests' more significantly than speech that occurs within a classroom setting as part of a school's curriculum."); Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 279-80 (3d Cir. 2003) (noting that student activities during holiday program in elementary school classroom are part of curriculum and will be perceived as having been endorsed by school); C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 174-75 (3d Cir. 1999) (explaining that student expressive activities that first-grade teacher allows to be presented "in a classroom under her supervision, are likely to be perceived as carrying her imprimatur"); Denooyer v. Merinelli, No. 92-2080, 12 F.3d 211, 1993 WL 477030, at *2 (6th Cir. Nov. 18, 1993) (unpublished per curium opinion) (describing second-grade teacher's concern that students would "assume that she and the school endorsed the message" of religious song that student wanted to present to class).

[164] *See, e.g.*, *Walz*, 342 F.3d at 277 (explaining that "in an elementary school classroom, the line between school-endorsed speech and merely allowable speech is blurred"). But not all judges agree. *See* C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 212 (en banc) (Alito, J., dissenting) (arguing that hanging child's Thanksgiving poster saying that he was thankful for Jesus in school hallway would not be reasonably perceived as endorsement of its message by school).

[165] This problem also arises when the speech of a non-student, outside speaker in the classroom is at issue. In *Busch*, the school refused to allow a child's mother to read verses from Psalm 118 to a kindergarten class during a show-and-tell type activity in which students' parents were invited to participate. *Busch*, 2007 WL 1589507, at *2-*3. In the ensuing lawsuit, the court decided that *Hazelwood* applied and upheld the school's decision. In the context of an elementary school classroom, the court explained, young children would reasonably perceive the presentation of a parent in the classroom as having been endorsed by the school.

principal's decision to eliminate "Johnny Reb" as the high school mascot could not reasonably be considered to be curricular in nature, but it was reviewed under *Hazelwood* because "a school mascot or symbol bears the stamp of approval of the school itself."[166]

While some cases in which a school-sponsored, non-curricular activity is determined to bear the imprimatur of the school, such as the school mascot case mentioned previously, seem indisputable,[167] other decisions are more controversial and less predictable. One majority opinion (en banc) held that advertisements in the school yearbook bear the imprimatur of the school.[168] That conclusion was rejected as "preposterous" by four dissenting judges.[169]

Several cases involve projects in which schools permanently placed tiles containing artwork, symbols, and messages in the hallways and walkways of school buildings.[170] Families and community members typically participated in the projects by painting and preparing the tiles for placement. The goals of these projects ranged from fundraising to social and aesthetic objectives. Free speech challenges were brought against schools that placed subject-matter and viewpoint-discriminatory restrictions on the tiles they would accept for their projects. Many of the lawsuits challenged restrictions prohibiting religious messages on the tiles.

No one could argue that these tile projects were part of the school's educational curriculum. Nonetheless, some courts applied the *Hazelwood* standard in adjudicating these cases. In one case, *Fleming v. Jefferson County School District R-1*, the district court concluded that the tile project did not bear the imprimatur of the school because community members had been invited to participate in painting the tiles and no reasonable observer would assume from the large number of participants and the variety of messages included that the school itself had endorsed the content of each tile.[171]

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[166] Crosby *ex rel.* Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1988).

[167] *See, e.g.*, McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 923 (E.D. Mo. 1999) (explaining that performances of high school Marching Band bore imprimatur of school because band members wear uniforms with school's colors, are transported to events on school's bus and are announced as school's Marching Band).

[168] Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 818 (9th Cir. 1991).

[169] *Id.* at 841 n.14 (Norris, J., dissenting).

[170] *See, e.g.*, Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002); Kiesinger v. Mex. Acad. & Cent. Sch., 427 F. Supp. 2d 182 (N.D.N.Y. 2006); Demmon v. Loudoun County Pub. Sch., 342 F. Supp. 2d 474 (E.D. Va. 2004); Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098 (D. Ariz. 2004).

[171] 170 F. Supp. 2d 1094, 1106-07 (D. Colo. 2001).

The Tenth Circuit reversed.[172] The court found that the tile project did bear the imprimatur of the school for two reasons. The school played a role in developing guidelines for the project, supervising its operation, and approving the tiles it accepted. Also, the tiles were to become a permanent part of the school's environment. The court reasoned that "[t]he presence of permanently affixed tiles on the walls implicates the school's approval of those tiles."[173] A similar analysis was applied in some, but not all, cases adjudicating free speech claims in roughly similar circumstances.[174]

*(c) When Does a School Create a Public Forum?*

If all of this were not complicated enough, superimposed over the government speech issue and multi-factor analysis of the *Hazelwood* criteria is the parallel question of whether school authorities have created a designated public forum by policy or practice. Such a determination would require a much more rigorous scrutiny of restrictions on student speech than *Hazelwood* demands. The public forum category can operate as an alternative to the school-sponsored activities criteria to which *Hazelwood* applies in the sense that the existence of a designated public forum suggests that the activity in question is not school-sponsored, curricular in nature, or perceived as bearing the imprimatur of the school.[175] But the public forum can also be understood as a subset of the school-sponsored activities to which *Hazelwood* would ordinarily apply. Thus, a school may create a designated public forum in a program that is sponsored by the school and intended to serve curricular goals.[176]

[172] *Fleming*, 298 F.3d at 918.

[173] *Id.* at 930. The court went on to explain that "[i]f a tile advocating racial hatred or sexual bigotry or encouraging the use of illicit drugs were affixed to the walls, community members rightly might protest that the school implicitly, if not explicitly, promoted such values and conduct." *Id.*

[174] *See, e.g,. Seidman*, 327 F. Supp. 2d at 1098 (applying *Hazelwood* to school authorized program placing tiles in elementary school hallway that might reasonably be perceived to bear imprimatur of school, but striking down exclusion of religious tiles as viewpoint discriminatory).

[175] *See, e.g.*, Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044 (9th Cir. 2003) (holding that school district's policy of distributing literature from outside organizations that might be of interest to students through its schools constituted limited public forum); O.T. *ex rel.* Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ., 465 F. Supp. 2d 369 (D.N.J. 2006) (finding that community-wide talent show that was not part of school curriculum and did not bear imprimatur of school was limited public forum).

[176] *See, e.g.*, Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799 (E.D. Mich. 2004)

The Supreme Court has provided only rudimentary guidance to lower courts on how to determine if a public forum exists. We know that "the government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening [a location that would not otherwise be a public forum] to public discourse."[177] We have also been told that "the court will look to the policy and practice of the government to ascertain whether it intended to designate . . . a public forum."[178] Finally, the Court has explained that a public forum involves "general access" rather than "selective access." This means that "the government creates a designated public forum when it makes its property generally available to a certain class of speakers," but it "does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it."[179]

With nothing more than these vague and uncertain criteria to apply, determining whether the government has created a public forum is a difficult question in the best of circumstances.[180] It is much more difficult to resolve in the context of school-sponsored activities where the promotion and regulation of speech is a core institutional function. Here, courts must consider whether a forum exists, and what kind of forum it is, while simultaneously evaluating the possible applicability of alternative doctrinal frameworks dealing with government speech, the exercise of editorial discretion, or the kind of school-sponsored activities to which *Hazelwood* applies. The difficulty of the analysis is exacerbated by the consequences of the court's decision for the standard of review it will apply. If the court determines that the activity at issue is government speech or that it

(holding that high school newspaper published as part of school curriculum in class for which students receive credit for their work is limited public forum); Draudt v. Wooster City Sch. Dist. Bd. of Educ., 246 F. Supp. 2d 820 (N.D. Ohio 2003) (same).

[177] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

[178] *Id.*

[179] *Id.* at 679.

[180] *See, e.g.*, Summum v. Callaghan, 130 F.3d 906, 913 (10th Cir. 1997); People for Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294, 307-09 (S.D.N.Y. 2000); Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 121-37 (1999); Daniel Farber & John Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234-35 (1984); Wright, *supra* note 120, at 194-95 (noting "the severe difficulties courts have in classifying a particular forum . . . [because of] the inexactitutde, if not manipulability, of how the respective forums can often be characterized, limited, and defined").

involves the exercise of editorial discretion, there is no judicial review under the Free Speech Clause. If *Hazelwood* controls, the legitimate pedagogical concern standard to be applied is relatively deferential, at least as long the speech regulation is viewpoint neutral.[181] If the court finds that the school has created a designated public forum, however, both content- and viewpoint-discriminatory decisions about speech within the forum are subject to strict scrutiny review.[182]

Virtually all cases involving school-sponsored activities discuss whether a public forum has been created. While in the great majority of cases the court ultimately answers this question in the negative, many cases involve long and sometimes tortured discussions attempting to reconcile *Hazelwood* with forum analysis. Courts generally recognize, for example, that schools do not create a designated or limited public forum by allowing students to speak in class, present reports or projects in class, or produce work that is displayed in the classroom.[183] Once disputes extend beyond conventional student speech in the classroom, however, there is far less uniformity in the analysis or holdings of decisions. In particular, whenever school authorities assert control over non-student speech directed at students and occurring in a school-sponsored program, the argument is often raised that the school has created a designated public forum by allowing non-students to participate in the activity.

The cases that present the strongest claims for the creation of a designated public forum involve situations where the school operates as a neutral conduit distributing messages from third parties to students or their parents. Thus, for example, if a school distributes brochures advertising "summer camps, art classes, sports leagues . . . and scouting activities" to students to be taken home to their parents,

[181] Courts are split as to whether viewpoint-discriminatory regulations should receive rigorous review under *Hazelwood*. *See infra* notes 202-05 and accompanying text.

[182] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1137-38 (3d ed. 2006).

[183] *See, e.g.*, O.T. *ex rel.* Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ., 465 F. Supp. 2d 369, 376 (D.N.J. 2006) (distinguishing off-campus talent show, which may be characterized as a limited public forum, from classroom curricular activities, which do not constitute a limited public forum); Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838, 844 (W.D. Pa. 1996) (stating that plaintiff has not "directed the court to a single case in which a public high school classroom was determined to be a designated open public forum. This is not surprising as it is simply not the law"), *aff'd*, 107 F.3d 862 (3d Cir. 1997); Duran *ex rel.* Duran v. Nitsche, 780 F. Supp. 1048, 1053 (E.D. Pa. 1991) (explaining teacher "did not create a public forum when she permitted students to give oral presentations on their report topics in her classroom"), *vacated*, 972 F.2d 1331 (3d Cir. 1992).

it creates a designated public forum in doing so and is constitutionally constrained in its ability to exclude some brochures because of their content or viewpoint.[184] Courts have much more difficulty resolving other cases, however. These disputes typically involve private speech by third parties that occurs in a setting or activity that is arguably school sponsored and bears the imprimatur of the school or that results in the continued exposure of students to outside messages. Thus, courts have found a public forum to exist in a range of activities that involve school sponsorship or school functions including student newspapers,[185] school yearbooks,[186] a play directed by a theater major as her senior project and performed in the University Theater,[187] and the "education, scholarship, or vocational information" made available in guidance counselor offices and bulletin boards.[188] But no public forum was created when school authorities invited community members to school assemblies for Career Day and Youth Motivation Day to discuss job opportunities and the skills needed to pursue them with students,[189] nor did a school district create a designated public forum when it sold advertisements to be placed on the high school's baseball field fence to raise funds for its athletic program.[190]

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[184] Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1047 (9th Cir. 2003); *see also* Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 519 (3d Cir. 2004).

[185] *See, e.g.*, Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799, 805-07 (E.D. Mich. 2004) (holding that school newspapers are limited public forums even though they are part of school curriculum and student staff receives academic credit and grades for their work); Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410, 1413-16 (E.D. Mich. 1990) (concluding that college newspapers are public forums).

[186] Kincaid v. Gibson, 236 F.3d 342, 348-49, 348 n.6 (6th Cir. 2001) (en banc) (holding that university intended "to make the yearbook a limited public forum," but noting that "a college yearbook with features akin to a university student newspaper might be analyzed under a framework other than the forum framework").

[187] Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 759-60 (7th Cir. 2001).

[188] Searcey v. Crim, 681 F. Supp. 821, 828 (N.D. Ga. 1988). An elementary school was also found to have created a public forum when it hosted a talent show for students (in the evening after the close of the school day) even though the children were invited to perform in the show by the school's music teacher and the material to be performed was reviewed by a committee of teachers. *Turton*, 465 F. Supp. 2d at 377-79.

[189] Searcey v. Harris, 888 F.2d 1314, 1318 (11th Cir. 1989). Schools also do not create a public forum when they permit teachers to post expressive material on classroom walls or bulletin boards, subject to the approval of school authorities. *See, e.g.*, Downs v. L.A. Sch. Dist., 228 F.3d 1003 (9th Cir. 2000); Lee v. York County Sch. Div., 418 F. Supp. 2d 816 (E.D. Va. 2006).

[190] DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 969 (9th Cir. 1999); *see also* Crosby *ex rel.* Crosby v. Holsinger, 852 F.2d 801, 802 n.2 (4th Cir. 1988) (noting that school does not create public forum by inviting input from

The analysis employed in designated public forum cases is often fact specific and easily susceptible to alternative conclusions. Accordingly, it is not surprising to find disagreements among judges on a panel deciding a given case, or comparable cases being resolved differently by different courts. Thus, for example, in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*,[191] the Ninth Circuit, sitting en banc, held (over forceful dissents) that a high school did not create a designated public forum by soliciting a range of advertisements for its yearbook.[192] In *Kincaid v. Gibson*, on the other hand, the Sixth Circuit concluded (also en banc and over dissents) that a state university had created a designated public forum in the yearbook it funded and produced.[193]

Inconsistent and unpredictable results are bad enough. Even more disconcerting are the difficulties courts experience in trying to keep straight the multiple doctrinal distinctions through which they are expected to maneuver. In one line of cases, noted previously, courts adjudicated challenges to speech restrictions governing school projects in which parents and community members were invited to place tiles or bricks on the school's grounds. The resulting opinions are damning illustrations of the degree of confusion regarding the relationship between forum doctrine and *Hazelwood* that exists in the case law. In *Fleming*, the Tenth Circuit rejected the district court's conclusion that a tile project involved private speech in a limited public forum, rather than school-sponsored speech.[194] Instead, the appellate court determined that the project constituted a nonpublic forum, and that it was also a school-sponsored expressive activity to which *Hazelwood* applied. In *Seidman v. Paradise Valley Unified School District No. 69*, a dispute about a tile project required the district court to determine whether the project was a limited public forum (which it described as a type of nonpublic forum) or, alternatively, whether it was school-sponsored speech to which *Hazelwood* applied.[195] The court decided that it was school-sponsored speech. In *Kiesinger v. Mexico Academy & Central School*, the district court recognized that there was an

community members in selecting new school mascot).

[191] 941 F.2d 817 (9th Cir. 1991) (en banc).

[192] *Id.* at 819; *see also* Yeo v. Town of Lexington, 131 F.3d 241, 255 (1st Cir. 1997) (en banc) (Torruella, C.J., concurring) (arguing that "when school newspapers and yearbooks publish advertising alongside student articles and pictures, it cannot be said that editors are necessarily intending to open a forum for all public discourse").

[193] 236 F.3d 342, 349 (6th Cir. 2001).

[194] *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 930-31 (10th Cir. 2002).

[195] 327 F. Supp. 2d 1098, 1104-06 (D. Ariz. 2004).

analytically important distinction between a limited public forum and a nonpublic forum.[196] It concluded that a brick project was without doubt a limited public forum, but it also decided that the project was school-sponsored speech to which *Hazelwood* applied. Finally, in *Demmon v. Loudoun County Public Schools*, the district court determined that a tile project was a limited public forum to which *Hazelwood* did not apply.[197] But the court also maintained that the standard of review applied in a limited public forum was the same standard of review required by *Hazelwood* for school-sponsored speech.[198]

One might be tempted to conclude from this line of cases that while these courts' forum analysis was incoherent, the courts at least agreed that the *Hazelwood* standard applied. As the next section shows, however, that is meager consolation because there is no consistent understanding among courts as to what the *Hazelwood* standard of review requires when it is found to apply. In the *Fleming* case, noted above, the court determined that viewpoint-discriminatory speech regulations could be upheld under *Hazelwood* as long as they were reasonably related to a legitimate pedagogical concern. The latter three district court decisions, on the other hand, all decided that viewpoint-discriminatory speech regulations violate the First Amendment.

*(d) What Constitutes a Legitimate Pedagogical Concern?*

Even if a court concludes that *Hazelwood* does apply, it must then determine whether the challenged speech restriction is reasonably related to a legitimate pedagogical concern. *Hazelwood* does not explain, however, exactly how the federal courts are to determine what constitutes a legitimate pedagogical concern. In the majority of lower court cases, the question of whether a challenged restriction furthers some legitimate pedagogical concern is answered in the affirmative under a very deferential standard of review.[199] Indeed, the

[196] 427 F. Supp. 2d 182, 190-91 (N.D.N.Y. 2006).

[197] 342 F. Supp. 2d 474, 474 (E.D. Va. 2004).

[198] *Id.* Other decisions also seem to mix and match forum distinctions and standards of review. *See* Busch v. Marple Newtown Sch. Dist., No. 05-CV-2094, 2007 WL 1589507, at *6 (E.D. Pa. May 31, 2007) (leaving open question of whether school has created designated public forum because court believes same standard of review — requiring speech regulations to be upheld if they are reasonable and viewpoint neutral — would apply to public forum and nonpublic forum).

[199] *See, e.g.*, Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570, 579 (6th Cir. 2008) (explaining that "*Hazelwood* does not require [courts] to balance the gravity of the school's educational purpose against [the student's] First Amendment right to free speech, only that the educational purpose behind the speech suppression be valid").

range of concerns determined to be "legitimate" and "pedagogical" is so broad that one can only wonder whether anything meaningful is accomplished by requiring courts to ask and answer the question.[200] The disutility of the inquiry is magnified by the reality that there is no consensus in our society as to the proper role of the public schools on myriad issues, ranging from religion to sex education to the status of gays and lesbians. Certainly, it is hard to understand why anyone would think that a federal judge is the right person, or a federal court the appropriate forum, to determine what constitutes legitimate pedagogical purposes.[201] But *Hazelwood* requires an answer and federal courts dutifully provide them, however arbitrary and ill-suited their response to this inquiry may be.

There is one significant issue regarding the legitimate pedagogical concern standard that has caused considerable controversy, however. Somewhat surprisingly, the contortions that courts undergo in deciding whether school-sponsored activities constitute some kind of public or nonpublic forum continue in one important respect, even after courts decide that *Hazelwood* applies to a given case. The open question is whether the school-sponsored activities to which *Hazelwood* applies should be considered nonpublic forums. The

Some judges, however, have maintained that the legitimate pedagogical concern standard was intended to require some form of substantive review. Thus, in her dissenting opinion in *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 376 (4th Cir. 1998) (en banc), Judge Motz argued that the Court in *Hazelwood* recognized "that, on occasion, a particular curriculum decision may have no valid educational purpose and that in such an instance the First Amendment is so directly and sharply implicate[d] as to require judicial intervention. . . . Thus, the Supreme Court in *Hazelwood* clearly did not hold . . . that each and every curriculum decision is by definition a legitimate pedagogical concern." Other than those cases which hold that school-sponsored activities are nonpublic forums in which viewpoint discrimination is prohibited, however, see *infra* notes 202-05 and accompanying text, it is hard to identify a case where a court has applied *Hazelwood* and failed to conclude that the school's decision furthered a legitimate pedagogical concern.

[200] *See, e.g.*, *Curry*, 513 F.3d at 579 (holding that "the school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose"); Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643, 648 (N.D. Miss. 2003) (finding legitimate pedagogical interest in "responding to complaints" about religious picture posted during student election campaign and in school's desire "to avoid litigation").

[201] Many courts explain their deference to school authorities when they apply *Hazelwood* precisely because it is so clear that a federal judge is not the "ideal" person to evaluate a principal or teacher's decision to restrict student speech in a school-sponsored activity. *See, e.g.*, *Curry*, 513 F.3d at 579.

resolution of this issue is a critical one. If school-sponsored activities *are* nonpublic forums, then the legitimate pedagogical concern analysis must conform to the standard of review applied to regulations of speech in a nonpublic forum. That standard, of course, prohibits viewpoint-discriminatory regulations unless they can be justified under strict scrutiny.

There is a split in the circuits on this question with the majority of cases favoring some kind of nonpublic forum approach that requires the invalidation of viewpoint-discriminatory decisions by school authorities.[202] To support their analysis, some courts suggest that viewpoint discrimination can never be reasonably related to a legitimate pedagogical concern. Others conclude that a school's decision is unconstitutional if it discriminates on the basis of viewpoint even if the speech restriction is reasonably related to legitimate pedagogical concerns.[203]

The explanation for these conclusions varies to some extent. To some judges, the ban on viewpoint discrimination is simply so foundational to free speech doctrine that it cannot be ignored.[204] For most courts, however, *Hazelwood* is interpreted to prohibit viewpoint discrimination because courts have concluded that the school-sponsored activities to which *Hazelwood* applies constitute a nonpublic forum, and viewpoint discrimination in a nonpublic forum must be subject to strict scrutiny review and struck down.[205]

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[202] *See, e.g.*, Peck *ex rel.* Peck v. Baldwinsville Cent. Sch., 426 F.3d 617 (2d Cir. 2005); Bannon v. Sch. Dist., 387 F.3d 1208, 1213 (11th Cir. 2004); Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), *rev'd on other grounds*, 236 F.3d 342 (6th Cir. 2001) (en banc); C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 203 (3d Cir. 2000) (en banc) (Alito, J., dissenting); Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991); Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989) (explaining that *Hazelwood* standard is "merely an application of the [nonpublic forum] standard to a curricular program"); Kiesinger v. Mex. Acad. & Cent. Sch., 427 F. Supp. 2d 182 (N.D.N.Y. 2006); Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098 (D. Ariz. 2004); Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003).

It is worth noting that a subsequent Ninth Circuit panel criticized the position taken in *Planned Parenthood*, but was bound to accept the decision as precedent. Downs v. L.A. Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000).

[203] *See, e.g.*, *Peck*, 426 F.3d at 633; *Keisinger*, 427 F. Supp. 2d at 193-94 ; *Hansen*, 293 F. Supp. 2d at 797.

[204] *Peck*, 426 F.3d at 633 (describing prohibition against viewpoint discrimination as "a core facet of First Amendment protection"); *Searcey*, 888 F.2d at 1319 n.7; *Hansen*, 293 F. Supp. 2d at 797.

[205] *See, e.g.*, *Oliva*, 226 F.3d at 203 (Alito, J., dissenting); *Kincaid*, 191 F.3d at 729 n.4, *rev'd on other grounds*, 236 F.3d 342 (6th Cir. 2001) (en banc); *Planned Parenthood*, 941 F.2d at 829; *Searcey*, 888 F.2d at 1324; O.T. *ex rel.* Turton v. Frenchtown

It is hard to understand why so many courts are persuaded by this nonpublic forum argument. To begin with, the *Hazelwood* opinion never states that school-sponsored activities constitute a nonpublic forum or that the regulation of such activities must be viewpoint neutral.[206] The Court argues at length that the school did not create a public forum by producing the student newspaper being censored because school authorities maintained curricular and supervisory control over the paper's publication. But the Court never uses the term nonpublic forum in its analysis. In prior free speech cases involving nonpublic forums, cited in *Hazelwood,*[207] the Court explicitly identified the existence of a nonpublic forum as justifying the standard of review it applied. It would be odd indeed if it had reached the same conclusion in *Hazelwood* yet strangely refrained from stating that its decision was similarly grounded on a nonpublic forum analysis.

There is only one sentence in the entire *Hazelwood* opinion that even implicitly suggests that the school newspaper constitutes a nonpublic forum. After explaining that school authorities did not intend to open the pages of the school newspaper to indiscriminate use, the Court comments that "[i]nstead, they 'reserve[d] the forum for its intended purpos[e]' . . . as a supervised learning experience for journalism students."[208] The use of the term "forum" in this single statement simply cannot justify citing *Hazelwood* for the proposition that school-sponsored activities are nonpublic forums.

Moreover, contending that school-sponsored activities are nonpublic forums flies in the face of the core argument underlying the *Hazelwood* analysis. As the Court makes clear, what distinguishes *Hazelwood* from *Tinker* is that *Tinker* involved "[t]he question whether the First Amendment requires a school to tolerate particular student speech."[209] *Hazelwood*, on the other hand, involved "the question whether the First Amendment requires a school affirmatively to promote particular student speech." It is because the First Amendment requires less rigorous review of speech restrictions in the latter circumstance than the former that the Court applies a more deferential standard of review in *Hazelwood* than it did in *Tinker*.

Elementary Sch. Dist. Bd. of Educ., 465 F. Supp. 2d 369, 378 (D.N.J. 2006).

[206] *See Downs*, 228 F.3d at 1010 (noting "the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*").

[207] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

[208] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).

[209] *Id.*

Yet the nonpublic forum standard of review, which requires speech regulations to be reasonable and viewpoint neutral, is designed to apply to situations where speakers claim that the state must tolerate their speech, not endorse it. Numerous Supreme Court and lower court cases have applied this standard to speech regulations that prohibited expressive activities where there was no suggestion of state approval or support of the speaker's message.[210] How then can this same standard of review be applied to situations where the state is asked to affirmatively promote a speaker's message? The Court's discussion in *Hazelwood* about the need for special deference in reviewing a school's decision not "to lend its name and resources to the dissemination of student expression" becomes meaningless if the exact same standard of review is employed both when a school declines to affirmatively promote particular student speech and when the state refuses to tolerate speech that a speaker wants to express on public property. But that is exactly what happens if *Hazelwood* is interpreted to mean that restrictions on school-sponsored activities are reviewed under a nonpublic forum standard of review.[211]

The nonpublic forum analysis is also inconsistent with the statement in *Hazelwood*, a version of which is repeated in virtually

[210] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (concluding that because large metropolitan airports are nonpublic forums, authorities can prohibit plaintiffs from soliciting funds to support their religion in airport terminals); Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299 (Fed. Cir. 2008) (holding that 95-acre medical center complex including nursing homes, hospital, and domiciliary for homeless veterans is nonpublic forum from which visitors attempting to register voters can be excluded); Anderson v. Milwaukee County, 433 F.3d 975 (7th Cir. 2006) (finding that municipal busses are nonpublic forums so that passengers may be prohibited from distributing literature to other passengers).

[211] One could argue that *Hazelwood* must be contrasted with *Tinker*, not with conventional nonpublic forum cases. Because *Tinker* requires a more rigorous standard of review than would be applied in a nonpublic forum, notwithstanding the argument that schools are nonpublic forums and should be acknowledged as such for free speech purposes, then the *Hazelwood* standard is reasonably interpreted to require the same standard of review applied in nonpublic forums. This would be true notwithstanding the argument that student speech regulations in school-sponsored activities should receive more lenient review than the nonpublic forum standard would require. This is an unpersuasive argument for many reasons. Most obviously, if we are going to focus on the *Tinker* standard for comparative purposes, it is hard to see why we should incorporate nonpublic forum doctrine into the *Hazelwood* standard in any way. Because *Tinker* ignores public forum and nonpublic forum doctrine entirely, it makes little sense to bring the formalities of nonpublic forum doctrine in through the backdoor in interpreting *Hazelwood*. We would achieve more clarity and doctrinal symmetry by assigning *Hazelwood*'s standard some kind of independent meaning — just as the Court did in *Tinker*.

every student speech case, 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 judges."[212] This statement surely suggests that some special degree of deference should be afforded the decisions of school authorities in regulating school-sponsored activities because the operation of the nation's public school is so clearly a matter of local concern that is properly subject to the control of democratically elected, community representatives. Nonpublic forum doctrine, however, is applied in numerous circumstances where issues of local community control are largely irrelevant. The lobby of a federal office building,[213] the interior sidewalk in front of a federal post office,[214] the terminals of a large, metropolitan airport heavily involved in interstate and international travel,[215] and a federal workplace charity drive,[216] to cite just a few examples, are all nonpublic forums. Yet none of these locations is particularly a matter of local concern. Nor is there any reason why administering the use of these locations should be uniquely the subject of democratic control, free from judicial intervention.

If speech regulations in school-sponsored activities deserve special deference because schools are so clearly recognized to be a matter of local concern and professional discretion, one would think that courts would review such regulations more leniently than regulations in locations where no special basis for deference exists. Treating school-sponsored activities as nonpublic forums runs directly counter to this analysis, however.[217] Put simply, if the regulation of school-sponsored activities is reviewed under nonpublic forum doctrine, the special deference due to school authorities out of respect for the local control of the nation's schools counts for nothing. The same standard of

[212] *See, e.g.*, Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 277 (3d Cir. 2003); Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002); Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1136 (8th Cir. 1999); Yeo v. Town of Lexington, 131 F.3d 241, 250 (1st Cir. 1997); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999).

[213] Claudio v. United States, 836 F. Supp. 1219, 1224-25 (E.D.N.C. 1993).

[214] United States v. Kokinda, 497 U.S. 720, 721 (1990).

[215] *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 679-80.

[216] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805-06 (1985).

[217] *See Fleming*, 298 F.3d at 926 (explaining that "[i]n 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").

review would be applied to situations where local community control requires deference and to those where no such deference was due.

Finally, there is language in *Hazelwood* that strongly suggests that viewpoint discriminatory restrictions on student speech in school-sponsored activities should be upheld against First Amendment challenges. The Court explains that "[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the 'shared values of a civilized social order.'"[218] Whatever the range of such shared values might be, one must reasonably assume from this language that a school may decline to sponsor student speech that flatly contradicts or rejects such values. At least some of those decisions must surely be viewpoint-discriminatory.[219] Otherwise, a school program could not promote racial tolerance and religious freedom as American values, or sexual responsibility, honesty and integrity, and good grooming as preferred personal choices, without providing comparable sponsorship to the advocacy of racial bigotry, religious persecution, sexual promiscuity, deceit and misrepresentation, slovenly dress and low standards of personal hygiene.[220]

Several circuits (and cases) reject the idea that the First Amendment requires courts to review viewpoint-discriminatory regulations of student speech in school-sponsored activities under strict scrutiny.[221] They recognize that distinctions based on viewpoint are a necessary part

[218] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

[219] *See, e.g.*, Bannon v. Sch. Dist., 387 F.3d 1208, 1217 (11th Cir. 2004) (Black, J., concurring) (citing language from *Hazelwood* quoted in text to support argument that *Hazelwood* allows school authorities to discriminate on basis of viewpoint in restricting student speech in school-sponsored activities); Wright, *supra* note 120, at 186 (citing referenced *Hazelwood* language and concluding, "[i]nescapably, this logic authorizes speech regulations based on viewpoint, on any reasonable understanding").

[220] *See* Wright, *supra* note 120, at 187-88. Cases that recognize that viewpoint-discriminatory regulations of speech in school-sponsored activities should be upheld as constitutional if they relate to legitimate pedagogical concerns often emphasize the importance of viewpoint discrimination to the school's educational mission. *See, e.g.*, *Bannon,* 387 F.3d at 1219 (Black, J., concurring) (explaining that schools need to be able to "promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint").

[221] *See, e.g.*, *Bannon,* 387 F.3d at 1217-18 (Black, J., concurring); *Fleming*, 298 F.3d 918; C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999), *aff'd in part and vacated in part*, 226 F.3d 198 (3d. Cir. 2000); Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993); Virgil v. Sch. Bd., 862 F.2d 1517 (11th Cir. 1989); Golden v. Rossford Exempted Vill. Sch. Dist., 445 F. Supp. 2d 820 (N.D. Ohio 2006).

of the educational process.[222] They also understand that the doctrinal line between content and viewpoint is simply too indeterminate to provide adequate guidance to school administrators and teachers on how they can do their jobs without violating the Constitution. In some of these cases, courts equivocate and suggest that viewpoint discrimination may be prohibited in activities where students are asked to express their personal beliefs[223] or that it may be more difficult for schools to demonstrate that viewpoint discrimination is related to some legitimate pedagogical concern.[224] But they reject the idea that school-sponsored activities are forums in which viewpoint discrimination must always be subjected to strict scrutiny review.[225]

However persuasive these arguments may be, they do little to explain how *Hazelwood* fits into the larger world of free speech doctrine. In rejecting a prohibition against viewpoint discrimination, courts may be correctly focusing their reasoning on what *Hazelwood*

[222] *See, e.g.*, *Bannon*, 387 F.3d at 1219 (Black, J., concurring) (agreeing with analysis in *Hazelwood* "entrust[ing] to educators these decisions that require judgments based on viewpoint"); Axson-Flynn v. Johnson, 356 F.3d 1277, 1290-91 (10th Cir. 2004) (suggesting that schools may require students to express viewpoint other than their own to train them to think critically); Brown v. Li, 299 F.3d 1092, 1106 (9th Cir. 2002) (explaining that "consistent with the First Amendment[] a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose"); *Fleming*, 298 F.3d 918 (arguing that if schools were allowed to discriminate on basis of viewpoint, "school could promote student speech advocating against drug use without being obligated to sponsor speech with the opposing viewpoint").

Courts particularly emphasize the necessity for viewpoint discrimination in elementary school cases because of the immaturity of students and the relevance of normative distinctions to the educational process. *See, e.g.*, Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 278 (3d Cir. 2003) (recognizing that "in the context of an organized curricular activity, an elementary school may properly restrict student speech promoting a specific message"); *Oliva*, 195 F.3d 167 (emphasizing fact that restriction on speech occurred in first-grade class to justify upholding allegedly viewpoint-discriminatory decision); Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996) (arguing that "a public elementary school can shield its five- through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development").

[223] *Walz*, 342 F.3d at 278 (distinguishing between school activities where student is invited to express his personal views and those where he is assigned specific subject to discuss).

[224] *See, e.g.*, *Bannon*, 387 F.3d at 1219 n.1.

[225] *Walz*, 342 F.3d at 280-81 (upholding school authorities' decision to prevent parent's effort "to promote a religious message through the channel of a benign classroom activity" by having her child distribute gifts bearing proselytizing religious message at elementary school holiday parties).

says. But that does not provide a doctrinal foundation on which the *Hazelwood* analysis can be grounded. Some courts are so perplexed by the problem of reconciling *Hazelwood* with forum doctrine (because forum analysis is all that they have to work with) that they end up in an Alice in Wonderland world where school-sponsored activities are classified as some kind of forum, but the standards of review mandated by forum doctrine are displaced by *Hazelwood*.

Thus, one court characterized school-sponsored activities as nonpublic forums, but nonetheless concluded "that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech."[226] In another case, the court determined that when a kindergarten teacher invited students' parents to come to class to participate in a "show-and-tell type exercise" with their child, she created either a limited or a nonpublic forum, both of which required speech decisions to be viewpoint neutral. Notwithstanding this conclusion, the court went on to decide that *Hazelwood* applied and that viewpoint-discriminatory decisions would be upheld as long as they were reasonably related to legitimate pedagogical concerns.[227] It is hard to avoid the conclusion from cases like these that some courts feel compelled to fit *Hazelwood* into the public and nonpublic forum framework for want of a doctrinal alternative. Because they cannot identify a forum classification that comports with *Hazelwood*'s requirements, however, they end up deciding that both forum doctrine

[226] *Axson-Flynn*, 356 F.3d at 1291. Cases involving mixed doctrinal messages like this are common. In *Muller*, 98 F.3d 1530, for example, the court upheld a school's authority to prohibit a student from distributing religious messages to all the students in his fourth-grade class. In justifying its conclusion against the barrage of plaintiff's arguments, the court explained, "Even assuming *Tinker* expression rights apply to children in public elementary schools, an elementary school's nonpublic forum status remains, and we apply the most recent standard elaborated by the Supreme Court in *Hazelwood*, that of 'reasonableness'." *Muller*, 98 F.3d at 1540. If merging *Tinker*, nonpublic forum analysis, and *Hazelwood* together were not enough, the court also concluded that the school could engage in viewpoint discrimination provided that doing so was reasonable. *Id.* at 1542.

[227] Busch v. Marple Newtown Sch. Dist., No. 05-CV-2094, 2007 WL 1589507, at *9 (E.D. Pa. May 31, 2007). Other courts seem equally befuddled as to how all of the pieces of free speech doctrine fit together in school-sponsored speech cases. In *Oliva*, 195 F.3d at 172-73, for example, the Third Circuit suggested at different places in its opinion that a teacher's exercise of control over student speech in the classroom represented the regulation of student speech in a school-sponsored activity subject to review under *Hazelwood*'s legitimate pedagogical concern standard, that such control involved "restrictions on the State's own speech," and that the first-grade classroom in which the control was exercised was a nonpublic forum. The court seemed oblivious to the fact that each of those conclusions supported the application of a different standard of review.

and *Hazelwood* apply and simply ignore the reality that these frameworks are inconsistent with each other.

If the issue of viewpoint discrimination is placed to one side, there is little left to the question of whether a school decision to which *Hazelwood* applies is reasonably related to a legitimate pedagogical concern. Courts overwhelmingly find that such a concern exists by deferring to the judgment of school authorities as to what constitutes a legitimate pedagogical purpose. Some discussions of this issue are fairly elaborate.[228] Others are summary and conclusory. What remains unclear is whether courts accomplish anything of value in applying a standard that is virtually always satisfied.[229]

## II. SOLVING THE *HAZELWOOD* PROBLEM — THE NONFORUM AS A DEFAULT PRINCIPLE IN FIRST AMENDMENT DOCTRINE

This Part of the Article presents an alternative approach for adjudicating free speech disputes arising out of school-sponsored activities. Its primary thesis proposes and describes a new free speech category called a nonforum in which government regulations of speech are not subject to judicial review under the Free Speech Clause. Two important factors that are useful in both identifying and justifying the existence of a nonforum are discussed at length. First, a nonforum involves government property and activities that are pervasively expressive in nature and serve intrinsically expressive functions. Second, nonforums may be identified as circumstances and settings where federalism and separation of powers concerns preclude intrusive judicial review of speech regulations under free speech doctrine. A third factor that is marginally relevant to identifying a nonforum is also considered – whether the expressive activity at issue in a dispute may reasonably be perceived as bearing the imprimatur of the state. This concern played a central role in the Supreme Court's

[228] *See, e.g.*, Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570 (6th Cir. 2008) (explaining at length why prohibiting distribution of promotional religious message by fifth-grade students to even younger children at elementary schools serves legitimate pedagogical purpose).

[229] Courts may contend that that the legitimate pedagogical concern standard does not preclude meaningful review of restrictions on student speech, but typically end up upholding the school's decision in any case. *See, e.g.*, Brown v. Li, 299 F.3d 1092, 1105 (9th Cir. 2002) (suggesting that *Hazelwood* "does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them," but holding that university satisfies this standard of review in rejecting student's free speech claim).

analysis in *Hazelwood*, and it is often found to be dispositive in lower courts cases involving school-sponsored activities. I argue, however, that when this factor is examined carefully, it turns out to play only a limited role in determining whether a nonforum exists.

The secondary thesis of this Part of the Article is that school-sponsored activities constitute a nonforum, and as such, government control of student speech in such activities should be shielded from free speech scrutiny. Accordingly, the remainder of the Article describes the application of the three nonforum factors, noted above, to the context of student speech in school-sponsored activities. This analysis demonstrates that school-sponsored activities are intrinsically and pervasively expressive and that for important federalism and separation of powers reasons, the regulation of speech in school-sponsored activities should not be subject to Free Speech Clause review.

The previous discussion in Part I described the confusion lower courts experience in trying to interpret and apply *Hazelwood* in a variety of circumstances. A significant part of the difficulty they encounter results from their attempt to fit the issues raised by restrictions on student speech in school-sponsored activities into one of three doctrinal categories: government speech, a designated public forum, or a nonpublic forum.[230] The problem, of course, is that student speech in school-sponsored activities does not fit very comfortably into any one of these categories to the exclusion of the others. But courts feel that they have no alternatives other than these doctrinal approaches. Student speech in school-sponsored activities has to fit somewhere into free speech doctrine and no other framework seems appropriate. If student speech in school-sponsored activities isn't government speech or speech in a public or nonpublic forum, what in the world is it?[231]

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[230] Thus, in *Hosty v. Carter*, 412 F.3d 731, 735-36 (7th Cir. 2005) (en banc), Judge Easterbrook described the choices before the Supreme Court in *Hazelwood* and in the university newspaper case before the Seventh Circuit's en banc panel as follows: "*Hazelwood*'s first question therefore remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a nonpublic forum or publish the paper itself (a closed forum where content may be supervised)?" The thesis of this Article is that there should be an additional choice available to courts.

[231] Courts have recognized that there is a limit to forum doctrine and that certain government activities and operations cannot be categorized as a forum of any kind. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 720 n.3 (2004) (concluding that state college scholarship program providing tuition assistance to low-income families "is not a forum for speech"); United States v. Am. Library Ass'n, 539 U.S. 194, 204-05 (2003) (noting that "forum analysis . . . [is] incompatible with the discretion that public libraries must have to fulfill their traditional missions"). The conclusion that forum

I think there is a way through this doctrinal thicket in which the lower courts find themselves entangled. It is a bit like the solution that Alexander the Great supplied to the problem of unraveling the Gordian knot. Alexander drew his sword and cut the knot in half.

I don't have sword, but I want to propose a new free speech category, which I call a ***NONFORUM***, to slash through the thicket. A nonforum is a new doctrinal category that the Supreme Court has never acknowledged, but which courts need to recognize to make sense out of free speech decisions. As noted at the very beginning of this Article, a nonforum is government property, or a government activity, where the conventional protection provided to private speakers under the Free Speech Clause does not exist. In a nonforum, neither content-neutral, content-discriminatory, nor viewpoint-discriminatory speech restrictions are subject to judicial review. Other constitutional constraints may apply. I will discuss those possibilities later in this Article. But for free speech purposes, the government's control over expressive activities in a nonforum is not subject to judicial oversight.

### *A. Identifying and Justifying the Nonforum*

There are numerous examples of nonforums. The oval office is a nonforum, as is the office of most government officials, including that of a high school principal. A courtroom trial is a nonforum. So is the selection of a graduation speaker at a public high school commencement program. Acquisition decisions at a public library are another example. The walls or display cases of a publicly owned museum are a nonforum too.

What nonforums have in common is that they constitute government property or activities, which, for a variety of important reasons, should not be subject to free speech review by the federal courts. These reasons not only justify recognizing government property or activities as a nonforum. They provide a working definition of the category by identifying the criteria courts should consider in determining that a nonforum exists. Nonforums involve: (1) intrinsically and pervasively expressive government property and activities where the burden of complying with free speech doctrine would unreasonably interfere with the activity's purpose or the use to which the property was being put; (2) government functions that for

analysis does not apply, however, is not an adequate answer to the question of how government decisions about speech that neither regulate a forum nor constitute government speech should be characterized or reviewed.

separation of powers and federalism reasons should not be subject to intrusive judicial review under the Free Speech Clause, and (3) expressive activities that may reasonably be perceived to bear the imprimatur of the state. Surprisingly, while the third factor was emphasized in *Hazelwood* and lower court cases, it is seldom a dispositive or even a critical factor in identifying a nonforum. Its importance will vary depending on the expressive nature of the government's activities.

1. Intrinsically and Pervasively Expressive Functions

Describing a government function or activity as intrinsically and pervasively expressive is a somewhat awkward description of this factor, but I have not been able to come up with better terminology. The basic idea is that a nonforum often involves a government institution or activity that has as its primary function the managing and directing of speech. Directing speech is not an occasional aspect of the government's operation in a nonforum. It is a regular, repeated, continual, and unavoidable dimension of what the government is doing. To paraphrase Justice Brandeis's famous phrase, expression in such a nonforum is both the government's goal and the means it uses to accomplish that goal.

Several constitutional law scholars have condemned contemporary free speech doctrine because of its emphasis on generic classifications and formal categories. These critics of free speech doctrine have argued repeatedly that the Court's decisions ignore the nature and purpose of government property and activities in resolving free speech disputes. Robert Post, for example, argues that courts adjudicating free speech disputes should distinguish between the exercise of managerial authority by the state and the exercise of governance authority by the state.[232] Frederick Schauer criticizes current doctrine for failing to focus on the differences between the various governmental institutions that direct or regulate speech.[233] The nonforum category resonates in part with both of these criticisms[234] in

[232] Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1784-85 (1987).

[233] Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1262-64 (2005).

[234] The idea of the nonforum category, however, is much more doctrinal than it is theoretical. It is designed to fit into current doctrine, rather than requiring the reformulation of the way that courts think about freedom of speech today. The common denominator of the nonforum is its consequence for free speech protection. It is defined as a category of settings and circumstances that cannot be accurately

its focus on the intrinsically expressive nature of the government functions to which it applies.

The nonforum category has a foundation in the case law as well as in free speech theory. It builds on Justice Kennedy's language in *Forbes* in which he argues that government functions involving the exercise of editorial discretion should not be subject to judicial review under the Free Speech Clause. The nonforum also parallels part of the Court's analysis in *National Endowment of the Arts v. Finley*,[235] at least to some extent. In upholding the constitutionality of the "decency" requirements Congress imposed on the award of NEA grants to artists, the Court emphasized "the competitive process according to which the grants are allocated." To do its job, the Court explained, the NEA must "make esthetic judgments" about speech. Discrimination based on the value of speech cannot be avoided in implementing "the inherently content-based 'excellence' threshold for NEA support" that is employed in awarding grants.[236] Thus, *Finley* acknowledges that the nature of what the NEA does in drawing distinctions based on the content of speech should influence the way free speech doctrine is applied to its decisions. The *Finley* decision does not fully comport with nonforum analysis, however, because the majority opinion circumvented the question of whether the NEA could engage in viewpoint discrimination in distinguishing between grant proposals. In a nonforum, viewpoint-discriminatory decisions are not subject to review and invalidation under free speech principles.[237]

described as government speech, in which the government's control and direction of speech should not be subject to judicial review under the Free Speech Clause. Just as there are several kinds of free speech cases in which courts are directed to apply roughly the same level of intermediate level scrutiny, there are several circumstances where judicial review under the Free Speech Clause is unwarranted and counterproductive. The nonforum captures and identifies those circumstances. Thus, the nonforum is a pragmatic classification that may include various settings and circumstances just as it may further diverse and unrelated purposes.

[235] 524 U.S. 569 (1998).

[236] *Id.* at 586

[237] Justice Scalia argued in his concurring opinion in *Finley* that the government may engage in viewpoint discrimination when it funds speech. *Id.* at 590, 599 (Scalia, J., concurring). As a formal matter, Scalia insisted, funding speech is different than regulating speech and the First Amendment only limits government decisions in the latter circumstance. Unlike the majority, which grounded its analysis on the inherently selective and competitive nature of NEA grants, Justice Scalia maintained that the nature of the funding program was largely irrelevant to the constitutional analysis. In Scalia's words, "The Government, I think, may allocate both competitive and noncompetitive funding . . . insofar as the First Amendment is concerned." *Id.*

This contention forced Scalia to confront the Court's decision in *Rosenberger v.*

Underlying the Court's discussion in *Forbes* and *Finley* is the recognition that certain governmental functions have a pervasive speech dimension to them that requires government decision makers to make choices about private speech. This recognition underlies a major factor in identifying a nonforum. The factor has two aspects. First, there is the extent to which the governmental function or activity is intrinsically and pervasively expressive in nature. Most government jobs involve speaking as do most human activities. But some activities are distinguished by the degree to which the focus and objective of the state's efforts is the content and value of speech. The role that speech plays in a librarian's activities or a newspaper editor's duties are different than the role that speech plays in the work of a fire fighter or building administrator. For these former functions, the core of the state's work requires the on-going direction and control of speech.

Second, the speech selected or directed by the state in a nonforum is chosen or controlled for the explicit purpose of furthering the governmental function being served. Thus, a nonforum is the antithesis of the situation in *Rosenberger v. Rector & Visitors of the University of Virginia* where the university provided stipends to student groups to be used for expressive activities and effectively disclaimed any interest in or responsibility for the way the money was used.[238] In a nonforum, government decisions about speech are intended to further specific governmental goals.

Sometimes, of course, government carries out its functions by communicating its own messages. It would be a mistake, however, to

*Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), in which it struck down the University of Virginia's viewpoint-discriminatory refusal to subsidize the religious periodical of a student group. Scalia distinguished *Rosenberger* on the grounds that the University had created a limited public forum with its funding scheme in that case, which invoked free speech review, while the NEA's "highly selective (if not highly discriminating)" award process bore no resemblance to a public forum. *Finley*, 524 U.S. at 599 (Scalia, J., concurring). But this is doublespeak. If the selectivity of the NEA's award process is what distinguished NEA funding from the subsidy scheme invalidated in *Rosenberger*, how can Scalia claim that government funding decisions do not implicate the First Amendment without regard to whether they are competitive or not?

Justice Souter challenged Scalia's analysis directly in his dissenting opinion. If the University of Virginia's policy for funding student groups struck down in *Rosenberger* had awarded subsidies based on some highly selective criteria, Souter asked, would the Court have upheld its viewpoint-discriminatory decision not to subsidize a religious group's periodical as beyond the scope of Free Speech Clause review? *Id.* at 613-15 (Souter, J., dissenting). Significantly, Scalia declined to engage Souter on this issue and did not respond.

[238] *Rosenberger*, 515 U.S. at 819.

try to characterize all governmental expressive functions as government speech. Many expressive government functions involve the control of speech that does not convey the government's own message. There is a distinction between speech that serves a government purpose and speech that expresses the government's message or point of view. Thus, if the President invites influential private citizens to the Oval Office to discuss their views on a policy initiative he is considering, the ensuing discussion serves a governmental purpose, but none of the conflicting perspectives presented can be accurately described as government speech. Similarly, the books acquired and offered to patrons at the public library do not constitute government speech. Neither of the teams debating a proposition in a public school debate program may express the government's position.

All of the speech in these settings and circumstances serve some government goal. All of the speech is subject to government decisions about the relevance, value, and utility of the content and viewpoint being expressed. But the fact that the government purchases a book or assigns a grade to an oral presentation or seeks advice from a private speaker or writer does not transform private speech into the government's own message. What is distinctive about these situations is that while they do not involve government speech, they should be shielded from judicial review under the Free Speech Clause as if they did involve government speech. Indeed, these government functions that are intrinsically expressive but do not constitute government speech are precisely the situations where the nonforum category comes into play.

The reason why the control of private speech in intrinsically and pervasively governmental activities should not be subject to judicial review is primarily pragmatic. Because the selection, direction, and control of private speech is the focus of the government's functional activities, subjecting the government's decisions about speech to free speech review would make the daily operations of state actors continually vulnerable to First Amendment challenges. The negative impact of such vulnerability on the ability of state employees to do their job should be obvious. Many of these functions are discretionary in nature and require the exercise of professional judgment. It is hard to imagine a more stifling burden to place on workers whose duties require them to make decisions about speech on an ongoing basis than to subject their work to continuous constitutional scrutiny of the content and viewpoints reflected in their choices. That burden is particularly egregious when the source of the scrutiny is every person who has standing to bring a constitutional claim and the magnitude of

the burden involves the stress, expense and time demands of responding to a lawsuit.

This burden is aggravated by the complexity of free speech doctrine, which confronts government actors subject to its mandate with a framework riddled with confusion and uncertainty. The distinctions courts draw between content and viewpoint discrimination, among various kinds of forums, between government speech, government-sponsored speech, and private speech, between speech and conduct, and in deciding between the rights of speakers and audience members would require government officials to classify their activities among poorly differentiated categories and evaluate their decisions under various indeterminate standards of review on a regular basis. The burden on government officials having to navigate through this doctrinal maze as they attempt to fulfill their daily duties would be extremely high.

It is true, of course, that every state actor who controls or regulates speech in any setting faces the daunting task of complying with Free Speech Clause requirements. For many governmental functions, however, at least some of the most difficult questions can be avoided. The administrator of a government office building, for example, can resolve many problems concerning access to the building's lobby through time, place, and manner regulations that will be subject to lenient review. Teachers and librarians and other state actors engaged in intrinsically and pervasively expressive activities, on the other hand, will find that few of their functions can be carried out effectively through content-neutral decisions. Their work would bear the full brunt of the complexity of free speech doctrine. Put simply, in circumstances in which the cost of state actors trying to abide by free speech mandates while performing their jobs would be prohibitively dysfunctional, courts should consider identifying the activities as a nonforum and shielding the control of speech from judicial review.

### 2. Federalism and Separation of Powers Concerns

The second factor that distinguishes a nonforum from the state's control of expressive activities in other circumstances is the importance of federalism and separation of powers concerns to the governmental function at issue. Judicial abdication of free speech review is particularly appropriate in a nonforum for reasons relating to federalism or separation of powers concerns (or in some circumstances both). The federalism basis for justifying and identifying a nonforum is relatively straightforward. The speech decisions of certain governmental institutions may be uniquely suitable to, and are recognized to be reserved for, local as opposed to

national control. The national uniformity and reasoned application of rules intrinsic to constitutional adjudication may have little utility in a nonforum where cultural distinctions among communities and the need for compromises among stakeholders lead to ad hoc and shifting solutions to problems.

In adjudicating free speech claims in these circumstances, the federal courts would displace government officials in directing the on-going performance of state and local employees in fulfilling their professional responsibilities. If citizens can sue municipal art museum directors on the basis of content or viewpoint discrimination to contest their choices in selecting artwork to display, for example, courts will take on the task of determining what paintings will appear on the museum's walls. The idea of government by the national judiciary would take on new meaning as the federal courts became de facto library boards, school boards, museum directors, principals, and classroom teachers.

The separation of powers concerns are more complicated. In many ways they reflect the criteria set out in *Baker v. Carr*[239] for identifying a political question.[240] These criteria, of course, are grounded on a separation of powers foundation that determines the proper role for the federal judiciary in the constitutional scheme of things. As Justice Scalia noted in *Vieth v. Jubelirer*, the case that held political gerrymanders to be non-justiciable, while it is "'the province and duty of the judicial department to say what the law is' . . . [s]ometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[241]

The two criteria identified in *Baker v. Carr* that resonate with the identification of a nonforum are "a lack of judicially discoverable and manageable standards [for deciding the question]" and "the impossibility of deciding [the question] without an initial policy determination of a kind clearly for nonjudicial discretion."[242] The latter criterion recognizes that underlying the application of free speech doctrine to a particular dispute or class of disputes may be

[239] 369 U.S. 186, 217 (1962).

[240] I do not suggest that free speech claims in school-sponsored activities or other nonforums should be considered non-justiciable political questions. My point is that the separation of powers concerns that help to identify and justify the existence of a nonforum are informed by the criteria used to identify a political question.

[241] 541 U.S. 267, 277 (2004) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[242] *Baker*, 369 U.S. at 217.

political choices that belong as a matter of constitutional allocations of power and democratic ordering to the legislative and executive branches of government. Sometimes the utility of this factor in identifying a nonforum is self evident. The federal courts have no business reviewing the President's decisions as to who gets invited to the Oval Office to determine if these access constraints are viewpoint discriminatory. Other settings may require more explanation. The core idea is that the Free Speech Clause provides no substantive foundation that enables judges to evaluate the aesthetic, social, moral, and political judgments routinely implemented by government officials and employees in a nonforum.

The lack of judicially discernible and manageable standards is also relevant.[243] Sometimes, in a nonforum, courts may recognize that a constitutional principle applies but nonetheless conclude that they lack the ability to enforce the principle under coherent and consistent standards. In *Vieth*, for example, the plurality agreed with the principle that "severe partisan gerrymanders" are incompatible with democratic self-government,[244] but concluded that given the intrinsically political nature of determining the boundaries of election districts, courts were incapable "of drawing the line between good politics and bad politics."[245] Similarly, one may imagine a court agreeing with the proposition that, at some point, content- and viewpoint-discriminatory restrictions on student speech in school-sponsored activities may cross the line from legitimate pedagogical discretion to impermissible political indoctrination. There may be no discoverable and manageable standard that would allow a court to identify that line, however, and to distinguish "good" content and viewpoint discrimination from "bad" content and viewpoint discrimination.

Richard Fallon's article, *Judicially Manageable Standards and Constitutional Meaning*,[246] provides as astute and thoughtful a discussion of judicially discernible and manageable standards as we have in legal commentary today. Fallon identifies two related factors that courts consider in determining whether judicially manageable standards exist that are directly relevant to determining whether a

[243] To a significant extent, the two *Baker* factors overlap. Certainly, one of the reasons a standard may not be "discernible" by the judiciary is that the standard must be grounded on "an initial policy determination of a kind clearly for nonjudical discretion." *Id.*

[244] *Vieth*, 541 U.S. at 292.

[245] *Id.* at 299.

[246] Richard H. Fallon, Jr., *Judically Manageable Standards and Constitutional Meaning,* 119 HARV. L. REV. 1274 (2006).

nonforum exists. One factor rejects a standard which "requires distinctions for which conceptual resources are lacking in too many instances."[247] More specifically, this standard is problematic because there are "no criteria sufficient to make nonarbitrary distinctions" between what satisfies the standard and what does not.[248] A second factor relates to the ability of standards "to generate predictable and consistent results."[249] Here, Fallon explains, a standard will be found to lack this necessary ability if there is a "lack of consensus about the meaning of underlying norms" on which the application of the standard will be based.[250]

Typically, both of these factors are implicated in the review of restrictions on speech in a nonforum. In the context of school-sponsored activities, for example, it does not matter how rigorous or lenient the level of review that courts employ may be or whether courts require a legitimate, important, or compelling pedagogical interest to justify the control and direction of student speech. Courts do not have criteria available that allow them to make nonarbitrary distinctions between regulations that deserve to be upheld and those that should be struck down on free speech grounds. There is simply no consensus about the underlying norms that determine the purpose and nature of public school education. Without such a foundation, courts cannot resolve questions about the legitimacy or importance of pedagogical concerns unless they take on the responsibility of developing educational policy standards for the public schools. The development of those standards, however, would certainly constitute "an initial policy determination of a kind clearly for nonjudicial discretion."

Thus, cultural conflicts about the proper role of the public schools deprive the courts of any discernible basis for evaluating the legitimacy or importance of content- or viewpoint-discriminatory decisions in school-sponsored activities. Further, the range and variety of decisions that teachers, principals, and school boards must make in controlling and directing these activities render any standard of review unmanageable for courts and unpredictable for state actors that must comply with its requirements. Separation of powers concerns preclude courts from enforcing constitutional principles in such circumstances.

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[247] *Id.* at 1287.

[248] *Id.*

[249] *Id.* at 1289.

[250] *Id.* at 1290.

A public library presents a good example of how federalism and separation of powers concerns may justify the identification of expressive activities as a nonforum. Both federalism and separation of powers concerns reinforce the idea that a public library's decisions about its inventory constitute a nonforum. First, as a matter of historical experience, the operation of public libraries is a traditionally local function. Second, local control of libraries helps to justify immunizing their inventory decisions from judicial review. If each of the thousands of public libraries in the United States makes independent decisions about the books it will purchase, the diversity of those decisions mitigates their cumulative effect. The decision by any particular library not to purchase a book would have little impact on the willingness of book companies to publish that work. That is why the unavailability of a book in one community's library is unlikely to seriously limit access to its content. Conversely, if every library in the United States refused to purchase a book, the loss of that market might discourage or limit the book's publication.[251]

Moreover, a community's decision about whether to have a public library, the size of its library, and how its public library should operate would seem to be an intrinsically political one. A library in a community where many military retirees live may have a large military history section and few books about pacifism. The reverse may be true in a small town adjoining a liberal arts college affiliated with the Quaker or Mennonite faiths. A community's decision about what it wants to read necessarily will reflect the viewpoints and preferences of its residents. Certainly, the Constitution does not provide any mandatory blueprint as to the nature of a public library.[252]

[251] United States v. Am. Library Ass'n, 539 U.S. 194, 220 (2003) (Stevens, J., dissenting). In criticizing the majority's decision to uphold a federal statute conditioning access to federal subsidies on a library's employment of filtering software on its computer terminals, Justice Stevens emphasized that he did not believe that it would violate the First Amendment if individual libraries independently determined to install the required software. What was problematic to Justice Stevens was the cumulative impact of a federal law that "operates as a blunt nationwide restraint on adult access" to constitutionally protected materials. *Id.*

[252] Even with regard to questions about whether libraries should provide access to sexually graphic websites, the argument for local control is persuasive. As Justice Stevens explained in his dissenting opinion in *American Library Association*, "Local decision makers and library boards, responding to local concerns and the prevalence of the problem in their own libraries, should decide if minors' Internet access requires filters. They are the persons in the best position to judge local community standards for what is and is not obscene, as required by the *Miller* [*v. California*, 413 U.S. 15 (1973)] test." *Id.* at 224 n.3.

Thus, a federal court cannot review a librarian's acquisition decisions to determine whether they further a legitimate library purpose because there is no constitutional foundation for a court making that kind of determination. There is no accepted functional description of what a library should be or do that is mandated by the Free Speech Clause. Nor is there the kind of clear consensus in our society about library functions that would allow a court to incorporate that collective understanding into the substance of free speech doctrine. Any attempt by courts to usurp the community's role in determining the nature of its libraries would be an unjustified exercise of judicial authority.

That has not stopped federal judges from trying to assign particular functions and methodologies to libraries. In *United States v. American Library Ass'n*, for example, Justice Rehnquist, in his plurality opinion, argued that public libraries serve a traditional function "of facilitating learning and cultural enrichment,"[253] and "facilitat[ing] research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[254] To the plurality, denying access to web sites that present pornographic material unsuitable for minors was consistent with that traditional library function.

In his dissenting opinion, Justice Souter ridiculed this argument by noting that "the plurality's conception of a public library's mission has been rejected by the libraries themselves" and pointing out that the challenge to the federal regulations in the case was brought by the American Library Association itself.[255] But then Souter goes on to describe what *he* understands the function and mission of a public library to be, basing his argument on the views of librarians expressed through their professional association, the American Library Association.[256] Neither justice seems to believe it appropriate to leave the question of the function of a public library to the discretion of the community that establishes and funds the institution and hires employees to operate it. But surely that is where the authority to determine the library's function properly lies.[257]

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[253] *Id.* at 203 (plurality opinion).

[254] *Id.* at 206.

[255] *Id.* at 231, 237-38 (Souter, J., dissenting).

[256] *Id.* at 237-38.

[257] *See generally* Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (arguing that "local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted").

It should be clear that the problem here is not simply an efficiency concern. It is true that asking the federal courts to review library acquisition decisions to determine if they reflected viewpoint-discriminatory motives in violation of the First Amendment would be a logistical nightmare. But that is only part of the problem. The more fundamental issue is that federal judges have no basis for making these decisions and no authority to substitute their subjective values for those of the community in which a library is located.

The discussion above of how federalism and separation of powers concerns help to justify identifying a public library as a nonforum is just an example. Various other municipal institutions and activities could be evaluated under a similar analysis. The core idea underlying this factor is that there are government functions that are distinctive with regard to the value we assign to their operating under local and/or democratic control. When a case for local and community control is persuasive, this factor, along with the intrinsically expressive nature of the government function at issue, is one of the two strongest criteria in identifying a nonforum.

Subjecting speech decisions in a nonforum to judicial review would undermine the legitimacy of the federal courts and unreasonably aggravate their work load. The functions of a nonforum involve qualitative distinctions and value judgments about speech that are not susceptible to review under neutral principles of law. Accordingly, constitutional courts have neither the authority nor the expertise to review these decisions. There are no canons of decision making that enable a federal judge to decide what books should be purchased for the public library, who gets access to the governor's office, or what paintings should be displayed on the wall of the municipal art museum. Judgments on these questions by courts would inevitably lead to inconsistent and incoherent results and subject the judges who rendered them to claims of personal or political bias.

### 3. Expressive Activities Bearing the Imprimatur of the State

Another possible factor to consider in identifying a nonforum is whether the activity at issue bears the imprimatur of the state. Despite the centrality of the imprimatur issue to the *Hazelwood* analysis, however, a close analysis of this factor suggests that it is assigned more weight than it deserves in determining whether speech decisions should receive deferential review, or no review at all, under the Free Speech Clause. Certainly, the conclusion that an expressive activity bears the imprimatur of the state does not mean that regulations of the activity should always be shielded from serious judicial review.

Evaluating the relevance and significance of this factor turns out to be a far more complicated task than one might anticipate. It requires the unraveling of a generally accepted idea that has seldom been subject to serious scrutiny. The results are surprising. Answering the question of whether speech bears the imprimatur of the state, it turns out, provides us little information about the core concern in *Hazelwood* — that schools should not be required to promote student speech when they do not endorse its content. Private speech bearing the imprimatur of a school or of the state is problematic for a different reason. It creates a real risk that the content of private messages will be misattributed to government. That is not a trivial consequence. Misunderstandings as to what the government believes can distort debate and interfere with the state's ability to further its goals. But it is far from obvious that the legitimate goal of avoiding these results can justify permitting the government to engage in content- and viewpoint-discriminatory regulations of speech.

The state often has alternative choices available to prevent costly misattributions of some third party's speech to the government. When it controls the setting in which speech that is likely to be misunderstood may occur, and this is often the case, the state can prohibit private expression in the area or restrict expression to the communication of the state's own messages. Ultimately, as I will explain in far more detail below, the risk that private speech may be perceived to bear the imprimatur of the state will be relevant to determining whether a nonforum exists only when these alternatives are unavailable or ineffective.

*a. What Does it Mean to Say that Speech Bears the Imprimatur of the State?*

The idea that speech bears the imprimatur of the state is more complicated than it appears to be. Speech expressed by a private actor, without more, ordinarily would not be perceived as bearing the imprimatur of the state. All state action related to the content or viewpoint of speech, however, typically bears the imprimatur of the state, at least to some extent. This is true whether the state regulates or promotes the expressive activity at issue. When the state restricts speech based on its content, an imprimatur of disapproval is likely to be perceived. Conversely, if certain speech is exempted from an otherwise applicable restriction, an imprimatur of approval or special value is likely to be perceived. Certainly one might conclude in a case

like *Carey v. Brown*,[258] in which a regulation exempted labor speech from a ban on residential picketing, that the state sees something useful or valuable about the speech to which it extends a regulatory preference. Similar perceptions of approval or disapproval would apply to speech that is subsidized or otherwise supported by the state and speech that is refused support. Understood in this way, determining whether expressive activity bears the imprimatur of the state tells us nothing about whether the government's control or direction of that speech should be subject to judicial review under the Free Speech Clause, or whether the level of that review should be rigorous or deferential. Imprimaturs created by regulation might be rigorously reviewed while imprimaturs created by subsidy or sponsorship might not.

When the Court in *Hazelwood* states that an article written by a student for the school newspaper bears the imprimatur of the school, it does not explain to us why that conclusion justifies the Court's decision to deferentially review the censorship of the student's story. That is an unfortunate omission. Clearly, underlying the Court's analysis is the assumption that readers of the newspaper will believe that the school's decision to publish the article signals support or approval of its content. Because the Court in *Hazelwood* explained that decisions about whether the state will promote speech should be more leniently reviewed than decisions about whether the state will tolerate speech, perhaps this assumption provides some superficial support for the Court's analysis. If a school's decision that actually promotes speech should be leniently reviewed, then it may be argued that a school's decision that is perceived as promoting speech should also be leniently reviewed.

But that argument cannot be correct. As we have just seen, state action that communicates an imprimatur need not involve the promotion of speech. It can also be conveyed by tolerating speech and allowing it to be expressed. If a strict teacher only permits students to speak in class when they have something useful and meritorious to say, allowing a student to express herself without interruption suggests approval of the student's speech. Whether promoting speech or allowing speech conveys an imprimatur of approval or disapproval depends on the relative treatment of competing or alternative messages. If the state supports most speech, there is no real imprimatur of approval that accompanies state support, but there will be an imprimatur of disapproval of speech that is denied support.

[258] 447 U.S. 455 (1980).

Similarly, when most speech is allowed, there is no imprimatur of approval that accompanies the state permitting speech, but there will be an imprimatur of disapproval of speech that is prohibited. The reverse is true in situations where support for speech is limited or where most speech is restricted. Thus, there is no clear connection between whether speech is tolerated or promoted and whether it bears the imprimatur of the state, and no persuasive explanation, at least in *Hazelwood*, why the fact that speech is perceived as bearing the imprimatur of the state should reduce the level of review applied to the regulation of such speech much less shield the regulation from judicial review entirely.

*b. What is Problematic About Speech That is Perceived as Bearing the Imprimatur of the State?*

While the *Hazelwood* opinion does not provide us much of an explanation of why imprimaturs matter, there may be several problems arising out of private expressive activities bearing the imprimatur of the state that justify allowing the state discretionary control over such speech. The content and viewpoint of particular messages may be flatly inconsistent with the state's goals. A tolerance center designed to promote good will among the people of different religions, ethnic backgrounds, and races, for example, will want to bar speech that promotes suspicion and rivalry among different groups. Even if it were not concerned about the instrumental consequence of such messages, the state may simply not want to host, facilitate, or be associated with certain viewpoints in any way. In a sense, this is the reverse of compelled speech cases, such as *Wooley v. Maynard*, where the Court struck down New Hampshire's requirement that all car owners must have the state's motto, "Live Free or Die," on their vehicle's license plates.[259] Government may not have the same dignitary interests as human beings, but surely the state has some interest in not being compelled to serve as a billboard for the messages of private individuals with which it disagrees.[260]

[259] 430 U.S. 705 (1977).

[260] In situations like those described in the text, posting a disclaimer disassociating the state from a bigoted message expressed at a tolerance center is unlikely to adequately remedy the State's concern. The impact of the message of intolerance will still undermine the State's goals. Nor can disclaimers fully mitigate the imposition of the unwanted message. Allowing New Hampshire car owners to place a disclaimer on their license plates would not require a different result in *Wooley*.

(1) Avoiding and Remedying Misunderstandings and Misattribution

The most important problem arising out of situations where private expressive activity will be perceived as bearing the imprimatur of the school involves misunderstandings and misattribution. These are situations where the perception that speech bears the imprimatur of the school is false. The state does not want to be erroneously perceived as endorsing the content of speech with which it actually, and perhaps strongly, disagrees. Misperceptions can undermine and complicate the state's ability to accomplish its goals. If nothing else, the state does not want to be blamed for approving the content of some private person's communication when it does not do so.

If that is the primary problem with activities that create an imprimatur of state approval, we need to understand first how such misunderstandings come about. Then we can determine whether the risk that misunderstandings may occur is sufficiently important that it justifies allowing states to restrict speech to prevent such misunderstandings without being subject to judicial review. Classifying expressive activities as a nonforum should not be done lightly. We need to know whether the problem of misattribution arising from activities that bear the imprimatur of the state requires shielding regulatory responses to that problem from judicial review.

Most misunderstandings about state approval of private speech occur in either of two ways. First, the state may decide not to control private speech in some setting where the state's exercise of control is appropriate and expected. Suppose, for example, a city almost never allows private messages to be placed on the sides of police cars and fire trucks. If it changes its position and allows private messages to be expressed in these locations free from any municipal control, many people, at least initially, will assume that the city approves the messages that they see on its police cars and fire trucks.

In theory, that misperception would be temporary and self correcting. As more and more diverse messages appear on police cars and fire trucks, people will recognize that the city could not possible be understood to approve of all of these messages. That may not always happen, of course. Messages on a limited number of subjects or expressing a particular point of view may so dominate speech in these locations that a perception of state approval of these messages will continue.[261] But it is hard to see how shielding state control of

[261] *See generally* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (explaining that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a

these messages from judicial review would solve that problem. Because the state is not exercising any real control of this private speech in the first place, and because the decision to open these locations for unfettered private expression would not violate the Free Speech Clause, nothing much is accomplished by shielding that decision from judicial review.

Suppose, however, that the state decides to exercise control over the content of private speech it permits to be placed on the sides of police cars and fire trucks. Some messages are accepted. Others are rejected. Those decisions will create an imprimatur of state approval for the messages displayed on the state's vehicles. But where is the misunderstanding? People will perceive an imprimatur of state approval that actually exists.

In a sense, the source of the misunderstanding is not anything that the state does. It is free speech doctrine itself. If the state asserts significant control over the messages it permits, the state may be able to convince a court that it has not created a designated public forum. But the sides of state vehicles would almost certainly be considered to be a nonpublic forum. In a nonpublic forum, content-discriminatory speech regulations are upheld as long as they are reasonable, a very deferential standard of review. Viewpoint-discriminatory regulations, however, would be subject to strict scrutiny and almost certainly struck down. This means that the city will be able to exercise a lot of control over the content of the messages placed on police cars and fire trucks, but there will be some messages — those expressing ideas that the city completely rejects because of the viewpoint they express — that the city will not be able to prohibit from being placed on its vehicles.

One can easily imagine the perception of approval that this application of free speech doctrine creates. City residents know that the city is exercising control over the content of messages on city vehicles. Accordingly, when they see an offensive message located on a police car, they have every reason to believe that the city approves of that message. In the real world, it is unlikely that many residents will be sufficiently familiar with free speech doctrine to understand that the city is required by the Constitution to allow unwanted messages to be displayed on its vehicles. Few viewers will recognize that by opening up these locations to some private expression, the city has lost its ability to prevent other messages from being displayed there. This is the kind of misunderstanding that the city wants to avoid.

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demonstration of approval" by government of private group's message).

If the sides of city vehicles constituted a nonforum because speech in that location bore the imprimatur of the city, however, this problem would be easily remedied. The city would only allow speech to be displayed on city vehicles if it approved of the message being expressed. The city could even reject messages because of their viewpoint. Accordingly, no misunderstandings would occur.

(2) Should Imprimaturs Be Part of the Criteria for Identifying a Nonforum?

The goal of avoiding misunderstandings about the government's approval of private speech supports the argument that a perceived imprimatur of state support should be part of the criteria used to identify a nonforum. But there are countervailing concerns that undermine this conclusion. Allowing the government to prohibit citizens from expressing disfavored viewpoints increases the government's ability to distort the marketplace of ideas in favor of its preferred positions. This distortion extends beyond whatever persuasive impact results from people recognizing that the state approves of certain messages and not others. When only certain private messages appear in public locations and not others, city residents have no way of knowing whether the absence of certain viewpoints is the result of the state's refusal to allow those messages to be expressed or whether it reflects the lack of support for those messages in the community. Thus, permitting the state to restrict the display of certain messages may remedy one misunderstanding, but only at the cost of creating another.

Moreover, an alternative solution to the imprimatur problem may avoid both types of misunderstandings. The city can allow only its own speech to be communicated on the sides of its vehicles and prohibit any private speech from being displayed there.[262] This solution will be of little value when a government function requires the state to support private speech, as is the case in a library or public school. But it would certainly avoid misunderstandings with regard to other non-expressive government functions, such as the operation of police cars and fire trucks. Thus, one might argue that the imprimatur factor reinforces the conclusion that a nonforum exists in situations

[262] Another possible alternative is for the city to post disclaimers on its police cars and fire trucks. There are at least two difficulties with this alternative, however. First, a conventionally sized disclaimer may not be easy to read on a moving vehicle some distance from the viewer. Second, it is not clear how believable a disclaimer would be to viewers. Disclaimers are used so frequently today that they may have lost much of their persuasive force.

where the government function is intrinsically expressive in nature, like a public school. But when the issue involves public property, like the side of a government vehicle, that is capable of being used for expressive purposes but does not primarily serve a speech function, then the better approach is for government to avoid misunderstandings by limiting the location to its own speech and prohibiting all private expression in that location.[263]

There is a cost to this solution as well, although one may argue about whether it is an acceptable one. It is easy to imagine situations where the state wants to serve a governmental purpose by opening public property to *private* expression because government speech would not be as effective as private speech in furthering the government's goals. But the government would need to be able to restrict the private speech on the basis of viewpoint to serve its purposes. Indeed, the government would never create these expressive opportunities at all unless its content- and viewpoint-discriminatory decisions were shielded from judicial review. The open question would be whether preventing the loss of such opportunities justifies treating them as a nonforum.

There may be more situations like this than one would think. Suppose, for example, a large city wants to display private messages on police cars encouraging residents, particularly young people, to respect, trust, and work with the police in reducing crime in the community. These messages are solicited from local residents who are held in high regard by the youthful audience the police are trying to reach. To be credible, however, these messages have to be understood to be private speech rather than government speech. Youth leaders and even community activists who often are critical of city hall may be precisely the kind people whose pro-police messages would be respected, and, accordingly, the city might invite them to participate in its program. Obviously, however, the city will want to discriminate on the basis of viewpoint in evaluating the responses it receives to its invitation and selecting the messages it posts on police cars. "Don't trust the Cops" is unlikely to be chosen. No city would open the sides of city vehicles to this kind of display of private messages if it could not discriminate on the basis of viewpoint in doing so.

The various school tile projects described earlier present a similar dilemma. Inviting private persons to contribute messages to be placed

[263] *See, e.g.*, DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999) (acknowledging that "closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion").

on tiles in and around school hallways and walkways arguably creates an environment that is qualitatively different than the government placing its own messages around the school building. Students may feel a greater sense of belonging in the school community when their families', relatives', or friends' messages are enshrined on the walls. Private messages may be particularly useful in communicating the idea that the school is a place where students from different backgrounds will treat each other with mutual respect and as persons of equal worth. But school authorities must impose limits on what may be communicated on these tiles to accomplish these objectives. A tile that says "We are all God's children" furthers the school's goals. A tile that says "The only path to God is through Jesus Christ" does not.[264] Clearly, some messages that school authorities would want to exclude will be defined by their viewpoint.

School authorities can avoid this problem by only allowing the school's own messages to be placed on the bricks or tiles to be purchased and displayed in the halls and walkways. Alternatively, the school district could so stringently restrict the content of the messages placed on the bricks and tiles that no claim of viewpoint discrimination could arise. If a school limited the message on tiles "to names of donors and their immediate family," it would be permitted to exclude all political or religious messages.[265] But that narrow a restriction might defeat some of the benefit the school hoped to derive from inviting parents and community members to participate in the project in the first place.

Are expressive projects like the police car and school tiles examples described above sufficiently valuable that we need a doctrinal category in free speech jurisprudence to provide government sufficient discretion to create them? Or would we be better off in cases where state-sponsored speech bears the imprimatur of the state for government to

[264] *See generally* Gernetzke *ex rel.* Bezotte v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 466 (7th Cir. 2001) (recounting how school principal feared that if he permitted religious symbols to be painted on murals in school's hallway, he would also have to approve murals depicting Satanic or neo-Nazi imagery); Seidman v. Paradise Valley Unified Sch. Dist. No 69, 327 F. Supp. 2d 1098, 1114 (D. Ariz. 2004) (describing predicament schools find themselves in if they are required to be viewpoint neutral in controlling tiles that may be placed on school grounds even though discordant religious messages that might be expressed do not belong in "the hallways of our public elementary schools").

[265] *See, e.g.*, *Seidman*, 327 F. Supp. 2d at 1117 (suggesting that school district might have avoided free speech claims by defining the scope of its tile program more narrowly and with more specificity); Tong v. Chi. Park Dist., 316 F. Supp. 2d 645, 657 (N.D. Ill. 2004) (discussing buy-a-brick program for public park).

be limited to the choice of speaking on its own behalf through government speech or rejecting projects because it cannot adequately control the content of what is expressed. Because there are reasonable arguments on both sides of this issue, we should be wary of assigning too much weight to the imprimatur of state support in determining whether a nonforum exists — at least in cases where the government's core function is not intrinsically and pervasively expressive in nature.[266] Once we conclude that the government function at issue is intrinsically and pervasively expressive in nature, however, there may be a sufficient foundation for finding that a nonforum exists without having to consider whether private speech may reasonably be perceived to bear an imprimatur of governmental support.

### *B. Applying the Nonforum Analysis to the Direction and Regulation of Student Speech in School-Sponsored Activities*

The foregoing analysis describes two key factors in identifying a nonforum: (1) the intrinsically and pervasively expressive nature of the government function and the burden of complying with free speech mandates, and (2) federalism and separation of powers concerns. That an expressive activity bears the imprimatur of the state is a marginally relevant but less influential factor to consider.

Any free speech category that is defined by multi-factor criteria raises questions about the difficulty and uncertainty of its application. While initial decisions about whether a nonforum exists may be difficult for courts to determine in some early cases, and there will always be some close cases in applying any free speech doctrine, over time adopting the nonforum category would substantially simplify the adjudication of many free speech claims. The test case, of course, for the purposes of this Article, is the problem of free speech rights in school-sponsored activities. The adjudication of disputes arising out of school-sponsored activities in cases like *Hazelwood* provides a powerful example of just how the nonforum analysis should be employed and what the benefits of a nonforum approach would be.

Under the analysis that I propose, all public-school-sponsored activities constitute a nonforum. Any activity developed and directed by school authorities to serve some educational purpose or objective (and I would define those terms expansively) would be presumed to

[266] Of course, a perception of state endorsement for a message may implicate other constitutional mandates, such as the Establishment Clause, in addition to the Free Speech Clause. Imprimaturs may vary in their relevance and importance depending on the constitutional provision that is at issue.

be a nonforum. Put simply, the identification of school-sponsored activities as a nonforum, immune from judicial review, would be the new default principle for this entire class of student free speech claims. Accordingly, the control and direction of student speech, and speech directed at students, in such activities would not be subject to judicial review under the Free Speech Clause of the First Amendment.

I do not suggest that a school could never organize a school-sponsored program in a way that implicates a different free speech analysis. It is possible for a school to create a designated, limited public forum in a school-sponsored extracurricular activity. However, plaintiffs challenging the conclusion that a nonforum exists would bear a heavy burden of persuasion to convince a court that a different principle and standard of review should apply. They would have to demonstrate that school authorities had made "an affirmative effort to disclaim responsibility" for student expression in the school-sponsored activity and had denied any interest in directing or exercising control over student expression toward the furtherance of educational goals.[267]

Importantly, the *Tinker* standard would continue to govern student speech that was extraneous to school-sponsored activities. There is a difference between students informally whispering to each other during a school assembly and students expressing some message that is part of the assembly program. Only the latter speech would fall under a nonforum analysis. Similarly, activities initiated and directed by students or non-school personnel that merely occur on school property, but have no other relationship to the school's programs or goals, would be reviewed under *Tinker* or forum analysis. The organization of an independent student club, such as a Bible study club, that met during lunch hour would remain outside of the nonforum and continue to receive some level of free speech protection.

[267] The showing required in the text parallels the explicit abdication of authority, responsibility, and approval asserted by the University of Virginia in funding student organizations that the Court described in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 823-24, 834-35 (1995). The University of Virginia required student groups receiving funds to include a disclaimer in their writings and dealings with third parties stating that the group is independent of the University and that the University is not responsible for the group's activities. Further, the groups were required to sign an agreement with the University clearly stating that the award of funds does not mean that the University approves of or controls the student group or its activities.

The Ninth Circuit has also acknowledged this basis for distinguishing private student speech from school-sponsored speech or the school's own expression. Downs v. L.A. Sch. Dist., 228 F.3d 1003, 1012 (9th Cir. 2000).

This conclusion, that school-sponsored activities constitute a nonforum, is fully justified by the criteria for identifying a nonforum. The intrinsically and pervasively expressive nature of public schools, the extraordinary burden that compliance with free speech guarantees would impose on instructional and administrative staff, and federalism and separation of powers concerns relating to local, democratic control of the public school system all lead to the same conclusion: public schools are a nonforum for free speech purposes. The remainder of this Article sets out that argument in detail. Pursuant to that analysis, the control of expression in school-sponsored activities by school boards, principals, and teachers should not be subject to judicial review under the Free Speech Clause.

1. The Intrinsically and Pervasively Expressive Nature of Public Schools

As I have argued throughout this Article, making decisions about speech is the core function of a school's educational mission. This is particularly true for classroom teachers. Regulating speech is fundamental to what an educator does. Virtually every aspect of a teacher's responsibilities involves the direction and control of speech.[268] The control of speech is a pervasive part of a principal's or teacher's role, and this authority is exercised in numerous circumstances and for many distinct purposes. Thus, virtually everything that an educator does arguably falls within the coverage of the First Amendment.

Because free speech requirements govern so many of the professional choices that educators make throughout the day, the burden of complying with this constitutional guarantee will be intolerable unless settled doctrine provides clear and certain guidelines to be followed. But any standard of review that meaningfully attempts to balance instructional needs and prerogatives against student free speech interests in public schools will, of necessity, be complex, subjective and unpredictable in its application. (Any reader doubting this conclusion should reread Part I of this Article.) There is simply no way to avoid this dilemma. When the

[268] *See* Brown v. Li, 308 F.3d 939, 948 (9th Cir. 2002) ("'Teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech.'" (quoting Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995))).

government function at issue is so intrinsically and pervasively expressive in nature, as is true with regard to public-school-sponsored educational activities, there is a compelling argument that a nonforum exists and that the discretionary exercise of control over that function should be immune from judicial review under the Free Speech Clause.

Consider the questions that courts must confront if they try to evaluate administration and teacher speech decisions in school-sponsored activities under a more nuanced, less categorical approach than the nonforum model that I have described. Then consider how the answers to these questions would affect the ability of principals or teachers to do their job.

First, courts must decide whether the direction of school-sponsored activities that are part of the school's curricular decisions constitutes government speech to which free speech doctrine does not apply. If some, but not all, curricular decisions constitute government speech, courts must draw a line to distinguish those decisions from others that will be subject to some form of judicial review. Drawing that line is no easy task. There are so many situations in which teachers use student speech as part of the educational enterprise, even student speech that expresses the student's own point of view, that it will be extremely difficult to determine when government speech ends and nongovernment speech begins.[269]

Second, curricular decisions that are not identified as government speech may be considered acts of editorial discretion by school authorities — a class of decisions that are essentially immune from free speech review under the *Forbes* analysis. The editing of a school newspaper or yearbook, surely definitive acts of editorial discretion, would seem to fall within this category, although *Hazelwood* on its face is to the contrary and requires review under a legitimate pedagogical concerns standard. The selection of speakers for a panel at a school assembly might also be considered an unreviewable exercise of editorial discretion under the *Forbes* analysis. Again, courts would have to decide whether the *Forbes* approach should determine how these decisions are be reviewed or whether *Hazelwood* or some kind of forum analysis should apply.

Third, there is the question of whether school-sponsored speech must be curricular in nature for *Hazelwood* to apply. If that question is

[269] Teachers may use student presentations to communicate material, orchestrate a class discussion, require students to provide feedback on other students' work under the teacher's supervision, solicit student input in presenting theatrical or musical programs and direct student performances in these programs. The list could go on and on with no certainty as which situations would be characterized as government speech.

answered in the affirmative, courts must confront the perplexing problem of determining what constitutes curricular speech for First Amendment purposes. The resolution of this issue may require courts to evaluate not only easily determined facts, such as whether the speech is part of the content of a course and whether academic credit is awarded for its expression, but also more indeterminate inquiries about the extent of faculty supervision that is provided.[270] Alternatively, courts may conclude that *Hazelwood* extends to non-curricular activities that bear the imprimatur of the school, a decision that requires a fact-based inquiry into how expressive activities are perceived.[271]

Fourth, there remains the possibility that by policy or practice, the school may have created a designated public forum. Courts are more likely to find that a forum has been created when non-students are permitted to engage in expressive activities on school grounds. But the pull of forum doctrine is always present even when students are the only ones speaking. Because of the vague criteria and fact-specific basis for determining whether a public forum exists, this issue will always be raised in litigation.

Fifth, courts that conclude that *Hazelwood* applies in a specific case will have to decide how to apply the legitimate pedagogical purpose standard. Here, courts must resolve the issue of whether *Hazelwood* prohibits viewpoint discrimination. More importantly, if the prohibition against viewpoint discrimination applies, courts will confront difficult problems in implementing a viewpoint-neutrality standard. The line between content discrimination and viewpoint discrimination is unclear in concept[272] and in practice.[273] If the

[270] It bears repeating that some courts have concluded that even school newspapers and yearbooks produced in courses for academic credit should not be reviewed under *Hazelwood* because they are too independent to be considered curricular in nature. *See supra* notes 80-93 and accompanying text.

[271] This factor is necessarily indeterminate if it is going to be taken seriously. Emily Waldman, for example, argues that "student speech that is delivered at a school assembly [or] printed in a school publication" is much less likely to be perceived as bearing the imprimatur of the school. Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 113 (2008). Many cases reach a contrary conclusion.

[272] *See* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch., 426 F.3d 617, 630 (2d Cir. 2005) (recognizing that "drawing a precise line of demarcation between content discrimination . . . and viewpoint discrimination . . . is, to say the least, a problematic endeavor"); DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 969 (9th Cir. 1999) (noting imprecision in distinction between content and viewpoint discrimination); Busch v. Marple Newtown Sch. Dist., No. 05-CV-2094, 2007 WL 1589507, at *6-*7 (E.D. Pa. May 31, 2007) (explaining that "the context of and intent behind the government action together with the nature of the speech inform the

prohibition against viewpoint discrimination does not apply, courts must decide whether the legitimate pedagogical concern standard has any rigor to it. If it does, the age of the students whose speech is restricted or controlled and the age of the audience of the student's expression will generally be relevant to determining what constitutes a legitimate pedagogical purpose.[274] Indeed, it is not even clear what kinds of decisions should be subject to this constitutional standard of review. The award of grades, deciding who will be called on in class, comments from the teacher, and the posting of class work on classroom walls or bulletin boards may all be actionable abridgements of speech if the legitimate pedagogical concerns standard is applied with any rigor.

There are no easy, predictable answers to this array of questions. Indeed, any frank assessment of the case law in this area demonstrates that current free speech doctrine does not provide federal judges, much less principals and teachers, with adequate guidance to enable them to determine whether restrictions on student speech in school-sponsored activities comply with constitutional standards. Given the complexity and uncertainty in doctrine, the burden of complying with

determination of whether the action amounts to content or viewpoint discrimination"); Brownstein, *supra* note 180, at 104-05; Wright, *supra* note 120, at 203-06 (describing intrinsic difficulties courts confront in trying to distinguish between viewpoint-discriminatory and viewpoint-neutral regulations).

[273] In *Bannon v. School District*, 387 F.3d 1208, 1216 (11th Cir. 2004), for example, the court determined that the exclusion of religious statements and imagery from a student mural painted on the walls of a school was content discriminatory rather than viewpoint discriminatory because "[t]hese are obviously inherently religious messages, which cannot be recast as the discussion of secular topics from a religious perspective." That conclusion could obviously be challenged. *See also DiLoreto*, 196 F.3d at 969 (arguing that exclusion of religious advertisements may be content discriminatory rather than viewpoint discriminatory); Demmon v. Loudoun County Pub. Sch., 342 F. Supp. 2d 474, 487 (E.D. Va. 2004) (concluding that school district engaged in prohibited viewpoint discrimination in disallowing bricks with Latin crosses).

[274] *See supra* note 164; *see, e.g.*, *Peck*, 426 F.3d at 633 n.11 (recognizing that age of children attending school informs court's analysis of justification for restricting speech); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (noting that in applying *Hazelwood*, "[a]ge, maturity, and sophistication level of the students will be factored in determining whether the restriction 'is reasonably related to legitimate pedagogical concerns'"); Walker-Serrano *ex rel.* Walker v. Leonard, 325 F.3d 412, 421 (3d Cir. 2003) (Fullam, J., concurring) (agreeing that age of students is related to free speech inquiry but "that does not mean that a nine-year-old child should be treated as if she were a pre-schooler").

To complicate the matter, there is no consensus in the case law and commentary as to the extent that the free speech rights of children outside of the school environment are less rigorously protected than the rights of adults because of their lack of maturity. *See generally* Symposium, *Do Children Have the Same First Amendment Rights as Adults?*, 79 CHI.-KENT L. REV. 3 (2004).

free speech mandates while orchestrating the direction of school-sponsored activities is extraordinarily high. Not only does free speech review subject an inordinately large number of school decisions to possible constitutional scrutiny, it subjects school personnel to an excruciatingly indeterminate framework of review. Principals and teachers, and financially strapped school districts, would perform their duties under a constitutional Sword of Damocles.

The unfortunate reality is that even courts and legal scholars struggle to understand and apply free speech doctrine today. Let's be honest. Many of the readers of this Article study free speech doctrine for a living, and we are still often surprised by the way courts decide free speech cases. If law professors and federal judges cannot predict what the Free Speech Clause requires, it makes little sense to impose this maze of conflicting and indeterminate requirements on a first-grade teacher trying to manage a classroom of twenty-five six year olds whose families represent diverse ethnic, religious, and political backgrounds. It is one thing to subject the administrator of a government office building, whose job occasionally requires her to decide who gets to use the building's foyer for expressive purposes, to a bewildering doctrinal mandate. It is another thing entirely to impose that burden on principals and teachers who make these determinations in myriad circumstances throughout the day.

2. Federalism and Separation of Powers Concerns Revisited

It is possible that dramatically transforming and simplifying free speech doctrine so that a unitary standard of review would be applied to all free speech disputes involving school-sponsored activities might mitigate, at least to some extent, the burden that current doctrinal complexity imposes on school authorities and teachers. That would not preclude categorizing school-sponsored activities as a nonforum, however. It is hard to imagine how any single substantive standard of review could avoid considerable indeterminacy in its application and a prohibitively heavy burden of compliance. Moreover, characterizing school-sponsored activities as a nonforum would still be justified by federalism and separation of powers concerns.

Suppose courts concluded that some consensus interpretation of the *Hazelwood* standard should be recognized and applied across the board to every imaginable school-sponsored activity. Three possible permutations of the legitimate pedagogical concern requirement might be adopted: (1) a standard of review that prohibited viewpoint discrimination but subjected all other regulations to deferential review, (2) some form of intermediate level scrutiny of indeterminate

but serious rigor, or (3) a deferential standard akin to rational basis review that would be applied uniformly to all restrictions on speech. The first two approaches raise significant federalism and separation of powers concerns. The third does not, but it is virtually indistinguishable from the nonforum approach.

Judicial enforcement of the first permutation, a form of the *Hazelwood* standard that includes a prohibition against viewpoint discrimination, would conflict with important federalism and separation of powers values. The problem is not simply that the line between viewpoint and content is so unclear in a school setting, although that is certainly the case.[275] It is that viewpoint discrimination is so intrinsically and appropriately a part of the schools' educational mission. From a federalism perspective, federal courts have no constitutional foundation for requiring cultural conformity throughout the diverse communities that comprise our society.[276] From a separation of powers perspective, by subjecting viewpoint-discriminatory, educational decisions to rigorous review, courts will make educational policy judgments that exceed their authority and competence and displace the role of school boards, principals, and teachers in determining the public schools' educational mission.

In any educational system, a significant number of instructional decisions are explicitly viewpoint discriminatory, have a viewpoint-discriminatory foundation, or at least have a viewpoint-discriminatory

[275] *See supra* notes 272-74.

[276] In *Virgil v. School Board*, 677 F. Supp. 1547, 1549 (M.D. Fla. 1988), *aff'd*, 862 F.2d 1517 (11th Cir. 1989), for example, the school board discontinued use of a Humanities textbook because it contained the play *Lysistrata* by Aristophanes and *The Miller's Tale* by Chaucer. The school board explained its belief "that the sexuality of the selections was violative of the socially and philosophically conservative mores, principles and values of most of the Columbia county populace" and its conclusion that these "two selections were not necessary for adequate instruction in the course." *Id.* In upholding the board's decision, the district court expressed its substantive disagreement with the board's judgment. The court stated that it found "it difficult to apprehend the harm which could conceivably be caused to a group of eleventh- and twelfth-grade students by exposure to Aristophanes and Chaucer," but it upheld the school board's decision in any case. *Id.* at 1552-54. What constitutional basis would justify a federal court reaching the contrary conclusion and substituting its judgment for that of the school board with regard to this community's values?

*See also* Chiras v. Miller, 432 F.3d 606, 619-20 (5th Cir. 2005) (explaining that except in most egregious circumstances where "a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans . . . [or] . . . if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration," Free Speech Clause would not be violated when school boards make curricular decisions).

dimension to them. Much of the substance of education is explicitly normative. This is obviously true for the socializing function of the public schools, whether a teacher is discussing social norms such as honesty to first graders,[277] respect for authority to seventh graders, sexual responsibility and the avoidance of alcohol and drug abuse to high school seniors,[278] or professional ethics to college and graduate students. But viewpoint discrimination also exists in many academic subjects. Some student writing projects or oral comments are better than others, more on point, more accurate, less disruptive, of greater value for the purpose of the discussion, or more amenable to grading and evaluation. In many fields of study, one simply cannot draw these distinctions without any regard to viewpoint.

The study of literature cannot be limited to facts and grammatical rules. It has to involve values and values involve viewpoints.[279] Similarly, history is more than the memorizing of facts. It involves inferences that can be drawn from facts and those inferences reflect alternative viewpoints. Studying the causes of the American Civil War, for example, can involve the expression of different historical viewpoints, not all of which are equally valid or persuasive or deserving of class time or recognition. Moreover, the discussion and evaluation of these varying viewpoints may invoke cultural and

[277] The need to draw lines based on viewpoint is particularly relevant in elementary school activities, as some courts have recognized. *See, e.g.*, Hosty v. Carter, 412 F.3d 731, 741 (7th Cir. 2005) (en banc) (Evans, J., dissenting) (explaining that elementary school education is largely concerned with inculcation of values); Walz *ex rel.* Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 276 (3d Cir. 2003) (explaining that "the younger the students, the more control a school may exercise" and that "[a] school must be able to restrict student expression that contradicts or distracts from a curricular activity"); Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996) (noting that "[i]n a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how much that may hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate, no matter the impact.").

[278] *See, e.g.*, Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 928 (10th Cir. 2002) (expressing "[n]o doubt the school could promote student speech advocating against drug use, without being obliged to sponsor speech with the opposing viewpoint"); C.H. *ex. rel.* Z.H. v. Oliva, 195 F.3d 167, 172 (3d Cir. 1999) ("[A] viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns . . . A rule foreclosing classroom speech that promotes the use of alcohol or that advocates a position on a controversial political issue is recognized by *Hazelwood* to be permissible even though it is not viewpoint neutral."), *vacated and remanded*, 226 F.3d 198 (3d Cir. 2000) (en banc).

[279] As is clear from the school board's decision in *Virgil*, discussed *supra* at note 276, educational judgments about literature are not value free or viewpoint neutral.

geographical differences. The discussion of the Civil War in a Mississippi public school may reflect different viewpoints than a discussion of the same subject in a New York City school. It should not violate the Free Speech Clause if the way a teacher in one school system orchestrates a discussion on the Civil War reflects this difference in perspective — even if doing so conflicts with the way a teacher in another school system (or a federal judge) might deal with the same subject matter.[280]

Pedagogical choices about the methodology of teaching may be based on different viewpoints about education and the implementation of those methodologies will often require viewpoint-discriminatory choices.[281] Teachers have to decide how they will respond to and evaluate creative, but less accurate, answers to a question, how much time they will allocate to controversial issues as to which there is no consensus in our society, and how aggressively they should orchestrate such a discussion to ensure that a balanced range of perspectives are considered. Implementing the answers to these questions may require explicit viewpoint discrimination. Attempts to achieve a balanced program, for example, may require a teacher to make viewpoint-discriminatory decisions to silence some students in an effort to provide students expressing less popular perspectives a fair opportunity to be heard. Conversely, a decision to focus on more widely respected perspectives and to provide little, if any, time to outlier positions deemed unworthy of class consideration involves viewpoint discrimination as well.

Moreover, if the prohibition against viewpoint discrimination is taken seriously, it will not only justify pervasive intervention by the federal courts into educational decision making but may also distort school decisions by creating unintended incentives. Confronted with a constitutional mandate that requires schools to provide equal

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[280] As the Sixth Circuit explained in *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989):

> The universe of legitimate pedagogical concerns is by no means confined to the academic; . . . "schools must teach by example the shared values of a civilized social order" . . . Judgments on how best to balance such values may well vary from school to school. Television has not yet so thoroughly homogenized us that conduct deemed unexceptionable in New York City, for example, will necessarily be considered acceptable in rural Tennessee.

*Id.* at 762 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

[281] Schools may "require students to express a viewpoint that is not their own in order to teach the students to think critically: [f]or example, a college history teacher may demand a paper defending Prohibition." Axson-Flynn v. Johnson, 356 F.3d 1277, 1290-91 (10th Cir. 2004) (citing Brown v. Li, 299 F.3d 1092, 1106 (9th Cir. 2002)).

opportunities for student speech in school-sponsored activities regardless of the viewpoints being expressed, school authorities may choose to limit the scope of such activities and the subjects that may be addressed. Judges are not educators and there is no reason to expect them to understand the predicaments in which their case decisions will place educators or to accurately predict how principals and teachers will respond to their rulings.[282]

The second permutation is equally problematic. Here, the *Hazelwood* standard would not formally prohibit viewpoint discrimination, but it would apply some form of serious scrutiny to the question of whether a school's control of speech in school-sponsored activities was related to a legitimate pedagogical concern. Of necessity, this standard will be subjective and indeterminate in its application. It would expose schools to all of the costs of applying a pervasive, indeterminate free speech standard to educational decision makers, described previously. It would also implicate all of the arguments based on federalism and separation of powers concerns.[283] Judges, not school boards, administrative staff or instructional personnel would be deciding whether asserted pedagogical concerns were legitimate. Federal courts, rather than local communities, would

[282] School authorities frequently understand the consequences of student speech in school-sponsored activities far better than outsiders. Thus, in *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 466 (7th Cir. 2001), the principal, who had invited all student groups to paint murals in the main hallway of the school, refused to allow the Bible Club to paint a large cross on the mural they proposed. This decision did not reflect any hostility to religious messages. It was grounded, in part, on the principal's concern that if he included a Christian symbol on a mural, he also would be required to accept "murals of a Satanic or neo-Nazi character" submitted by self-identified student skinheads in the student body.

But the predicament school authorities find themselves in is not entirely lost on courts. In *Fleming*, 298 F.3d at 934, for example, the court warned that if a school sponsoring a tile project can not engage in viewpoint discrimination it "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 to not sponsor speech at all." *See also* Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098, 1114 (D. Ariz. 2004) (wondering if "school allowed tiles inscribed with messages stating that 'God Blesses Quinn'. . . [w]ould it have also been required to allow an inscription stating that 'God blesses none, for there is no god?'").

[283] *See, e.g.*, Boring v. Buncombe County Bd. of Educ. 136 F.3d 364, 371 (4th Cir. 1998) (arguing in case involving free speech rights of teacher that treating legitimate pedagogical concern standard as substantive standard of review would transform public schools from "a matter of state and local concern" into "federal judicial enterprise" and "would remove from students, teachers, parents, and school boards the right to direct their educational curricula through democratic means").

control the value choices endemic to the educational process. To paraphrase Justice Kennedy's comments in *Forbes*, free speech review here would "obstruct the legitimate purposes"[284] of public education by subjecting to intrusive judicial oversight a host of decisions that should be left to the professional discretion of educators and the political judgment of the communities that hire them.

Under the third permutation, the legitimate pedagogical concern standard would require a very deferential standard of review. As we have seen, if we take the prohibition against viewpoint discrimination out of the analysis, most courts interpret *Hazelwood* this way, although they devote considerable time to explaining and defending the pedagogical choices being challenged. In fact, after pages of discussion, a legitimate pedagogical concern is pretty much whatever school authorities say it is. But if that is all that the legitimate pedagogical concern standard requires, what do we achieve by subjecting disputes about student speech in school-sponsored activities to this standard of review — other than inviting litigation by creating a false impression that the Free Speech Clause restricts the discretion of educators in this area when in fact it does not do so. Put simply, there is no legitimate constitutional basis for requiring courts to go through the pretense of determining whether the control of student speech in a school-sponsored activity serves a legitimate pedagogical concern.

3. Imprimaturs of the School

As I discussed in the prior section, the fact that an expressive activity is reasonably perceived to bear the imprimatur of government approval, without more, would not establish the existence of a nonforum. But an imprimatur of state approval provides some additional support for the conclusion that a nonforum exists. This is particularly true when the governmental function at issue is intrinsically and pervasively expressive in nature, as is the case with public schools. Schools do not have the luxury of allowing only their own messages to be expressed in school-sponsored activities. It would be difficult, if not impossible, to prohibit all private speech in curricular and non-curricular programs, and any serious attempt to do so would undermine and distort the educational process. Thus, school-sponsored activities represent the kind of situation in which the imprimatur factor deserves some marginal weight to be assigned to

[284] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

it because the choice of restricting speech to the government's own message and prohibiting private expression is unavailable.

While the weight to be assigned to this factor may be difficult to pin down precisely, there is nothing uncertain about the existence of an imprimatur of school approval in school-sponsored activities. Given the scope and nature of the educational mission of public schools, there is a strong argument that whatever the school sponsors, whether it is curricular or extracurricular, necessarily bears some kind of imprimatur of support. Learning is not limited to classrooms or to academic subjects.[285] It pervades the school environment. Ideas and values are communicated by hanging pictures or painting murals on the walls and placing tiles and bricks on walkways. A school would hardly want to sponsor any expressive activities that influence the educational environment if it believed that doing so would undermine or conflict with its educational goals.[286]

The basic syllogism here is a powerful one. The purpose of a school is to educate students. Education requires decisions about when it is appropriate to draw distinctions between arguments, information, and ideas. When the school sponsors and controls expressive activities, students, parents, and community members will reasonably perceive that the distinctions the school draws in those activities, and those that it declines to draw, reflect the school's educational purposes.

There is no reason to assume that a teacher's invitation to students to express their personal points of view would fundamentally alter this analysis or the conclusion that the control of student speech in school-sponsored activities should not be subject to judicial review. In many cases, observers will not realize that a student's work, such as a picture hanging in the school hallway, was in response to a teacher's invitation to express his or her own personal message. Moreover, the invitation to students to express their own view in their work will not necessarily be understood to suggest that the teacher or school authorities are waiving their control over the resulting work product. To the extent that such invitations are implicitly conditioned upon and "subject to the pedagogical goals of the activity and the broader

[285] *See* Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 825 (9th Cir. 1991) (explaining that "[h]igh schools foster learning experiences inside and outside the classroom and serve pedagogical as well as in locus parenti purposes").

[286] *See Fleming*, 298 F.3d at 925 (explaining that unlike activities organized by outside groups that occur after school day is over, "[e]xpressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school").

requirements of the educational mission," the students' responses will be perceived as bearing some imprimatur of the school, particularly if they are prominently displayed.

Most importantly, even if we could be certain that no imprimatur would be perceived, that result would not undermine the conclusion that a nonforum exists. This factor is relevant, but not dispositive in defining a nonforum, and for good reasons. The need for editorial, educational discretion in the teaching enterprise and the intrusiveness of judicial intervention in the classroom are more critical to the nonforum inquiry than the question of whether an imprimatur of school approval exists. It makes no sense to require teachers to permit or promote a message that is pedagogically problematical simply because it was elicited as a personal statement. As a matter of educational policy, teachers may err in, and be properly criticized for, not anticipating the subjects or viewpoints that students will express when they are invited to submit their own ideas on an assignment. However, there is no reason why such errors should be construed to create a constitutional entitlement to free speech protection for the student's response.[287]

Finally, it may be far from clear whether a teacher actually solicited students' personal points of view when they communicated an assignment. Requiring courts to adjudicate whether an assignment actually called for a "personal" response from students, or more generally, whether a student's work would be perceived as bearing the imprimatur of the school, would add another layer of complexity to the free speech analysis. In doing so it would substantially increase the burden of compliance as teachers and administrative staff struggled to monitor their language in assigning student work, and the context in which student work was displayed, to avoid any suggestion they were soliciting "personal" expression that would render their decisions subject to constitutional review. The idea behind the nonforum is to relieve teachers and school authorities of these kinds of burdens. Employing complex criteria to determine whether a nonforum exists would undermine that objective.[288]

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[287] *See* Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155-56 (6th Cir. 1995) (suggesting that teacher's errors of judgment or mistakes in assigning or grading student work does not constitute violation of student's constitutional rights).

[288] In her article on the scope and meaning of *Hazelwood*, *Returning to* Hazelwood's *Core: A New Approach to Restrictions on School-Sponsored Speech*, *supra* note 271, at 110-21, Emily Gold Waldman fails to consider the burden that complying with indeterminate free speech standards would impose on teachers and administrative staff when she suggests that courts should apply a "sliding scale" approach to free

## CONCLUSION: WHAT CONSTITUTIONAL REQUIREMENTS SHOULD APPLY TO THE REGULATION OF STUDENT SPEECH IN SCHOOL-SPONSORED ACTIVITIES?

The nonforum is solely a category of free speech doctrine. Identifying school-sponsored activities as a nonforum says nothing about the applicability of other constitutional provisions to the decisions of school authorities that control or direct student speech. The Equal Protection Clause, the Free Exercise Clause, the Establishment Clause, and other constitutional provisions may apply with appropriate rigor to school-sponsored activities. Even ancillary requirements under the Free Speech Clause itself may be enforced to protect students and limit school authority.[289]

speech disputes arising out of school-sponsored activities. Under Professor Waldman's analysis, courts would be required to determine where student speech in a school-sponsored activities falls "along the 'imprimatur spectrum.'" *Id.* at 113. Professor Waldman argues that "[g]enerally, the perception of imprimatur will be strongest in two situations: when the student speech changes the permanent physical appearance of the school or when the student speech changes the nature of other students' substantive classroom experiences." *Id.* In these situations, courts should deferentially review viewpoint-discriminatory decisions by school authorities. In other circumstances, "where the speech is clearly attributable to a particular student" and neither of the prior conditions is found to apply, viewpoint discrimination should receive something "akin to intermediate scrutiny." *Id.*

While Professor Waldman provides several examples of how courts should determine whether an imprimatur is strong or weak under her sliding-scale framework, this kind of an analysis is intrinsically indeterminate. Courts will disagree and teachers and school authorities will be left guessing as to the standard of review that will apply to viewpoint-discriminatory decisions. This problem will only be aggravated by the continuing uncertainty as to whether specific speech decisions should be characterized as content or viewpoint discriminatory. Finally, of course, intermediate-level scrutiny will yield uncertain and unpredictable conclusions. This will be especially true when courts are called on to evaluate the pedagogical rationales for schools engaging in viewpoint discrimination, a task for which the federal courts are uniquely ill suited. Avoiding the burden of complying with indeterminate doctrinal standards like these is one of the strongest rationales for identifying school-sponsored activities as a nonforum.

[289] One free speech related doctrine that will still apply, even in a nonforum, at least to some extent is the prohibition against compelled affirmation of belief. Virtually all of the cases discussed in this Article involve free speech claims in which the plaintiff is challenging school decisions that restrict speech. A separate and distinct analysis applies in compelled speech cases where litigants do not want to speak and seek to opt out of school mandates requiring them to do so. Certainly, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), is still good law and would protect students from being required to affirm loyalty oaths. Exactly how the principle prohibiting compelled speech and affirmations of belief should be interpreted and applied in the context of school-sponsored activities in circumstances other than the mandated recitation of a loyalty oath is a subject that is

In a sense, there is something left of *Hazelwood*'s legitimate pedagogical concern standard even in a nonforum. But it has nothing to do with Free Speech Clause requirements. Speech regulations must further constitutional objectives. They cannot violate constitutional mandates other than the Free Speech Clause. They cannot deliberately serve constitutionally impermissible purposes. To take one obvious example, teachers cannot restrict a student's speech or punish their expression because of the student's race or gender.[290]

The reason why these other constitutional provisions can apply to school-sponsored activities in public schools, while the Free Speech Clause does not, should be obvious at this point. The government's job is not to discriminate among children of different races in the public schools. By and large, there is cultural and legal consensus that racial discrimination is irrelevant to, and inconsistent with, the goals of public education. Controlling and directing speech, on the other hand, is what schools are supposed to do. There is no consensus in our society as to the appropriate goals and pedagogy of public education. It is easy to understand how specific constitutional provisions like the Equal Protection Clause can be employed to protect the rights of students. It is extraordinarily difficult to determine how the Free Speech Clause should apply in school-sponsored activities.

Many of the cases described in the text of this Article involve religious speech. It may be that some of those cases merit constitutional attention. But the Constitution includes specific provisions that deal with religion and it is those provisions, the Free Exercise Clause and the Establishment Clause, that are the proper vehicles for resolving questions about religious speech in school-sponsored activities. Thus, for example, if a speech regulation is invidiously motivated by hostility to particular religious beliefs and is "discriminatorily applied to religious conduct," a viable free exercise claim may be asserted.[291] Establishment Clause requirements, such as

beyond the scope of this Article.

Discrimination against one political party's partisan political speech in a school-sponsored activity or in favor of another political party's speech would also be unconstitutional. But that conclusion may be grounded on constitutional provisions other than the First Amendment. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring).

[290] *Settle*, 53 F.3d at 155 (explaining that "[s]o long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion, or political persuasion, the federal courts should not interfere").

[291] Axson-Flynn v. Johnson, 356 F.3d 1277, 1293-95 (10th Cir. 2004).

those prohibiting teacher directed prayer in the public schools,[292] would also apply in appropriate cases.

What judges fail to appreciate in attempting to employ the Free Speech Clause to protect religious expression in school-sponsored activities is the breadth and intrusiveness of the constitutional tool that they are using. Free speech doctrine extends far beyond religious expression. Constitutional mandates requiring the review of content- or viewpoint-discriminatory decisions by teachers and administrators would subject to judicial scrutiny pedagogical decisions about public policy, current events, politics, science, literature, ethics, social behavior, and numerous other areas where parents and students disagree about facts and values.[293]

Of course, classifying school-sponsored activities as a nonforum will have the result of immunizing some one-sided and unfair teacher and administrator decisions from constitutional evaluation. These decisions will still be vulnerable to community and political review, however. While the communication of student and parental concerns about restrictions on student speech to teachers, administrators and the school board may have considerable utility in many cases, there is no question that nonforum analysis will leave some bad educational choices uncorrected.[294] Some of those wrongheaded educational

[292] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, 301 (2000) (holding that student election to determine whether prayer should be offered before high school football game violates Establishment Clause); Lee v. Weisman, 505 U.S. 577, 580, 586 (1992) (holding that prayer offered by invited clergy at public high school graduation violates Establishment clause); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (holding that reading of Bible verses to students at beginning of school day violates Establishment Clause); Engel v. Vitale, 370 U.S. 421, 424 (1962) (striking down teacher directed school prayer as Establishment Clause violation). The Establishment Clause would also be violated if a school were only to invite clergy who held particular theological views to speak on a panel at a high school assembly. *See* Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780, 804-06 (E.D. Mich. 2003).

[293] *See* Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 467 (7th Cir. 2001) (expressing court's "doubts about the appropriateness of litigation that is intended, whether by friends of religion or by its enemies, to wrest the day-to-day control of our troubled public schools from school administrators and hand it over to judges and jurors who lack both knowledge of and responsibility for the operation of the public schools").

[294] In a recent decision evaluating the free speech claim of a school teacher, the Seventh Circuit explained that "majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination . . . . But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers." Mayer v. Munroe County Cmty. Sch. Corp., 474 F.3d 477, 479-80 (7th Cir. 2007). Similarly, the power to determine what constitutes indoctrination and to respond to its occurrence is better reposed in the

judgments might have been successfully challenged and remedied in court. That is a cost. But there is no guarantee that judicial review will only invalidate wrongheaded educational judgments. Judges may invalidate sound educational decisions in the name of freedom of speech and end up causing more harm than good. That is a cost too.

In any case, the fact that some bad policy decisions relating to student speech will be left uncorrected does not change the core argument of this Article. Reviewing the content and viewpoint of pedagogical decisions in school-sponsored activities is simply not the kind of function that should be assigned to constitutional courts. Doing so unreasonably interferes with the ability of school boards, principals, and teachers to do their job, and it assigns a job to federal judges that they have neither the constitutional authority nor institutional competence to perform. The risks of abuse are real, but sometimes in constitutional law "'[c]alculated risks of abuse are taken in order to preserve higher values.'"[295]

Finally, it must be remembered that *Tinker* is still good law. Student speech that is not a part of school-sponsored activities receives considerable protection under free speech doctrine.[296] Earlier in this Article, I suggested that in some cases, under *Tinker,* students receive greater protection for their speech at public school than adults receive in comparable circumstances, and that courts have never adequately justified this privileging of student expression. In an indirect way, this Article's contention that school-sponsored activities constitute a nonforum may provide something of an answer to this question. Because public school students spend so much time in school-sponsored activities in which they have virtually no free speech rights as participants in educational programs, it may be particularly important to vigorously protect their freedom of speech elsewhere in the school environment. In those situations where school authorities do not need the discretionary authority to control or direct student expression in order to further their pedagogical objectives, student

community and the school board it elects than in life-tenured federal judges.

[295] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998) (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973)).

[296] *See, e.g.*, Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643, 648 (N.D. Miss. 2003) (distinguishing between distribution of religious literature "by students to other students in school hallways prior to the start of classes," which receives significant free speech protection, and "a situation in which religious iconography and language are placed on a school wall as part of a school-sponsored election," which does not).

speech should be free to serve the students' individual interests and not those of the school that they attend.